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**PREVENTING RENDITION AND TORTURE BY MAPPING
THE GLOBAL SYSTEM OF RENDITION AND SECRET DETENTION**

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Abstract¹

This paper seeks to explain the development and operation of a now global system of rendition and secret detention. Rendition involves the kidnap of suspects and their illicit transfer to another state and frequently involves torture. It is generally assumed that rendition was very much a phenomenon of the Bush administration. In fact, it has continued since Obama took office, despite his early executive orders which ruled out some of the other nefarious practices of the Bush administration, such as torture. Situating rendition within the wider framework of US neo-imperial practices, particularly the quest for US hegemony within the global military-industrial complex, the paper provides a detailed account of the development and evolution of the global system of rendition. It analyses the ways in which key moments in US and international politics have impacted on rendition practices, and also shows how rendition constitutes the latest iteration of international state terrorism.

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Introduction

Ten years have now elapsed since President George W. Bush issued an Executive Order on the Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism (G. Bush 2001). This stipulated that individuals detained under the Order, known as 'enemy combatants' need not be tried, but when they are, this should be by military commission. It also allowed for the detention of individuals at an appropriate location designated by the Secretary of Defense outside or within the US. It was this Order that paved the way for the arbitrary detention of thousands of detainees in Afghanistan and Iraq at sites intended for this purpose, including at the Bagram Airbase, Afghanistan, and the Abu Ghraib prison, Iraq. It also laid the ground for the development of a global system of rendition. Since 9/11, rendition as enacted by the Bush and Obama administrations has involved the transfer of terror suspects by US military or intelligence personnel, or their agents, to a foreign state where they are arbitrarily detained, without charge or trial, and where it is likely that they will be subjected to torture, cruel, inhuman and degrading treatment.

Relatively little research has been undertaken on the now global system of rendition and secret detention within the field of International Relations. Most academic work on rendition has been in the field of International Law, where a small number of scholars have examined the various ways in which rendition violates various international treaties and conventions on human rights (Parry 2005; Sadat 2007; Satterthwaite 2006; Satterthwaite and Fisher 2006; Satterthwaite 2007a; Satterthwaite 2007b; Weissbrodt and Bergquist 2006). Important interventions have been made by Margaret Satterthwaite and Angelina Fisher (2006), and more recently by James Boys (2011), to demonstrate that rather than being a phenomenon exclusive to the Bush administration, rendition dates back to the Reagan era, and since then has been an important part of US counter-terrorism practices. Boys also offers a brief account of the continued use of rendition by the Obama administration. The work of Satterthwaite and Fisher and Boys helps to show how successive administrations carried out rendition.

Yet there has been little analysis that situates rendition within the wider framework of US foreign policy objectives and the strategies used to achieve them. Furthermore, no real attention has been paid to the significant ways in which events largely beyond the US government's control have also impacted upon how rendition has been used, particularly under the Bush and Obama administrations. The paper will begin by briefly demonstrating that rendition is a tool in the arsenal of the US' repressive counter-insurgency practices which have long been used to entrench US hegemony and secure significant influence among the military and intelligence services of multiple states across the global south. Such endeavours can be traced back to US military intervention in the Philippines in the early 1900s, and subsequently its Cold War era interventions in the Philippines, Korea, Vietnam and Latin America.

The paper will then proceed to develop the main argument, which is that the global rendition system is a system in flux. It has been shaped significantly by the on-going contestation between the US executive, the judiciary and the human rights community, played out in the US Courts, over the (il)legitimacy of the US' treatment of those it suspects of complicity in terrorism, and legal processes that have ensued. Concerns within different branches of the US state, including the CIA, Department of Defense, and Department of Justice, have also had important ramifications for the global rendition system. Finally, the pressure on President Obama to reverse some of the most abusive policies of the Bush administration has also had an impact. We contend, however, that not all of these impacts have had the effect of improving compliance with human rights laws. In some instances they have instead led to increased reliance on client states to harbour and interrogate detainees and to further attempts to conceal US reliance on rendition as a tool in the fight against terrorism. This paper is intended to map those evolutionary moments that have had an important

impact on how rendition has evolved since 2001. In turn, the implications for US foreign policy more broadly will be outlined.

Rendition in historical context

Rendition as used in the 'War on Terror' can be traced back to the Reagan administration, as Satterthwaite and Fisher (2006) and subsequently Boys (2011) have demonstrated. In 1986, President Reagan authorised a covert practice known as 'rendition to justice' to apprehend terror suspects elsewhere in the world, and transfer them to the US where they would face trial or criminal investigation (Satterthwaite and Fisher 2006: 55-56). While this model operated outside extradition proceedings as recognised in international law, legal process in the US justice system was a requirement for those captured and detained. Under the Clinton administration, as Boys argues, renditions to justice became central to US counter-terrorism measures (Boys 2011: 590). But it was also on Clinton's watch that a significant change occurred in the practice of rendition. Under the Clinton administration, several renditions occurred where no legal processes in the US were followed, and rather than being transferred to the US, detainees were rendered to Egypt where they were interrogated, tortured, and in at least one case, executed (Satterthwaite and Fisher 2006: 58). Tal'at Fu'ad Qassim, an Egyptian national who had been granted asylum in Denmark travelled to Bosnia in the mid-1990s apparently to write about the war. The US had been urging the Bosnian authorities to expel foreign militants from its territory, but the Bosnians did not. The US targeted Qassim for rendition, but to Egypt rather than the US. This was the first recorded case of a rendition to a third country known to routinely use torture. Qassim was reported to have been executed while in custody. A second case occurred three years later, again, with detainees being transferred not to the US, but to Egypt. This time the initial capture took place in Albania, where the CIA and Albanian secret police were monitoring what they thought was a terrorist cell of Egyptians in Tirana. The Albanian police arrested them, handed them to the CIA, and they were transferred to Egypt. Within a month, another Egyptian was rendered by the CIA from Bulgaria to Egypt. They were all tried as part of a mass trial, and alleged that they had been severely abused while in detention (Satterthwaite and Fisher 2006: 58). Following 9/11, the legal process requirement was dropped entirely. The use of rendition increased, as did reliance on foreign states to detain suspects. States known to use torture and cruel, inhuman and degrading treatment and punishment as part of their interrogations were deliberately selected as the recipient states for detainees.

