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The Extraordinary Condition of Extraordinary Rendition: The C.I.A., the D.E.A., Kidnaping, Torture, and the Law*

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Abstract

Extraordinary rendition is a maneuver in which United States agents abduct or arrange for the abduction of persons in foreign countries who they suspect of terrorist activities. These persons are then taken to other nations where they often are tortured by local enforcement personnel in order to secure information that the Americans desire. The article portrays an egregious episode in which a Muslim cleric was kidnaped in Milan by C.I.A. operatives and flown to Egypt where

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he was severely manhandled. It also traces the legal background in American law of renditions and offers an interpretative analysis.

The practice of extraordinary rendition raises significant policy issues regarding legally acceptable government behavior. It also provides background for consideration of moral and ethical principles that should guide state action. It further brings into play questions concerning necessity, that is, the relationship between threat and tactics that are permissible to attempt to deal with such real or perceived threat. Extraordinary rendition also provides a context for consideration of national values and the manner in which such values should be taken into account in determining public policy.

In addition, the practice of extraordinary rendition raises fundamental questions about priorities and means-end considerations. There is, for instance, the issue of whether an end, in this instance the presumed protection of the public, is sufficient to overcome objections to the means, the kidnapings and the torture. Inherent in this concern lie inordinately complex empirical and moral considerations. How much protection does the procedure afford or might it afford in contrast to what likely would occur were it not employed? Are only a few injuries and deaths of nationals prevented or are many hundreds or thousands saved from harm? And what numerical conclusion, in the unlikely event that one can be determined, is adequate justification for the procedure being employed, factoring into the equation the political, moral, and

social costs and benefits, themselves calling for measurement in order to render a surer judgment. How much is the international reputation of the United States damaged by the episodes of extraordinary rendition, and what are the consequences of such damage both in the short and the long term? These are, of course, questions quite unamenable to precise answers, but they bring to the fore matters that must be taken into account when making judgments about extraordinary rendition.

In the material that follows, we offer details regarding the most notorious extraordinary rendition case involving the United States, an episode that was exposed when Italian authorities indicted 22 CIA operatives on a charge of kidnaping. We note the responses by American officials to accusations of the employment of extraordinary rendition, accusations that became prominent when Congress successfully fought the executive office's attempt to exempt the CIA from a statute outlawing torture and other forms of degrading and inhuman treatment of prisoners.[1] We also provide a capsule survey of the development of American law on rendition in order to establish a further context for evaluation of extraordinary rendition as we view it and as others might see it.

[1] See generally Karen J. Greenberg, ed., The Torture Debate in America. New York: Cambridge University Press, 2005; Kenneth Roth & Minky Worden, eds., Torture: Does It Make Us Safer? Is It Even OK?: A Human Rights Perspective. New York: New Press, 2005.

Extraordinary Rendition

Extraordinary rendition involves hiring overseas henchmen or sending undercover agents from the United States to foreign countries where they forcibly apprehend individuals who are known or suspected to be engaging in acts that are deemed inimical or likely to prove inimical to the interests of the United States. Typically, extraordinary rendition is carried out with the overt or tacit consent of the country in which the maneuver occurs. The person captured is then taken to another jurisdiction, outside the United States, and may be (and often is) subjected to beatings and torture.[2] The ingredients of extraordinary rendition have led to depictions of it as "outsourcing torture"[3] and "torture by proxy."[4]

The kidnapings would pose no legal problems under American law, but the torture would involve domestic difficulties, both politically and legally. That is why the suspects are exported to realms beyond the reach of American courts. What happens to persons shipped to these jurisdictions may violate international agreements to which the United States is a party, but, as we shall see, American officials either ignore what they have wrought or use semantic re-framings to

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[2] Richard A. Clarke, Against All Enemies: Inside America's War on Terror 142. New York: Free Press, 2004.

[3] Jane Mayer, *Outsourcing Torture: The Secret History of America's "Extraordinary Rendition" Program,* New Yorker, Feb. 14 & 21, 2005, at 106.

[4] Association of the Bar of the City of New York & Center for Human Rights and Justice, N.Y.U. School of Law, *Torture by Proxy: International and Domestic Law Applicable to "Extraordinary Rendition,"* 60 The Record 13 (2005) (hereafter cited as Torture by Proxy).

exculpate themselves from responsibility.

Extraordinary rendition was employed during the presidency of Ronald Reagan as a tactic to allow U.S. law enforcement agencies to deal with wanted persons in so-called "lawless" states such as Lebanon. It was, at that time, "extraordinary" in the sense that it was only infrequently employed. Since the September 11, 2001 attacks on the World Trade Center and the Pentagon, the Bush administration has used the process on a large scale, with an estimated total of sixty or seventy such episodes by the middle of 2005 involving Egypt alone. At least another sixty extraordinary rendition maneuvers have sent captured persons to Jordan, Yemen, Morocco, Pakistan, Uzbekistan ("where partial boiling of a hand or arm is quite common"[5]), as well as to other sites, including Diego Garcia, an island off the tip of India, which is a military outpost that the United States has leased from and shares with Britain.[6] President George W. Bush's position on extraordinary rendition was expressed in a meeting with Prince Bandar bin Sultan, the Saudi ambassador to the United States. If Al Qaeda suspects were captured, and "if we can't get them to cooperate," the President reportedly said, "we'll hand them over to you."[7] On the other side, a former CIA official

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[5] Mayer, *supra* note 3, at 116.

