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**INTER-STATE TERRORISM IN THE 21<sup>ST</sup> CENTURY:  
MAPPING THE EVOLUTION OF THE GLOBAL RENDITION SYSTEM**

*Draft paper: not for citation or circulation without prior permission of the authors*

**Abstract<sup>1</sup>**

This paper seeks to explain the development and operation of a now global system of rendition and secret detention in the 'War on Terror'. The paper offers two corrections to current understandings of rendition. Firstly, while existing scholarship has emphasised the use of rendition as a counter-terrorism tool during the Reagan and Clinton administrations, there has been no analysis of the role played by rendition in the much longer history of the efforts at the heart of US foreign policy to insulate US hegemony. The paper will show that rendition is the most recent in a long line of tools that have been developed by US intelligence and defence officials to carve out extra-legal spaces to deal with perceived threats. Secondly, the paper seeks to show that the global rendition system is a system in flux. Various pressures beyond the US government's control have forced the US Executive and intelligence and defence services to make major changes to the global rendition system in desperate attempts to maintain that extra-legal space that it believes it needs to thwart threats to its interests.

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## Introduction

On 17 September 2001, President George W. Bush sent a 14-page memo to the Director of the CIA pertaining to the Presidential approval of 'clandestine intelligence activity' and an authorisation for the CIA's subsequent 'terrorist detention and interrogation program'. While the memo remains classified, the topic of the memo was disclosed in January 2007 when the CIA filed a declaration to the Courts insisting that it was too sensitive for release, following an attempt by the American Civil Liberties Union to obtain its release through Freedom of Information legislation. Within weeks of issuing the memo, President Bush issued an Executive Order on the Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism (G. Bush 2001). This Order provided the Pentagon with the authority to detain indefinitely any non-American in the world, in any place in the world, as long as they were determined by the US Government to pose a terrorist threat to US interests. Together with the September 2001 memo to the CIA, this Order laid the foundations for the development of a global system of rendition and secret detention, as well as the official military detentions in Afghanistan and Guantanamo Bay, Cuba.

Rendition is not a term defined by international law, and as such there are various understandings of what the term means. At the heart of all definitions, however, is the movement of detained persons across state boundaries in a manner which is outside of any legal framework. Building on attempts that have been made to scope out various sub-categories of rendition, particularly the work of the UK Parliament's Intelligence and Security Committee (ISC 2007), we consider the following to be substantive types of rendition: rendition to justice, which involves the transfer of persons from one jurisdiction to another for the purposes of standing trial within an established and recognised legal system; military rendition, which involves the extra-judicial transfer of persons (detained in or related to a theatre of military operations) from one state to another, for the purposes of official military detention in a military facility; and extraordinary rendition, which involves the extra-judicial transfer of persons from one jurisdiction or state to another, where this involves the capture and transfer outside of the recognised theatres of conflict in Iraq and Afghanistan, or where it otherwise involves transfer to secret detention outside of the normal legal system. All forms of rendition stand in contrast to legal movements of detained persons, such as those covered by extradition or deportation processes. Whereas the Reagan and Clinton administrations tended to use rendition to justice, since 9/11 rendition to justice has been discontinued, and both the Bush and Obama administrations have deployed military rendition and extraordinary rendition, in violation of international law. The treatment of detainees, including the interrogation methods used, also violates international human rights and international humanitarian law.

Relatively little research has been undertaken on the now global system of rendition and secret detention within the field of International Relations.<sup>2</sup> 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; Meg Satterthwaite 2006; Margaret Satterthwaite and Fisher 2006; Margaret Satterthwaite 2007a, 2007b; Weissbrodt and Bergquist 2006). As these scholars have shown, the

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<sup>2</sup> One exception to this is the work of Jason Ralph on the implications of the legal status of so-called 'enemy combatants' under the Bush and Obama administrations, which can be traced back to Bush's 2001 Executive Order. As Ralph has shown, this, and the subsequent Military Commissions Acts (MCAs) of 2006 and 2009, criminalise supposed enemies simply for engaging in hostilities against the US. As Ralph points out, this 'transforms war from an institution between combatants of equal legal status to an institution of legal hierarchy', based on an assumption that 'the US is the only party with the authority to wage war' Jason Ralph, 'War as an Institution of International Hierarchy: Carl Schmitt's Theory of the Partisan and Contemporary Us Practice', *Millennium - Journal of International Studies*, 39/2 (December 1, 2010 2010), 279-98. This criminalisation of individuals alleged to be engaged in warfare against the US has been used to justify military rendition and extraordinary rendition.