The various logics behind this new iteration of rendition (often referred to as 'extraordinary rendition') are firstly, that it facilitates the secret detention of a terror suspect. Secondly, it excludes the possibility of review by the domestic courts of the US or the home country of the detainee. Finally, as a leaked memo from a special agent of the FBI indicates, it was assumed that foreign agents might gain useful intelligence that could be passed back to US intelligence agents through interrogations that involve torture. The memo, sent in November 2002, warned senior FBI staff that proposed 'enhanced interrogation techniques' for use against Guantánamo detainees would violate US law on torture. As Satterthwaite and Fisher explain, the memo makes clear that the purpose of rendition is to subject detainees to illegal interrogation techniques as a means of securing intelligence. It states, 'Detainee will be sent off GTMO [the US detention facility at Guantánamo Bay], either temporarily or permanently, to Jordan, Egypt, or another third country to allow those countries to employ interrogation techniques that will enable them to obtain the requisite intelligence'. The author of the FBI memo then warns that any such action would violate Article 18, §2340 [the criminal torture statute] of the US Code (Satterthwaite and Fisher 2006: 59). Despite this warning, rendition of detainees by the CIA to third countries known to use torture continued throughout the Bush presidency, and has continued under the Obama administration.

The explanation of the origins of rendition by Satterthwaite and Fisher and Boys, and its continuation under Obama, is important because it challenges the widely held assumption that rendition was a method initiated by the Bush administration as part of the fight against global terrorism, and eschewed by Obama. Yet while important, work to date does not show the connections between rendition and comparable repressive methods deployed by US intelligence and military agencies since at least the beginning of the 20th century. Furthermore, Boys in particular does not really comment on the fact that under the Reagan administration, rendition to justice was one of the less nefarious practices deployed as part of the US' counter-insurgency and counter-terrorism campaigns. The Reagan administration was using, and sponsoring, various forms of state violence and terrorism, including disappearances, torture, arbitrary detention and assassination throughout Latin America in the 1980s. Disappearances bear a striking resemblance to rendition as used in the 'War on Terror'. Disappearances involved the kidnap, detention, interrogation, torture and murder of suspected insurgents and their supposed accomplices, with victims having no access to due process. Inadvertently, Boys' effort to differentiate the earliest iteration of rendition from that developed by the Clinton administration, and rolled out extensively under George W. Bush, fails to show the important continuities between rendition in the 'War on Terror' and earlier forms of kidnap, secret and arbitrary detention and torture deployed under Reagan (and previously) in collaboration with partners in the global south. In other words, rendition in the 'War on Terror' continues to appear as something that is exceptional and outside the bounds of normal US foreign policy, whereas it is our contention that rendition is the logical next step in the evolution of repressive US counter-terrorism techniques, particularly disappearances. More broadly, analysis to date hasn't adequately shown how rendition is part of a wider set of counter-insurgency measures that in turn play an important role in entrenching US hegemony, and have done since at least the beginning of the 1900s.

When viewed within the context of US foreign policy over a much longer period of time, rendition as deployed in the 'War on Terror' cannot so easily be seen as an exceptional feature of US foreign policy. And while it is distinct from the 'renditions to justice' established under Reagan, it bears a striking resemblance to other counterinsurgency methods deployed by successive US administrations, including the Reagan administration, and their allies in the global south. Rendition as deployed in the 'War on Terror' is therefore part of a consistent pattern of state violence and terrorism that has characterised the foreign policy of the US in the global south for more than a century, and of other powerful liberal democratic states with colonial legacies, such as the UK and France, going back at least 200 years.² Much of the violence and terrorism deployed by the European colonial powers, and subsequently the US, was instrumental for capital accumulation, and for securing positions of dominance in the global order. Rendition as used in the 'War on Terror'

² The use of violence and terrorism by the European colonial powers was explicitly intended to ensure the compliance of subjugated populations in the colonies to facilitate the extraction of resources for aggrandisement of the empire. Spanish and Portuguese colonisers in Central and Latin America terrorised indigenous populations into providing food supplies for the conquistadors, threatening them with death if they did not comply, and wiping out whole tribes that were not considered to be of use to European settlers. Surviving populations were terrorised into forced labour to serve the interests of the Spanish and Portuguese crowns, and were literally worked to death Leslie Bethell, *The Cambridge History of Latin America* (Vol.II; Cambridge: Cambridge University Press, 1984) at 1-40. The British, Germans, Belgians and French used similar terrorising methods in their colonies, largely to secure a plentiful supply of labour for resource extraction. Forced labour was accompanied by considerable violence, the confiscation of property and imprisonment, both to coerce, but also to terrify others into compliance Mpk Sorenson, *Origins of European Settlement in Kenya* (Nairobi and Oxford: Oxford University Press, 1968) at 150-51. Similar tactics were used as part of early American imperialist adventures. In the Philippines, terrorism was used widely in 1901-02 to bring that country under US control, and involved torture, rape, shootings, hangings and the systematic burning of homes and villages, all aimed at diminishing support for the insurgency against the US Richard Welch, 'American Atrocities in the Philippines: The Indictment and the Response', *The Pacific Historical Review*, 43/2 (1974), 233-53 at 233-53.

therefore builds on a long tradition of very powerful states seeking to ensure their dominant positions by developing systems of client relationships with elite partners in the global south.