[6] David E. Kaplan, *Playing Offense*, U.S. News & World Rep. June 2, 2003, at 18, 22; Stephen Grey and Don Van Atta, *13 With CIA Sought by Italy in a Kidnapping,* N.Y. Times, June 25, 2005, at A1, A6. See generally Anita Bhatt, The Strategic Role of Indian Ocean in World Politics: The Case of Diego Garcia. Delhi, India: Ajanta, 1992.

[7] Trial by Proxy, *supra* note 4, at 23. See also Diarmuid Doyle, *Which Ones are the Bad Then? The U.S.'s Contempt for the Rights of Its Prisoners Puts*

pointed out that in the extraordinary rendition program, which he helped to establish, a detainee can't be taken to court because evidence against him had been obtained illegally, and that "You can't kill him either. All we've done is create a nightmare."[8] The term extraordinary rendition itself is a bit peculiar, especially in a political context, when, among numerous other illustrations, legislation infringing on civil rights is called the Patriot Act. "Extraordinary" tends to suggest that only very demanding and rare circumstances would bring the tactic into use; "rendition"[9] conveys a sense other than that of a person surreptitiously being apprehended, transhipped, and tortured in violation of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), of which the United States is a signatory.[10] Other international agreements

Saddam to Shame, Sunday Tribune *(*Ireland) (Mar. 30, 2003), at 7.

[8] Mayer, *supra,* note 3, at 110.

[9] International law commonly expresses this concept with the French term *refoulement.*

[10] 1465 U.N.T.S. 85 (1984). The United States signed the treaty in October 1984. Article 3 of CAT reads: "No state may permit or tolerate torture or other cruel, infamous or degrading treatment or punishment." Article 2(2) adds: "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability, or any other public emergency may be invoked as a justification of torture, or other cruel, inhuman or degrading treatment or punishment." Both Germany and the United States excepted to some aspects of Article 3, but these reservations did not pertain to extraordinary rendition. As of June 2004, CAT had been ratified by 136 countries and signed by 12 additional nations. See generally J. Herman Burgers & Hans Danelius, The United Nations Convention Against Torture: A Handbook on the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment. Dordrecht, The

that the United States is a party to that interdict torture include the International Covenant on Civil and Political Rights,[11] the Geneva Conventions of 1949,[12] and the Refugee Convention of 1951.[13]

In the next pages, we provide details of a recent episode of extraordinary rendition. Then we examine the response of government officials to the practice with particular attention to the disjunction between what was claimed by American officials and what our case study shows. We then will follow the trail of decisions in the United States regarding the appearance before American courts of persons who have illegally been seized in other jurisdictions in order to suggest why extraordinary rendition has evolved in the way that it has.

Netherlands: M. Nijhoff, 1988; Malcolm D. Evans & Rod Morgan, Preventing Torture: A Study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment and Punishment. Oxford, England: Clarendon Press, 1988; David Weissbrodt & Isabel Hortreiter, *The Principle of Non-Refoulement: Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment In Comparison with the Non-Refoulement Provisions of Other International Human Rights Treaties*, 5 Buff. Hum. Rts. L. Rev. 1 (1999).

[11] 990 U.N.T.S. 171 (1976).

[12] 75 U.N.T.S. 145 (1949).

[13] 189 U.N.T.S. 150 (1951). See also Gunnel Stenberg, The Prohibition Against Removal of Refugees with Special Reference to Articles 32 and 33 of the 1951 Convention Relating to the Status of Refugees. Uppsala, Sweden: Iustus Főrlag, 1989. On another front, in 2005 Pope Benedict XVI in his annual papal message declared, apparently with reports of torture in mind, that "not everything automatically becomes permissible between hostile parties once war had regrettably commenced." Ian Fisher, *Pope Condemns Both Terror and Violations of Geneva Pact*, N.Y. Times, Dec. 14, at A4.

The Milan Kidnaping

Arrest warrants, accompanied by 80,000 words of documentation, were issued by an Italian court in July 2005 charging thirteen American CIA operatives--ten men and three women--with the kidnaping in Milan in early 2003 of a Muslim imam.[14] The matters that the court decision spelled out fueled outrage, particularly from the opposition political party in Italy which said that the CIA action was a violation of the country's sovereignty. A prominent Italian lawyer summed up the feelings of many of his compatriots: "It is incredible," he wrote, "that a country going on saying that they defend liberties does not care for the liberties and rights of other countries."[15] The Italian government denied that it had granted prior approval of the kidnaping, a position regarded skeptically by retired CIA agents,[16] especially since the government refused to seek extradition of the accused, though early in 2006 it requested the American government to allow Italian prosecutors to interrogate the indicted agents on American soil.[17] The CIA

[14] A copy of the charge and the evidence against the C.I.A. operatives was kindly supplied, when the materials were not secret, to the first author by Amando Spataro, the lead prosecutor, during a personal meeting in Milan. The facts of the case have been extracted from that material. We cite American media reports in order to direct readers not conversant in Italian to English-language sources.

[15] Stefano Nespor, e-mail to Joseph DiMento, June 27, 2005.

[16] Dana Priest, *Italy Knew About Plan to Grab Suspect: CIA Officials Cite Briefing in 2004,* Wash. Post, June 30, 2005, at A01.

[17]Nicole Winfield, *Italy's Justice Minister Forwards Request to US for Information about CIA Kidnapping,* Associated Press, Jan. 22, 2006.

adopted a "no comment" response as did the American president.

The U.S. Department of State issued a statement that nothing whatsoever would be said about the case since it remained under investigation.[18] The Italian prosecutor pointed out that if persons in his government had acquiesced in the rendition they would be prosecuted for violating the Italian statute regarding criminal complicity that punishes the failure of a public official to stop a crime when that official is obligated to do so.[19] He noted that a year after the rendition, CIA officials had lied to their Italian counterparts, telling them that the cleric was in Albania, an untruth that was taken as evidence that American agents continuously kept the Italians in the dark about what was going on.

The American veil of official silence remained impenetrable when subsequently an Italian three-person appellate court, the *Tribunale della Liberrta,* issued arrest warrants for nine additional Americans who were said to have been involved in activities related to the kidnaping. The prosecutor also sought to extradite the kidnap victim from Egypt, ostensibly on charges of terrorism, but primarily to re-establish his right to justice in the country where he had been living. The victim of the kidnaping was 42-year-old Omar Moustafa Hassan Nasr, better known locally as Abu Omar, who was intercepted on February 17, 2003 when he was on his way to noon prayers at a nearby mosque. Omar, as we shall

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[18] Tracy Wilkinson, *Italy Orders Arrest of 13 CIA Operators,* L.A. Times, June 20, 2005, at A1, A8.

[19] C.P. art. 112 (1).

now call him, is an Egyptian who, after stays in Albania and in a refugee dormitory in Munich, had gained political asylum in Italy in May 1997. The ground for his asylum status was that as a member of the radical Islamic organization, Jamaat al Islamiya, which he had joined as a student (and had served a one-year jail term for his membership), he risked political persecution if he returned to Egypt.[20] He allegedly had fought in Bosnia-Herzegovina and Afghanistan as part of the jihadist movement and was suspected of recruiting terrorists and inciting unrest. Five of his colleagues were then on trial in Italy. The Italians denounced the CIA action as interference with an ongoing investigation of Omar being conducted by DIGOS, the antiterrorist branch of the police, and more generally, they complained that dealing with Americans in regard to intelligence was a one-way street: the Americans took, but rarely gave information.

Two CIA agents, dressed as Italian police officers, first asked Omar for identification, then sprayed chemicals into his face and hustled him into the back of a mini-van. They drove for four or five hours to the American portion of the joint U.S-Italy air base at Aviano, northeast of Venice. From there Omar was flown to the Ramstein Air Base in the southwest corner of Germany. During the flight he was told, in perfect English, to "shut up" or he would be killed. There was speculation that Omar, who had worked as a government informant for SHIK, the Albanian intelligence agency, and allegedly had been a

[20] John Crewdson, Tom Hundley, and Liz Sly, *Italy Charges CIA Agents in Rare Act by Ally: Officials Seek Arrest of U.S. Agents in Kidnapping of Imam Who Alleged He Was Tortured in Egypt*, , Chi. Trib., June 25, 2005, at 2, 6.

productive CIA informant, had been kidnaped in an attempt to persuade him to play the same role in Italy.[21] He was released from prison in April 2004, perhaps because of his deteriorating physical condition, and placed under house arrest in Alexandria, where his mother and siblings lived. To gain his prison release he was obliged to sign a form affirming that he had voluntarily made himself available to the Egyptian police. He telephoned his wife, a woman he had married since coming to Italy (although he had a first wife and three children in Albania). He told her and also told Mohammed Reda, a fellow imam, that he had been tortured when he refused to return to Italy as an informer. Police had wiretaps on both telephones and heard Omar say that electric shocks had been applied to his genitals that had made him incontinent. He also claimed that he had been hung upside down and had lost hearing in one ear because of loud noises constantly being played. His eyesight also had been damaged. He further claimed that he had been placed alternately in a sauna-like atmosphere and then in a refrigerated cell. The Italian police were inclined to believe the torture allegations since Omar was unlikely to be aware that both his wife's and his associate's phones were being wiretapped.[22] Shortly thereafter, Omar was re-arrested.

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[21] John Crewdson and Tom Hundley, *Abducted Man Aided CIA Ally: Last Month Italian Authorities Charged 13 CIA Operatives with Kidnapping an Islamic Cleric Known as Abu Omar: Now Former Intelligence Officials Reveal that Imam was Once an Informant Valued by CIA,* Chi Trib., July 2, 2005, at 1, 4.

[22] Wiretapping, though it requires judicial permission, is pervasive in Italian law enforcement. It is reported that authorities have spent $1.6 billion on nearly 200,000 intercepted phone calls during the past five years. Tracy Wilkinson, *Wiretaps Unfold Italian Tycoons' Dirty Laundry*, L.A. Times, Aug.

Family visitors to him in prison after his re-arrest reported that he bore scars from his beatings.

Descriptions of Omar's torture in Egypt dovetailed with the U.S. Department of State's recent publication concerning human rights violations in that country which noted that there were numerous credible reports that security forces mistreated detainees and that torture and abuse of detainees by police, security personnel, and prison guards remained frequent.