With the decline of the European powers following World War II, US foreign policy planners were keen for the US to continue along its ascendant path. US planning during World War II focused on developing a 'Grand Area' in which the US could ensure its economic supremacy. The Council on Foreign Relations advised President Roosevelt in 1940 that US foreign policy should be framed around integrating the Western hemisphere with the Pacific region into a trading bloc. This, it was argued, would ensure huge benefits for the US through its exports of manufactured and agricultural goods and the import of raw materials and food stuffs. The President was also advised that the US would need to be prepared to increase military expenditure and take other risks, including using force to limit 'any exercise of sovereignty by foreign nations that constitutes a threat to the minimum world areas essential for the security and economic prosperity of the US and Western Hemisphere' (Shoup and Minter 1977: 130). This strategy, which came to be known as elbow room among US policy planners was to shape US foreign policy throughout the Cold War.

Considerable force was subsequently used in cases where US efforts to open up other states and markets for penetration by US capital were threatened. For example, in its efforts to defeat communist movements in South Asia, which posed a considerable challenge to the US' efforts to open up the region to US capital, the US resorted to various forms of violence and terrorism. This included carpet bombing and the use of indiscriminate weapons against civilians in an attempt to terrorise populations into shunning insurgent movements in Korea and Vietnam (Cumings 1990, 2004), and the implementation of the Phoenix Program which involved the widespread use of detention, torture and murder to deter support for the Vietcong (Valentine 2000). Important features of the Phoenix Program are worth noting. As Douglas Valentine shows, Province Interrogation Centres (PICs) were established across the country. Vietnamese citizens suspected of involvement with the Vietcong insurgency were rounded up and imprisoned in these centres, without charge or trial, and were interrogated and tortured, and usually killed. Indeed, according to CIA officer William Colby, who directed the Program between 1968 and May 1971, 20,587 alleged Vietcong cadres died as a result of Phoenix, although the South Vietnam government put this figure much higher, at 40,994 (Valentine 2000: 85). While the Phoenix Program was overseen by the CIA, responsibility was handed over to hired agents, often former police officers or Green berets who were now self-employed (Valentine 2000: 80-85). They therefore fell outside of the command and control structures of the CIA and US Department of Defense. This demonstrates that long before the use of rendition in the 'War on Terror', the CIA was developing mechanisms for holding those it alleged were complicit in insurgent activities beyond the law, and was outsourcing interrogation and torture to third parties.

As the Cold War continued, the US was engaged in far-reaching counterinsurgency campaigns to try to thwart the emergence of political movements committed to social transformation, particularly redistributive economic policies and land reform. These campaigns were underpinned by the development of client relationships between the US and elites in the global south, particularly in Latin America. Those relationships were oiled by large injections of financial and military aid to cooperative allies, and the provision by the US of substantial training by the CIA and Department of Defense for the security agencies of the client states, leading to the proliferation of the national security strategy that came to characterise the foreign policy of the US and the domestic policies of its partners (Chomsky and Herman 1979; McClintock 1992). As part of the counterinsurgency campaigns, the US supported and was complicit in considerable violations of human rights, including disappearances, torture and murder. The role that the counterinsurgency training of military and intelligence forces in Latin America played in encouraging the use of torture and other human rights violations is well documented (Chomsky and Herman 1979; Haugaard 1997; McClintock 1992). A

typical pattern was for the US to sponsor coups d'état to unseat governments considered to be implementing policies that were inimical to US interests, and to ensure their replacement by authoritarian, often military regimes. For example in Chile in 1973, the US was complicit in a coup which overthrew the democratically elected Salvador Allende, who had proposed redistributive policies. Prior to his election, Henry Kissinger had expressed considerable concern that Allende's consolidation 'would pose some very serious threats to our interests and position in the hemisphere' and would be a 'source for subversion in the region' (Kissinger 1970). Pinochet unleashed a campaign of state terrorism against his opponents, with US support in the form of military aid and covert support for clandestine intelligence and counterinsurgency activity. The Chilean National Commission for Truth and Reconciliation (CNCTR) found that during and in the years following the coup, 2,279 people were killed. Of those, 815 were victims of death by execution or death by torture, and 957 disappeared following their detention by state authorities (CNCTR 1991). The coup provided the opportunity for intense economic restructuring, backed by the US, and implemented through the International Financial Institutions, with Pinochet's willing cooperation. This was facilitated by the Chicago Boys – members of the Chilean elite who received their education at the Chicago Business School under Milton Friedman, and returned to Chile to implement structural adjustment policies, which in turn facilitated the incorporation of Chile into the global political economy (Robinson 1996: 165-66).

Disappearances were used widely throughout the region, not just in Chile, frequently with the full knowledge and even involvement of US military and intelligence agents. Following the military coup in Argentina in 1976, which overthrew Isabel Perón, estimates of the numbers of people that were disappeared by the regime between 1976 and 1982 range from 9,000 to 30,000 (AI 2003). Immediately following the coup, rather than condemn the human rights abuses that the US government were aware of, Henry Kissinger simply urged the Argentine foreign minister to be quick about it:

Look, our basic attitude is that we would like you to succeed. I have an old-fashioned view that friends ought to be supported ... The quicker you succeed the better. The human rights problem is a growing one ... If you can finish before the Congress gets back, the better. Whatever freedoms you could restore would help (DoS 1976).