> The "principal methods of torture reportedly employed....included victims being: stripped and blindfolded; suspended from a ceiling or doorframe with feet just touching the floor; beaten with fists, whips, metal rods, or other objects; subjected to electric shocks; and doused with cold water....Some victims, including male and female detainees and children, reported that they were sexually assaulted or threatened with rape themselves or family members."[23]

This summary is fleshed out by the report of a U.S. request for the return of a suspect in the first World Trade Center bombing who had fled to Egypt. When he was delivered, he was wrapped head to toe in duct tape, much like a mummy. Another Egyptian prisoner who had cooperated with American authorities in a terrorism trial was kept chained

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21, 2005, at A1, A8.

[23] U.S. Dept. of State, Country Reports on Human Rights Practices 2003: Egypt 17; Torture by Proxy, *supra* note 4, at 72.

to a toilet for several days where guards urinated on him.[24]

The CIA operatives had left a tell-tail trail. As a former C.IA officer expressed it: "They behaved like elephants stampeding through Milan. They left huge footprints."[25] The media were particularly taken with the $144,984 bill for food and accommodations that the CIA agents had rung up in a relatively short time span and with post-abduction festive holidays at taxpayers' expense that a number of the agents took in Venice to celebrate their feat. The Italians produced transcripts of numerous cell phone communications made by the CIA team, including calls to their families in the United States as well as copies of driver's licenses and credit cards used for car rentals and xerox copies of their passport pictures that were made when they registered in hotels. The Italian authorities presumed that the names the CIA agents used were fictitious, and asked, fruitlessly, that the United States identify the kidnapers. Information also was forwarded to Europol about the CIA agents that obligated any European country in which they were spotted to arrest them. If the kidnapers were to be extradited and tried in Italy, an extremely unlikely occurrence, they would face a maximum prison sentence of ten years and eight months.[26]

Certain identification was made of one person, Robert Seldon Lady, a CIA operative who had passed as a diplomat in the American consulate in Milan, and had retired ten months

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[24] Mayer, *supra* note 3, at 110.

[25] Tom Englehardt, The CIA's La Dolce Vita War on Terror, TomDispatch.com, July 22, 2005, at 1 (retrieved April 20, 2006 from Common Dreams News Center)

[26] C.P. art. 605.

after the Omar kidnaping. Lady had flown from Milan to Cairo five days following the Omar abduction and remained there for three weeks. He owned a retreat in the Asti region in Italy in which Italian authorities found pictures of Omar and of the area where he lived and worked. Like the other accused Americans, Lady had fled the country. An appeal by his attorney to the Italian courts claiming that he deserved diplomatic immunity for any part he might have played in the kidnaping was rejected by an Italian judge who declared that since Lady had retired he no longer was entitled to such protection.[27] Another participant in the kidnaping, a 63-year-old man, was said to have been assigned to the U.S. Embassy in Tanzania, out of reach of Europol.[28]

Case Law in the United States

Courts in the United States have been willing to try persons who have been kidnaped and transported to America, a long-standing jurisprudential doctrine that provided a significant underpinning for extraordinary rendition. It can be argued that had American courts inquired into the legality of the means by which a defendant was brought before them, as they had done in regard to issues such as interrogation tactics[29] and stomach pumping to recover swallowed narcotics,[30] they

[27] Tracy Wilkinson, *Ex-CIA Agent Asks for Immunity,* L.A. Times, Dec. 5, 2005, at A3.
[28] John Crewsdon, *Italy Seeks Arrest of 6 More CIA Operatives,* Chi. Trib., July 21, 2005, at Al, A4.
[29] Miranda v. United States, 384 U.S. 436 (1966).
[30] Rochin v. California, 324 U.S. 165 (1952).

could have established precedent proscribing criminal actions undertaken to "bring a suspect to justice." The courts could have adopted the guideline enunciated by Justice Frankfurter in the stomach-pumping case:

> We are compelled to conclude that the proceedings by which the conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. This is conduct that shocks the conscience.[31]

That ethos and precedent could have interdicted renditions by maintaining that those who carried it out could be prosecuted criminally and those who were its victims could not.

Rendition, initially wholeheartedly supported by the judiciary, began to arouse reservations in lower courts when it was revisited in the context of later international treaties and moral considerations condemning torture. In such instances, however, the United States Supreme Court consistently, though not unanimously, reversed lower courts and endorsed the laissez-faire principle that, however accomplished, the physical appearance of a defendant before the court was all that mattered. Four leading cases--*Ker, Frisbie, Alvarez-Machain,* and *Toscanino*--- convey how rendition has been viewed over time in American jurisprudence**.**

[31] Ibid. at 132.

Ker v. Illinois (1886)

Frederick M. Ker had stolen money from his Chicago employer and fled to Lima, Peru. President Chester Arthur, acting on a request from Illinois authorities, wrote out an extradition order for the return of Ker to the United States to face a charge of larceny. Henry G. Julian of the Pinkerton Detective Agency was dispatched to deal with the Peruvian authorities. Julian never did so, perhaps because he believed that his official mission would not be successful since at the time Peru and Bolivia were fighting against Chile in the War of the Pacific (1879-1884) and persons with civil authority were difficult to locate in Lima.[32] Julian forcibly and violently arrested Ker.[33] The prisoner was put aboard the U.S. Navy vessel *Essex* en route to Honolulu. There he was placed on the *City of Sydney* for its voyage to San Francisco. In California, the governor honored an extradition request from Illinois to have Ker returned there.

Ker was tried for embezzlement as a baillee; embezzlement as a clerk; larceny at common law; and receiving stolen property. He refused to plead, arguing that he had illegally been brought before the court. He was convicted only of embezzlement. The Illinois Supreme Court found his jurisdictional due process argument unpersuasive, citing a string of precedents to buttress its opinion, beginning with an 1829 British case in which a woman had been seized in Brussels

[32] William F. Slater, Chile and the War of the Pacific. Lincoln, NB: University of Nebraska Press, 1986.

[33] Ker v. Illinois, 119 U.S. 436 (1886).

by an English police officer and brought before an English court. The judge ruled that the circumstances of her arrest were none of the court's business: she was there, how she got there was beside the point.[34] The Illinois court granted that there was ample precedent for the position that Ker could have been tried only for the larceny offense, for which he was found not guilty, had he been officially extradited.[35] But he had not been officially extradited so that any criminal charge was in order.

The United States Supreme Court dismissed Ker's claim with rhetoric that conveys its indifference to the moral implications of what had taken place. It would not overturn the conviction, it pronounced, because "for mere irregularities in the manner in which he may be brought into the custody of the court, we do not think he is entitled to say he should not be tried at all for the crime with which he is charged in a regular indictment." Ker could get Julian extradited to Peru and tried there for kidnaping, and/or he could sue Julian for trespassing and false imprisonment, charges that, the court observed,

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[34]Ex parte Scott, 9 Barn. & Cress. 446; 109 Eng. Rep. 166 (K.B.1829). Cf. John G. Kester, *Some Myths of United States Extradition Law,* 30 Geo. L.J.. 1441, 1449-1450 (1989).

[35]Ker v. People, 111 Ill. 627 (1884). See generally United States v. Rauscher, 119 U.S. 407 (1886) (a court could not try the second mate of a vessel for assault when he had been extradited from Great Britain on an allegation of murder); Commonwealth v. Hawes, 76 Ky. 697 (1878) (a man extradited from Canada for forgery who was acquitted of that offense could not thereafter be tried for embezzlement unless a reasonable amount of time had elapsed so that he could return to asylum in Canada); State v. Vanderpool, 39 Ohio St. 273 (1883) (extradited for forgery, Vanderpool was convicted of that offense, but then successfully maintained that he could not be tried for another offense after his release from prison).

could easily be sustained.[36]

Frisbie v. Collins (1962)

Shirley Collins, incarcerated in the Michigan State Penitentiary, filed a habeas corpus petition claiming that his due process rights had been violated when he was arrested on February 19, 1942 by the local police in a Chicago bus station. He said that when he had refused to answer questions without a lawyer, he was beaten, and then turned over to Michigan authorities. In Flint, Michigan, he was convicted of murder and given a life sentence. No attempt had been made to extradite Collins. His attorney, seeking to differentiate this case from *Ker*, focused on the passage in 1937 of the Federal Kidnaping Act[37] which, the attorney insisted, now rendered this police tactic unacceptable. Writing for the U.S. Supreme Court, Justice Hugo Black found no persuasive reason to overturn *Ker:* "There is nothing in the Constitution," he ruled, "that requires a court to permit a guilty person rightfully convicted to escape

[36] Ker v. Illinois 119 U.S. 436, 444 (1886). See also Mahon v. Justice, 127 U.S. 700 (1888) (the governor of West Virginia refused to extradite Plyant Mahon, accused of murder in Kentucky of Randall McCoy in the Hatfield-McCoy feuding, because the governor did not believe he was guilty of the charge. Mahon was kidnaped by Kentucky authorities, an act said by the U.S. Supreme Court to be beyond relief, and received a life sentence; Lasalles v. Georgia, 148 U.S. 537 (1893) (Sidney Lascelles was extradited from Britain to Georgia for being "a common cheat and swindler" and for "larceny," but was tried for forgery. The Court declared that he had no remedy, and distinguished his situation from *Rauscher* on the ground of the terms of the extradition treaty with Britain).

[37] Act of June 23, 1932, c. 271.

justice because he was brought to the trial against his will."[38] This, of course, states the issue in government-friendly language: It was a questionable act, most certainly in moral terms that brought Collins into a Michigan court against his will. Black addressed the kidnaping issue in equally dismissive terms. The 1937 statute, he believed, could not fairly be construed so as to bar "a state from prosecuting persons wrongfully brought to it by its officers."[39] Then there were words of judicial restraint and a bow to legislative power. "It may be that Congress can add a section," Black observed. "We cannot." The ruling in part may have been influenced by the seriousness of the charge against Collins. It is, of course, difficult to believe that unless there was an egregious abuse involving powerful or appealing persons, Congress would be inclined to limit this reach of the law.