The US Embassy in Argentina had itself compiled documentation pertaining to human rights violations against 10,000 people, most of them disappearances, by 1979, which it sent to the US Department of State (Embassy 1979).

But the US did not simply turn a blind eye to the disappearances. There was also significant collaboration by the US in regional operations intended to identify, illegally detain, interrogate and torture suspected insurgent leaders in Latin America, who then disappeared. The most notable example was Operation Condor, in place by 1975 and which built on pre-existing arrangements for the sharing of intelligence between various Southern Cone states and the US (McClintock 2001: 9; McSherry 2002). Operation Condor used methods very similar to rendition as implemented in the 'War on Terror'. Individuals were secretly transferred between the intelligence agencies of various states in Latin America, often on the basis of intelligence supplied by the CIA to one or other of the parties to the Operation, and were interrogated and tortured by foreign agents at the request of the sending state. A brief example of Paraguay's involvement demonstrates a number of the similarities between Operation Condor and the now global system of rendition, operated by the US in the 'War on Terror'. Details of Paraguay's involvement were uncovered when an archive of documents detailing the disappearance of torture of hundreds of Latin Americans was discovered in 1992. The archive includes a letter from the Paraguayan police director, Alberto Cantero, to Pastor Conornel, Paraguay's Chief of Police and the main torturer of detainees held by the government of Alfredo Stroessner. The letter concerns the transfer of five detainees from the Paraguayan police to two

agents of Argentina's Secretariat of State Intelligence, José Montenegro and Juan Manuel Berret. None of the five were ever heard from again, following their transfer, which occurred outside of normal extradition proceedings, and they were presumed to have been killed by Argentine intelligence agents (Slack 1996). The documents indicate that the source of much of the intelligence gathered by the Paraguayan authorities and then used as the basis for the detention of the suspected insurgents was the CIA (Slack 1996: 498). Patrice McSherry demonstrates how these methods spilled over into the US-backed counterinsurgency campaigns in the 1980s in Central America (McSherry 2002). For example, US military aid under Reagan to the authoritarian regime in El Salvador, which had seized power through a coup in 1979, was vast, rising from \$5.9 million in 1980, to \$35.5 million in 1981, and \$82 million in 1982 (DoS 1980-1982). Much of the aid was used for the training of large sections of the El Salvadoran armed forces, including counterinsurgency training (Leuer 2000: 17). Disappearances, torture and killings at the hands of the Salvadoran armed forces and associated paramilitaries were widespread, with 75,000 people killed, many of whom were tortured, according to the United Nations Truth Commission for El Salvador (Buergethal 1994: 502). The US government did nothing to deter the human rights violations; instead it fuelled them through the on-going and increasing provision of military aid to the regime.

Rendition as exercised in the 'War on Terror' then, has some similarities to predecessor programmes in which the CIA was involved, especially the Phoenix Program and Operation Condor. In both cases, the CIA depended on third party agents to illegally detain, interrogate and torture individuals it suspected of complicity with insurgent movements. But whereas the Phoenix Program was localised, and operated within the borders of South Vietnam, therefore within a US battlefield, Operation Condor was extended beyond the confines of one state, to provide a regionalised system of detention without charge or trial, interrogation and torture. What is striking about rendition in the 'War on Terror' is its extension beyond the local and regional levels; the CIA has operated a global system of rendition, drawing in the intelligence and security apparatuses of dozens of states from regions across the globe including North America, Europe, Africa, and Asia, for the transfer of detainees out of US jurisdiction. As in the Cold War, the global rendition system is fuelled by the injection of US military aid into client states, in return for the detention and interrogation 'services'. As in the Cold War, these security arrangements also facilitate the preservation of US dominance, demonstrated in the US' ability to bring together for its own purposes agencies that are the embodiment of sovereign state power, since it is they that constitute the coercive capacity of the state. Furthermore, states have allowed the mistreatment of individuals within their own sovereign territories by external agents who are also allies. This is demonstrated in the report of the investigation by the European Parliament into the complicity of EU states in rendition, which shows CIA agents were given carte blanche to remove citizens from the streets of European sovereign states, transfer them to states known to use torture, and detain them indefinitely without due process (EU 2007). This shows the extent to which the US' illicit actions have been facilitated by numerous cooperative Western allies, as well as by its client states in the global south.

While scholars have analysed the similarities and differences in how successive US administrations from Reagan to Obama have implemented rendition, there has been no real focus on the ways in which rendition in the 'War on Terror' has been shaped by events beyond the control of the Bush and Obama administrations. The remainder of this paper is aimed at providing a much more focused analysis of the evolution of the global rendition system in the 'War on Terror'. It aims to show how the global rendition system has evolved at certain key moments in response to the on-going contestation over the applicability of human rights law between the US executive, the judiciary and the human rights community, within and beyond the US.

The evolution of the global rendition system in the 'War on Terror'

The global rendition system that emerged following President George W. Bush's Executive Order on the Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism, issued on 13 November 2001, is a system in flux. It has been shaped significantly by a number of key cases in which petitions for writs of habeas corpus (challenges to the lawfulness of detention) on behalf of numerous rendition victims, mostly held in Guantánamo Bay, have progressed through the US District Courts, Courts of Appeal and the Supreme Court. Simultaneously, concerns over US complicity in torture and over the denial of basic rights, including habeas corpus, among staff employed in various departments of the US government, notably the CIA, the Department of Defense and Department of Justice, have also shaped the global rendition system. The intersection of the legal cases on the one hand and anxieties within branches of the US administration on the other, have shaped the rendition system in sometimes unexpected ways. While in some instances they have led to the upholding of the human rights of detainees, in others they have led to the US administration passing new laws deliberately intended to further deny rights of all non-US detainees. We contend that they may also have led to an increased reliance on client states to harbour detainees on behalf of the US, rather than having those detainees transferred into US custody at the detention facility in Guantánamo Bay. Finally, we suggest that pressure on the Obama administration to reverse some of the most abusive measures deployed by the Bush administration may have also have led to further reliance on client states for detention and interrogation.