United States v. Toscanino (1974)

Some U.S. courts subsequently have proven to be less amenable to approving renditions when torture has been involved. In *United States v. Toscanino,* an American trial court refused to accept jurisdiction over Francisco Toscanino, an Italian citizen, who was charged with conspiracy to import heroin. American agents had bribed a Uruguay telephone employee (who was subsequently imprisoned for his behavior) to wiretap Toscanino's phone. He then was kidnaped by police in Uruguay who were paid by U.S. agents. Toscanino was

[38] Frisbie v. Collins, 342 U.S. 519, 545-546 (1962).
[39] Id. at 523.

knocked unconscious, bound, blindfolded, and held incommunicado for 11 hours, deprived of food and water, and subsequently transferred to Brasilia where he was tortured for 17 days by local authorities in consort with members of the U.S. Bureau of Narcotics.[40] The federal appellate court noted: "Incredibly, these agents of the United States government attached electrodes to Toscanino's ear lobes, toes, and genitals. Jarring jolts of electricity were shot throughout his body, rendering him unconscious for indeterminate periods of time but again leaving no physical scars."[41] No effort had been made to have Toscanino legally extradited. Writing for the second circuit, the judge offered the following observation:

> Society is the ultimate loser when, in order to convict the guilty, it used methods that lead to decreased respect for the law....[W]e are satisfied that the "Ker-Frisbie" rule cannot be reconciled with the Supreme Court's expansion of the concept of due process, which protects the accused against pre-trial illegality by denying to the government the fruits of the exploitation of any deliberate and unnecessary lawlessness on its part...Faced with a conflict between the two concepts of due process, the one being the restricted version in Ker-Frisbie and the other expanded and enlightened interpretation expressed in more recent decisions of the

[40] United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974).
[41] Id. at 270.

> Supreme Court, we are persuaded that to the extent that the two are in conflict, the Ker-Frisbie version must yield.[42]

United States v. Alvarez-Machain (1992)

In 1985, Enrique Camarena-Salazar, a special agent in the United States Drug Enforcement Administration (DEA), and Alfred Zavala Avelar, the pilot of the plane Camarena-Salazar was using to track drug traffickers in Mexico, were murdered by members of a Mexican drug cartel. They first were tortured and then stabbed to death. On April 2, 1990, Mexican nationals, bounty hunters, who had been enlisted by a DEA official, kidnaped Humberto Alvarez-Machain from his home in Guadalajara, held him overnight in a motel, and then flew him in a private plane to El Paso, Texas, where the DEA placed him under arrest. Among other things, Alvarez-Machain, a doctor, was suspected of having used his medical training to prolong the life of the American enforcement agent so that he could be incrementally tortured. The federal district

[42] Id. at 274-275. On re-hearing, the trial court found no credible evidence of involvement of U.S. agents in the treatment of Toscanino nor satisfactory evidence that what was done to him was ordered or approved by American personnel. United States v. Toscanino, 398 F. Supp. 916 (E.D.N.Y.1975). The same rationale prevailed in United States v. Lira, 515 F.2d 68 (2nd Cir. 1975), *cert. denied* 423 U.S. 847 (1975). In United States *ex rel.* Lujan v. Gengler, the Court declared that the conduct of government agents did not reach the level enunciated in *Toscanino* to protect the abducted defendant from being tried. 510 F.2d 62 (2d Cir. 1975). Cf. Timothy D. Rudy, *Did We Treaty Away* Ker-Frisbie? 26 St. Mary's L.J. 791 (1995).

court in central California ruled that the 1978 extradition treaty between the United States and Mexico had been violated by the treatment of Alvarez-Machain, and that it therefore had no legitimate jurisdiction over the case, that Alvarez-Machain should be released and returned to his homeland.[43] The Ninth Circuit Court of Appeals endorsed the decision,[44] but the U.S. Supreme Court, by a 6-3 vote, reversed that ruling. Writing for the majority, Justice William Rehnquist examined the extradition treaty in great detail, concluding that it had not been violated. That done, Rehnquist found adequate precedent in *Ker* and its progeny to support the trial of Alvarez-Machain in the United States.[45] In dissent, Justice John Paul Stevens concluded that the treaty clearly had been breached, pointed out that Mexico was diligently hunting down the killers of the DEA employees, and that a trial of one of them had resulted in a forty-year term of imprisonment.[46]

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[43] United States v. Alvarez-Machain, No. CR-87-0422-21 ER (CD Cal. 1987). See also United States v. Verdugo-Urquidez, 939 F.2d 1341 (9th Cir. 1991); Peter S. McCarthy, United States v. Verdugo-Urquidez: *Extending the Ker-Frisbie Doctrine to Meet the Modern Challenges Posed by the International Drug Trade*, 27 New Eng. La. L. Rev. 1067 (1983).

[44] United States v. Alvarez-Machain, 971 F.2d 370 (9th Cir. 1992).

[45] United States v. Alvarez-Machain, 504 U.S. 655 (1992). See generally, Alfred Paul LeBlanc, Jr., United States v. Alvarez-Machain *and the Status of International Law in American Courts,* 52 La. L. Rev. 1411 (1993); Michael J. Glennon, *International Kidnapping: State-Sponsored Abduction: A Commentary on* United States v. Alvarez-Machain, 86 A.J.I.L. 746 (1992).

[46] Id. at 67. Justice Stevens was joined by Justice Blackmun and O'Connor in dissent. See generally Jonathan A. Bush, *How did We Get Here? Foreign Abduction After* Alvarez-Machn. 45 Stan. L. Rev. 99 (1993); Paul Mitchell, *English-Speaker Justice: Evolving Responses to Transnational Forcible Abdction After* Alvarez-Machan, 29 Cornell Int'l L. J. 383 (1996).

After a trial in Los Angeles, Alvarez-Machain was acquitted. The judge said that he had found the government's evidence very weak, that it was based on "suspicion and...hunches, but no proof," and that its charges had been constructed out of "whole cloth, the wildest speculation."[47] Subsequently, following the line of advice offered in *Ker*, the Mexican government sought to have two DEA agents extradited to face kidnaping charges, but the U.S. government refused to do so. Then Alvarez-Machain, basing his case on the Federal Tort Claims Act (FTCA),[48] sued the United States government, and, relying on the Alien Tort Statute of 1789,[49] also sued his kidnapers--Mexican nationals who now were in the U.S. Witness Protection Program--and four DEA agents. The federal district court approved only a judgment of $25,000 against José Francisco Sosa, one of the kidnapers, a ruling endorsed *en banc* [50] The decision, however, was reversed by the U.S. Supreme Court which decided that Alvarez-Machain had no legitimate recourse under the FTCA because it precluded claims arising out of actions committed in a foreign country. The Court rejected the appellate court's interpretation that the impetus for the action against Alvarez-Machain had originated in the United States and that therefore he had a valid claim.[51]

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[47] Alvarez-Machain v. United States, 331 F.3d 604, 610 (9th Cir. 2004) (en banc).

[48] 128 U.S.C. ' '1346(b)(1), 2671 et. seq.

[49] 28 U.S. C. '1350. See generally Filartigo v. Pena-Irata, 630 F.2d. 876 (2d Cir. 1988).

[50] Alvarez-Machain v. United States 331 F.3d 634 (9th Cir. 2004) (en banc).

[51] Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

Thus, despite lower court concerns about due process, prevailing Supreme Court jurisprudence balances favorably the substantive possible illegal behavior and the possible conviction of a person against the means of his having been brought "to justice" without an extradition process and across jurisdictional boundaries.

Discussion

The magisterial report of the Association of the Bar of the City of New York and the Center for Human Rights at the New York University School of Law concluded that the legal and political evidence clearly supports the position that "both domestic and international law prohibit the practice of Extraordinary Rendition."[52] The report went on to say:

> Despite these clear standards, allegations of such transfers have surfaced repeatedly in the press and in the reports of human rights and other humanitarian organizations. The United States should demonstrate its opposition to this practice by initiating formal inquiries into Extraordinary Rendition, investigating cases in which U.S. officials or their agents may have committed criminal acts, and implementing a moratorium on the use of diplomatic assurances in torture cases. Far from being an acceptable tool in the "War on Terror," Extraordinary

[52] Torture by Proxy, *supra* note 4, at 191.

> Renditions are illegal and constitute a perversion of justice that must be exposed and brought to an end.[53]

Among the recommendations the group puts forward are that the President, the Secretary of Defense, and the Secretary of Homeland Security should reject the practice of extraordinary renditions as contrary to U.S. and international law, that the United States should ensure that victims of extraordinary rendition are provided with adequate remedies,[54] and that Congress should enact legislation prohibiting extraordinary renditions.[55]

This last recommendation is in line with a measure introduced in 2005 in the House of Representatives by Congressman Edward J. Markey of Massachusetts, a member of the Homeland Security committee, and Congresswoman Betty McCollum of Minnesota. The proposed statute provides for three major actions. First, the Secretary of State would be required to report to Congress the names of countries where there are substantial grounds to believe that torture commonly is used on prisoners. Second, no intelligence agency would be allowed to be involved in the transfer of individuals to countries on the Secretary of State's list as torture sites; and third, a person could not be deported from the United States unless the country to which he or she is to be sent assures U.S.

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[53] Id.

[54] Id. at 26.

[55] Id. at 27.

officials that the deportee will not be tortured.[56] Besides the moral and legal objections to extraordinary rendition, the bill's sponsors point out that the information secured by a process of torture often is inaccurate – a suffering person will tell you anything that it is presumed you want to hear[57] – a and that information so obtained is not admissible in an American court. As of late 2005, the bill had 63 co-sponsors (62 Democrats and one Independent), but was not expected to obtain a hearing in the House Committee on International Relations unless/until it could secure some Republican backing.[58] Supporters of the bill summarize their position by noting that extraordinary rendition "undermines the moral integrity of the United States."[59]

Extraordinary rendition came in for attention from the Bush administration when Secretary of State Condoleezza Rice felt it necessary to address the issue before she embarked on a

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[56] Torture Outsourcing Prevention Act, H.R. 952, 109th Cong., 1st Sess. (Feb. 17, 2005).

[57] The classic illustrations are the confessions under torture on the European continent of women accused as witches to acts that it is inconceivable they actually engaged in, such as flying through the air to sabbats. H. C. Erik Midelford, Witch Hunting in Southwestern Germany, 1582 to 1684: The Social and Intellectual Foundations. Stanford, CA: Stanford University Press, 1972; E. William Montter, Witchcraft in France and Switzerland: The Borderlands During the Reformation. Ithaca. NY: Cornell University Press, 1976.; see generally Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 U.N.C.L. Rev. 891 (2004).