The majority of the legal proceedings launched on behalf of detainees held by the US in the 'War on Terror' have been aimed at securing the right for them to challenge their detention through the US courts. These proceedings have led to various important rulings by the US Courts, including the Supreme Court, which have undermined the US government's position that the detainees have no such recourse to justice in the US Courts, and that they have no rights under the Geneva Conventions. Each time the Supreme Court has ruled in favour of the detainees, the US government has introduced counter-measures to try and reverse or circumvent the Court's judgements. Several notable cases, which comprised the petitions of multiple detainees, and which were consolidating at specific points during the legal wrangling, help to illustrate the nature of this struggle. The ways in which the anxieties within various government departments over the legality of US actions in relation to detainees has intersected with the legal wrangling will be highlighted as these cases are discussed.

Very shortly after the first detainees were transferred to Guantánamo Bay in 2002, lawyers acting on behalf of some of those detained filed petitions in the Washington DC circuit court. Some of the first were *Rasul v. Bush*, and *Habib v. Bush*, filed on behalf of British citizens Shafiq Rasul and Asif Iqbal, and Australian citizens David Hicks and Mamdouh Habib by the Center for Constitutional Rights in February 2002. In July 2002, the US District Court for the District of Columbia granted the US government's motion to dismiss the habeas corpus petition in *Rasul v. Bush*, as well as in an accompanying case, *Al Odah v. United States*. The judge's ruling was based on the US Supreme Court's ruling in the *Johnson v. Eisentrager* case from 1950, which involved the habeas corpus petitions on behalf of 21 German national detained and tried by US military commission in China after the surrender of Germany but before the end of hostilities with Japan. In *Johnson v. Eisentrager*, the US Supreme Court had ruled that writs of habeas corpus are not available to aliens outside the sovereign territory of the US. On the same grounds in *Rasul v. Bush*, Judge Kollar-Kotelly ruled that the District Court of Columbia 'does not have jurisdiction to entertain the claims made', since 'the military base at Guantánamo Bay, Cuba, is outside the sovereign territory of the US'. The judge added that this judgement 'should not be read as stating that these aliens do not have some form of rights under international law', but 'Rather, the Court's decision solely involves whether it has jurisdiction to consider the constitutional claims that are presented to the Court for resolution'

(*Rasul v. Bush* 2002). Appeals were launched in both *Rasul v. Bush* and *Al Odah v. United States* in the Washington DC Circuit Court of Appeals. On 11 March 2003, the Appeals Court affirmed the dismissal of *Rasul v. Bush*, *Al Odah v. United States* and a third case, *Boumediene v. Bush*. The judges were divided 2-1, but the Court maintained that the petitioners had no right to due process and that no US court had jurisdiction to hear their claims, consistent with the District Court's decision of 30 July 2002 (CCR 2008a). Undeterred, the lawyers representing the detainees filed a petition for a writ of certiorari before the US Supreme Court, seeking review of the DC Appeals Court decision. On 10 November 2003, the Supreme Court granted certiorari in the three leading habeas corpus cases, agreeing to hear the cases and to decide whether the US courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad and incarcerated at Guantánamo under Bush's 2001 Executive Order. The cases were consolidated under the name *Rasul v. Bush*. Before the Supreme Court had heard the cases, UK citizens Shafiq Rasul and Asif Iqbal were released from Guantánamo in March 2004, and returned to the UK. The ruling of the Supreme Court in *Rasul v. Bush* came on 28 June 2004. The Court ruled that the 600 Guantánamo detainees had a right of access to the federal courts, via habeas corpus and otherwise, to challenge their detention and conditions of confinement (CCR 2008a). Following this ruling, the Center for Constitutional Rights and associated lawyers filed 11 new habeas corpus cases in the US District Court for the District of Columbia, on behalf of more than 70 Guantánamo detainees. They became the consolidated cases of *Al Odah v. United States* and *Boumediene v. Bush*.