[58] We want to thank Aaron Scherb, legislative assistant of the Friends Committee on National Legislation, for providing this information.

[59] *Extraordinary Rendition@Outsourcing Torture,* http://www.fcnl.org/issues/item.php?item_id=1249&issue_id=70 (retrieved Aug. 21, 2005).

trip to European countries which had been critical of American actions. The Secretary claimed that the United States did not authorize, employ, or condone torture under any circumstances, though she added the qualification that the U.S. would "use every lawful weapon" to defeat terrorist suspects. Her carefully crafted statement[60] avoided mention of specific incidents, such as the Italian case, and was wrapped in ambiguity in regard to the precise meaning of words such as "condone" and "lawful" and "torture."[61] Once in Europe, Rice warned the leaders of host countries that were they to challenge American anti-terrorist tactics their criticisms could damage efforts to protect their own citizens from attacks.[62]

It was the issue of the moral standing of extraordinary rendition[63] that prompted an editorial in the *New York Times*, noting that the Secretary of State had maintained that rendition had been employed to lock up some really dangerous bad guys, like Carlos the Jackal and Ramsi Yousef, who masterminded the 1993 World Trade Center bombing.[64] Well and good, the editorial writer observed, then added:

But both men were charged in courts, put on

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[60] An acerbic columnist ridiculed Ms. Rice's observations as "willfully disingenuous piffle" and "loophole-riddled." Maureen Dowd, Torturing the Fact, N.Y. Times, Dec. 7, 2005, at A12.

[61] David Crawford, *Rice Defends U.S. Treatment of Terrorism Suspects,* Wall St. J., Dec. 6, 2005, at A4.

[62] Paul Ritter, *Rice Warns Europe on Questioning U.S. Tactics,* L.A. Times, Dec. 6, 2005, at A1.

[63] Even the Wall Street Journal, a staunch backer of America's anti-terrorist tactics, conceded that extraordinary rendition is "morally problematic." *Condi's European Torture,* Wall St. J., Dec. 7, 2005, at A16.

[64] *Secretary Rice's Rendition,* N.Y. Times Dec. 7, 2005, at A34.

> trial, convicted and sentenced. That's what most Americans think when they hear her [Secretary Rice] talk about "bringing the terrorists to justice"--not predawn abductions, blindfolded prisoners on plane rides and years of torture in distant lands without any public reckoning.[65]

Episodes of extraordinary rendition might reasonably be regarded as war crimes, an illegal abuse of power for dealing with defined enemies. The difficulty is that what is determined to be a war crime characteristically depends on who has won the war. This reality makes it imperative that extraordinary rendition be exposed to as strong a domestic light as possible and that moral suasion be mobilized to eliminate its practice.

Conclusion

The striking proliferation of extraordinary rendition since the September 11 Al Qaeda attack on New York and Washington is a consequence of the accretion of American global power. Particularly important has been the collapse of the Soviet empire that left the United States without a counteracting force in regard to worldwide struggles, and especially in the Mideast. The unparalleled military superiority of the United States, a circumstance perhaps not seen since the glory days of the Roman Empire, undoubtedly is only a temporary situation. Sooner or later, other nations will accumulate enough strength to check unilateral actions by the

[65] Ibid.

United States. China, with almost a quarter of the world's population, certainly increasingly will flex its military and financial muscles and will be able to inhibit rogue pursuits by the United States.

Considered in its most favorable light, the United States today is seeking to take advantage of an unprecedented window of opportunity to employ its military might to try to fashion a world that reflects its own interests, a world that gives priority to its form of democratic capitalism.[66] In this vision, foreign oil imports would be assured, tyrants would be toppled, fair elections would prevail, and humankind would prosper in peace.

With the end result thus defined as both essential and admirable, arguable means to it can be justified. As leaders of the preeminent world power, policy makers in the United States have come to believe that they have the right to do anything that they interpret as in their country's best interests, and that its best interests are in the best interests of the remainder of the world.

The response of the United States to the escalating criticism of extraordinary rendition has been insensitive and self-righteous. The evidence in the Milan abduction seriously undercuts the plausibility of such a position, but government policy makers appear to have decided that if you say something that is misleading often and forcefully enough a significant number of people are likely to believe you.

Extraordinary rendition assuredly will save the lives of

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[66] Michael Scheuer, Imperial Hubris: Why The West is Losing the War on Terror. Washington, D.C.: Brassey's, 2004.

innocent people and punish some malefactors. In earlier times we would add to the foregoing that the fight was against a "godless enemy." Today, we would have to say the opponent is a "god-filled" antagonist. For the time being, the United States government need not accept other nations' interpretations of international law or of its actions. The most powerful country in the world has the means at its disposal to handle its affairs as it pleases. As a former CIA lawyer has said: "It's the law of the jungle. And right now we are the strongest animal."[67]

[67] Mayer, *supra* note 4, at 123. It is appropriate in this context to remember Lord Acton's view set out in an 1887 letter to a friend that the judgment of history will prevail in judging the activities of those who exert power. "Historic responsibility has to make up for want of legal responsibility." Then he added his famous aphorism: "Power tends to corrupt and absolute power corrupts absolutely." Louise Creighton, Life and Letters of Mandel Creighton 372. London: Longmans, Green, 1904.