Meanwhile, an investigation undertaken by the Inspector General of the CIA into the use of Enhanced Interrogation Techniques (EITs) against detainees by CIA agents concluded in May 2004, when the Inspector General presented his findings (IG 1997) (classified at the time) within government circles. This was a cause for considerable anxiety about the risks that agents involved in torture could face prosecution. The Inspector General's investigation had been undertaken to evaluate the effectiveness of the EITs in preventing further terrorist attacks. Approval had been sought by the CIA's Office of General Counsel in 2002 for the use of the EITs under the CIA's Counterterrorist Program. These were intended to provide a number of measures that went beyond the 'Standard Interrogation Techniques' (SITs). The SITs included sleep deprivation up to 72 hours, continual use of light or darkness in a cell, loud music, and white noise, approved for use by the CIA (CIA 2004: 40). The rationale for the EITs was that they would be effective in securing intelligence from detainees that were unresponsive to the SITs, thereby increasing the capacity of the US to prevent future terrorist attacks. The EITs were intended for use against the first so-called 'High Value Detainee' (HVD), Abu Zubaydah, held by the CIA in a number of secret prisons, following his capture in Pakistan in March 2002. He was not transferred to Guantánamo Bay until September 2006, when he was sent there with a number of other HVDs (George W Bush 2006). It was during his time in those secret CIA prisons that the CIA argued that he was resistant to the standard techniques, and sought permission to use more aggressive methods (CIA 2004: 3-4), although as discussed elsewhere, permission to use them was sought retroactively; the CIA was already using the EITs (Blakeley 2011: 550-53). The initial list of EITs for which the CIA sought approval included: 1) the attention grasp; 2) walling; 3) the facial hold; 4) the facial insult or slap; 5) cramped confinement; 6) insects placed in confinement box; 7) wall standing; 8) stress positions; 9) prolonged sleep deprivation; 10) the waterboard (CIA 2004: 15). As discussed elsewhere (Blakeley 2011: 547-50), these methods are forms of torture, and the Inspector General recognised them as such. He noted, for example, that "The EITs . . . are inconsistent with the public policy positions that the US has taken regarding human rights" (IG 1997: 91). He also noted that frequently the US State Department calls other states on similar practices, which it describes as torture, such as threats to families and forcing detainees to lie on hard floors, depriving them of sleep and hooding and stripping prisoners naked (IG 1997: 92-93). Furthermore, in his report, he showed that despite the fact that the CIA had gone to great lengths to provide protection from prosecution for those agents involved in deploying the EITs, in collusion with the Office of Legal Counsel of the US Department of Justice, he acknowledged

that the advice received from the Office of Legal Counsel never adequately addressed the question of whether the application of both SITs and EITs was at odds with the undertaking, accepted conditionally by the United States, regarding Article 16 of the Torture Convention to prevent cruel, inhuman, and degrading treatment. It was unlikely, therefore, according to the Inspector General, that any of these measures would provide shelter for CIA agents from recriminations and prosecution (IG 1997: 91-101).

Two important moments in the evolution of the global rendition system had thus coincided. The Supreme Court had ruled that those detainees held in Guantánamo had a right to challenge their detention. Furthermore, the CIA Inspector General had questioned the legality of the interrogation methods that were being deployed by the CIA, and had flagged up the risks of prosecution against those agents responsible, as well as their superiors. Following the Supreme Court's ruling in *Rasul v. Bush* in June 2004, the US government halted the transfer of new detainees to Guantánamo. Between mid-2004 and September 2006, therefore, no new detainees were transferred to the Department of Defense facility at Guantánamo Bay. A secret CIA prison that had operated at Guantánamo Bay was also shut down.

At that point, information about the CIA's secret prison network and its use of torture methods was classified. However, as investigative journalist, Dana Priest, reported in November 2005, the CIA had been operating a secret prison at Guantánamo Bay. She found that:

Sometime in 2004 the CIA decided it had to give up its small site at Guantanamo Bay. The CIA had planned to convert that into a state-of-the-art facility, operated independently of the military. The CIA pulled out when U.S. courts began to exercise greater control over the military detainees, and agency officials feared judges would soon extend the same type of supervision over their detainees. In hindsight, say some former and current intelligence officials, the CIA's problems were exacerbated by another decision made within the Counterterrorist Center at Langley. (Priest 2005)

This raises important questions about what the US was doing with terror suspects detained around the world instead of transferring them to Guantánamo. Did the CIA continue to hold them? Were they transferred to third parties? The fragmentary data gathered on victims of rendition and secret detention in the 'War on Terror' suggests that during that period, the US became heavily reliant on third parties for the detention of terror suspects. In other words, detention was being increasingly outsourced to states where legal redress for victims would be much more difficult to pursue.

It is thought that a number of the 'High Value Detainees' had been held in this detention site, and were then transferred out in 2004 to detention facilities in third party states.

For example, evidence exists to suggest that several High-Value Detainees (HVDs) were held in Lithuania, from 2004, and presumably at the site known as Project No 2. Former CIA officials directly involved in the programme told ABC News that 'as many as eight suspects were held for more than a year, until late 2005 when they were moved because of public disclosures about the program'. According to these officials, the HVDs were moved from Lithuania and Romania once the sites in Poland (which had been closed in 2004) and Romania became known. They were transferred out of Eastern Europe, to one or more undisclosed locations – variously described as 'North Africa', or 'war zone facilities'. They were kept at these sites for a further 9mths, until their September 2006 transfer to GTMO.

A highly plausible explanation for these movements of prisoners out of CIA custody at the secret facility in Guantánamo, therefore, and for the halting of new transfers to Guantánamo in 2004, was that the administration feared the details of the torture of those detainees previously held in the

secret CIA prison network would come out, if those individuals were transferred to Guantánamo, and if the US courts continued to insist on the granting of their habeas corpus rights.

Having halted the transfer of detainees to Guantánamo, the US administration could therefore limit legal proceedings on behalf of detainees to those already held in Guantánamo, without the numbers increasing, and without risking details of the secret CIA prison network and torture of detainees being exposed. Nevertheless, the US administration was also seeking to halt those legal proceedings already underway. Therefore, within days of the Supreme Court's ruling in *Rasul v. Bush* in June 2004, Paul Wolfowitz as Deputy Secretary of Defense authorised the establishment of the Combatant Status Review Tribunals (CSRTs) at Guantánamo. These were deliberately intended to avoid granting access for Guantánamo detainees to the US Courts. It was instead up to military officers to review each detainee's enemy combatant status, without the involvement of lawyers to represent the detainees (Wolfowitz 2004). Evidence was permitted that had been obtained under coercion or torture, and detainees were denied access to classified evidence, which in many cases comprised the majority of the evidence against them. This opened the way for the US government to file a motion in October 2004 for dismissal of all the remaining habeas corpus cases filed in the US Courts. Before the Court considered the government's motion to dismiss, a ruling was made in *Hamdan v. Rumsfeld* that undermined the government's position. In November 2004, the US District Court for the District of Columbia granted a petition for habeas corpus rights for Salim Ahmed Hamdan, ruling that the military commissions lacked authority to try him since there was no congressional act that authorised them. The judge also ruled that the Geneva Conventions did apply to Hamdan, since they 'are triggered by the place of conflict, and not by what particular faction a fighter is associated with'. The judge found that 'there was nothing in the record to suggest that a competent tribunal had determined that Hamdan is not a prisoner-of-war under the Geneva Conventions'. The court thus dismissed the government's position that Al Qaeda members are not prisoners of war. The court also ruled that trial before the military commission was unlawful unless the military commissions were amended so that detainees could have access to the evidence against him which had been withheld during the commission sessions (CCR 2008b). Subsequently, however, in January 2005, Washington DC District Court Judge Richard J. Leon, considering the government's motion to dismiss one of the remaining habeas corpus cases (*Khalid v. Bush*), upheld the Bush administration's position that the non-citizen detainees at Guantánamo who had been detained outside the sovereign territory of the US in the course of the war against Al Qaeda and the Taliban possessed no substantive rights to due process. He also held that they possessed no constitutional rights, that no federal law was relevant and applicable, and that international law was not binding (CCR 2008a). But this ruling was contradicted in July 2005, when in *re Guantánamo Detainee Cases*, which concerned the remaining 11 habeas corpus cases, Judge Green held that the detainees were entitled to constitutional due process rights that the CSRTs failed to satisfy, and furthermore that a number of the detainees had rights under the Third Geneva Convention (CCR 2008a).

Within months, as a response to the ruling in *re Guantánamo Detainee Cases*, the US government implemented legislation that would strip the US courts of their jurisdiction over habeas corpus petitions filed on behalf of those detained under Bush's 2001 Executive Order. The Detainee Treatment Act, passed on 30 December 2005, vested exclusive review of final decisions of the CSRTs and military commissions in the DC District Court (DoD 2005). Within days of the passing of the Act, the US government moved to have the appeals dismissed in *Hamdan v. Rumsfeld* in the Supreme Court, and *Al Odah v. United States* and *Boumedienne v. Bush* before the Circuit Court, arguing that the Detainee Treatment Act should be applied retroactively. In June 2006, in *Hamdan v. Rumsfeld* the US Supreme Court determined that detainees did have the right to pursue habeas corpus cases in civilian courts, irrespective of the Detainee Treatment Act. It also ruled that the military commissions, as defined under Bush's 2001 Executive Order, violated US military law and the

Geneva Conventions (CCR 2008b).³ Subsequently, Bush withdrew his Directive from February 2002, and acknowledged that the Geneva Conventions do apply (although he reversed this by Executive Order later on in 2007).

Despite this acknowledgement by Bush that the Geneva Conventions apply to detainees, administration continued to seek ways to deny their habeas corpus rights. In a direct response to the Supreme Court's ruling in *Hamdan v. Rumsfeld*, the US Congress passed the Military Commissions Act (MCA), announced in advance by Bush on 6 September 2006. This was when Bush first admitted the existence of the CIA's secret prison network. He also announced that the Act would enable the CIA's rendition programme to continue (George W Bush 2006). The Act, passed by Congress on 17 October 2006 (Congress 2006), stripped the US courts of jurisdiction over the appeals relating to any aspect of detention or treatment of individuals determined to be 'enemy combatants' or 'awaiting such determination'. The Act also ratified the CSRT review process as a substitute for habeas corpus. So confident must the administration have been in the capacity of the Military Commission's Act to contain further proceedings through the US courts, that Bush announced that transfers to Guantánamo would resume; fourteen so-called 'High Value Detainees', including Abu Zubaydah, one of the victims of the victims of CIA torture, were on their way. The day after the Act was passed, the Department of Justice notified the US District Court for the District of Columbia that it no longer had jurisdiction to consider habeas corpus cases brought on behalf of Guantánamo detainees (DoJ 2006). As a result, on 20 February 2007 the Court of Appeals ruled 2-1 in the consolidated cases of *Boumedienne v. Bush* and *Al Odah v. United States* that the Military Commissions Act had eliminated any statutory right to habeas corpus (US 2007a). Undeterred, the Center for Constitutional Rights and co-counsel, petitioned the US Supreme Court to review the Court of Appeals decision. On 2 April 2007, the Supreme Court declined to hear the combined cases of *Boumedienne v. Bush* and *Al Odah v. United States*, on the grounds that the detainees should exhaust all remedies through the CSRTs. Nevertheless, three of the Supreme Court judges issued a dissenting statement, arguing that the case 'raises an important question: whether the Military Commissions Act of 2006 [...] deprives courts of jurisdiction to consider their habeas claims, and, if so, whether that deprivation is constitutional' (US 2007b). The dissenting judges were of the view that the petition for certiorari should have been granted 'to help establish the boundaries of the constitutional provision for the writ of habeas corpus' (US 2007b).

It was not simply the three dissenting judges that had anxieties about the legality of the military commissions. An army reservist with years of experience in military intelligence, who had been involved in the CSRTs, filed an affidavit to the US Supreme Court in the *Al Odah v. United States* case, just days before they reached their decision on 29 June 2007 to reverse their decision and announce that they would hear the consolidated cases of *Boumedienne v. Bush* and *Al Odah v. United States* in the 2007-2008 Supreme Court term (CCR 2008a). This was their first reversal for 60 years.⁴ Lt Col Abraham's had been assigned to the Office for the Administrative Review of the Detention of Enemy Combatants (OARDEC) between 11 September 2004 to 9 March 2005, to gather or validate information relating to the CSRTs from various government departments. In his affidavit he described the CSRT process as being substantially flawed, including during the *Al Odah* hearings, with which he had been involved:

What were purported to be specific statements of fact lacked even the most fundamental earmarks of objectively credible evidence. Statements allegedly made by percipient witnesses lacked detail. Reports presented generalized statements in indirect and passive forms without

³ Following the Supreme Court's ruling in *Hamdan v. Rumsfeld* case, the first habeas corpus petition on behalf of a detainee held in the US Department of Defense detention facility at Bagram airbase in Afghanistan was filed in the US District Court for the District of Columbia on behalf of Fadi al-Malqeh, in September 2006.

⁴ This also led to the judgement in the District Court that the *Fadi al-Maqaleh v Rumsfeld et al* case, would need to be considered on behalf Bagram detainee al-Maqaleh, in light of the Supreme Court's resolution.

stating the source of the information or providing a basis for establishing the reliability or the credibility of the source. Statements of interrogators presented to the panel offered inferences from which we were expected to draw conclusions favoring a finding of “enemy combatant” but that, upon even limited questioning from the panel, yielded the response from the Recorder, “We’ll have to get back to you.” (Abraham 2007)

It is widely thought that Abraham’s testimony played a key role in the decision of the Supreme Court to hear the cases. Within less than a month, following the Supreme Court’s decision, President Bush issued Executive Order 13440, in which he reaffirmed that members of Al Qaeda, the Taliban and associated forces are unlawful enemy combatants who are not entitled to protection under the Geneva Conventions (George W. Bush 2007). Nevertheless, the ruling in the consolidated cases of *Boumediene v. Bush* and *Al Odah v. United States*, by the Supreme Court came on 12 June 2008, and the Court ruled 5-4 in favour of the detainees, granting them the writ of habeas corpus. It further ruled that the Detainee Treatment Act was not an adequate substitute for full habeas review. The Court also recommended that all future cases be channelled to a single District Court (the US District Court for the District of Columbia) ‘to reduce the burden habeas corpus proceedings will place on the military, without diluting the writ’s protections’ (US 2008). In the legal proceedings that followed, five of the six petitioners in *Boumediene v. Bush*, had their cases dismissed and were released, with the judge ruling on 20 November 2008 that the classified document provided as evidence against them by the government was insufficient (CCR 2008a).

Within months of the Supreme Court’s ruling, President Obama took office, and began his term with the issuing of three Executive Orders relating to the detention of terror suspects. Executive Order 13491, ‘Ensuring Lawful Interrogations’ (Obama 2009a), banned the use of controversial CIA interrogation techniques while they are reviewed. It also outlawed the use of CIA secret prisons, and revoked Bush’s Executive Order 13440 which had affirmed that detainees were not entitled to protections under the Geneva Conventions. Executive Order 13492, ‘Review and Disposition of Individuals Detained At the Guantánamo Bay Naval Base and Closure of Detention Facilities’ (Obama 2009b) prohibited the referral of any further cases to military commission under the Military Commission Act, pending the review of these. However, Obama did not revoke the Executive Order issued by President Bush on 13 November 2001 on the Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, which provided the basis for detention without charge or trial in the first place, and denied detainees access to lawyers. Executive Order 13493, ‘Review of Detention Policy Options’ (Obama 2009c) ordered the review of US detention policy options for those detained as terror suspects. Unfortunately, none of these Orders outlaws the use of rendition. On the same day, Judge Bates of US District Court for the District of Columbia invited the Obama administration to review its position on the cases filed on behalf of detainees at Bagram airbase. The administration affirmed on 20 February 2008 that the District Court for the District of Columbia had no jurisdiction to hear the Bagram habeas corpus petitions under the Military Commissions Act. In other words, despite the suspension of the military commissions for Guantánamo detainees, the Obama administration would continue to deny the habeas corpus rights of detainees held beyond the US itself and beyond Guantánamo. Furthermore, later that year, following the work of the Special Task Force that had been charged with reviewing detention policies, the Attorney General announced that rendition would continue, but that the treatment of detainees would be more closely monitored to ensure that they were not tortured (DoJ 2009).

Political pressures made it very challenging for Obama to follow through on his commitments to close the Guantánamo Bay detention facility. Since the Military Commissions Act of 2006 had enshrined military commissions for terror suspects into law, it was always going to be very difficult, particularly with a Congress dominated by Republicans, to halt these permanently. Therefore, on 7 March 2011, by Executive Order, President Obama reinstated the military commissions at Guantánamo Bay (Obama 2011). This went against Obama’s earlier plans to bring the detainees

before US courts, largely because of the political pressures upon him not to do so. What seems clear is that despite the concerted efforts of human rights organisations and lawyers representing victims, political failures have prevented the reinstatement of the rule of law in the treatment of detainees that the US alleges are complicit in terrorism. What is less than clear is how committed Obama really is to reversing the nefarious practices of the Bush administration.

A number of important questions remain about rendition, secret detention and torture since 2009. How extensively is rendition being used by the Obama administration? It is far from clear how widespread this practice is, and if it is on-going, which states are being used to harbour those individuals caught up in it. Obama promised that torture of individuals subjected to rendition would be prevented by ensuring that it did not occur. How far is this possible? What mechanisms are used to prevent the torture of rendition victims? The increased use of drones to carry out targeted killings of supposed enemies in Afghanistan and Pakistan under the Obama administration raises important questions about whether this method of eliminating enemies is replacing the rendition, secret detention and torture of supposed enemies.

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