rendition and/or secret detention of a detainee necessarily entails multiple violations of their human rights, as codified in the national law of many states, as well as in international human rights law and international humanitarian law. Despite attempts by the Bush administration to legitimise these violations by carving out an extra-legal space within which the detainees could be held and interrogated, legal experts from around the world are overwhelmingly of the opinion that these practices are illegal. In some cases they may even constitute 'war crimes' and 'crimes against humanity'. Specifically, rendition and secret detention violate the following: the prohibition of arbitrary detention; the right to a fair trial; the prohibition of torture; and the prohibition of enforced disappearance. In addition, complicity in rendition and secret detention may mean that states fall foul of international laws concerning non-refoulement and the requirement that states are in no way accessories to human rights violations. Indeed they have certain responsibilities to prevent those violations. As well as mapping out the ways in which rendition and secret detention violate international law, 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, as is often assumed, 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 the Reagan, Clinton, Bush and Obama administrations used rendition.

This paper aims to offer two corrections to current understandings of rendition. Firstly, while existing scholarship has emphasised the use of rendition as a counter-terrorism tool during the Reagan and Clinton administrations, there has been no analysis of the role played by rendition in the much longer history of the efforts at the heart of US foreign policy to insulate US hegemony. Specifically, there has been no work to evaluate the ways in which rendition is the most recent in a long line of tools that have been developed by US intelligence and defence officials to preserve space outside of US and international law to deal with perceived threats to US power. Secondly, while scholarship on rendition has tended to emphasise the ways in which rendition lies outside of the law, analysis to date has paid little attention to the extent to which the global rendition system is a system in flux. Events and processes largely beyond the US government's control have had a significant impact upon how rendition has evolved over time, particularly under the Bush and Obama administrations. This paper will show how various pressures have forced the US Executive and intelligence and defence services to make major changes to the global rendition system.

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 argument 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. Furthermore, public exposure of the extent and nature of the global rendition system have forced the US Executive to make adjustments to its rendition practices. 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, as has unease among many of the US' allies. 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 (Margaret 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 (Margaret 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 (Margaret 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, analysis 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 20<sup>th</sup> 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. 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 (Blakeley 2009). Rendition as used in the 'War on Terror' 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). There was 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, particularly El Salvador (McSherry 2002).

Rendition as exercised in the 'War on Terror' 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 2007a). 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 is a system in flux.

## **Rendition in the 'War on Terror' - a system in flux**

The global rendition system has been shaped significantly by attempts through the US courts to close down the extra-legal space in which rendition operates, especially by petitions for writs of habeas corpus (challenges to the lawfulness of detention) on behalf of numerous rendition victims, mostly held in Guantánamo Bay. 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. At the same time, increased public exposure, anxieties among allied states about the global rendition system, and subsequent investigations, particularly by the Council of Europe, the European Parliament and the UN, have added to the pressures on the US to make adjustments to the global rendition system. Finally, the struggles between the Obama administration and the Republican opposition on how to deal with terror suspects, have also had significant impacts on rendition practices. While in some instances these adjustments have led to reinstating certain rights for detainees, in others they have led to the US administration passing new laws deliberately intended to further deny the 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 on the one hand, and significant pressure from the Republican majority in both Houses on the other to take a hard line, may have also 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.

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 2008b). 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, consolidated as *Rasul v. Bush*, 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 Supreme Court ruled on 28 June 2004 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 2008b). 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. The 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 EITs 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.

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 Guantánamo 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 (Priest 2005)

Priest's work is indicative of the growing interest in and scrutiny of US-led rendition practices. At various stages, revelations by investigative journalists have had important impacts, and have subjected the US administration to considerable pressure. Priest's findings raise 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. In August 2009, ABC News provided the first details of the operation of CIA detention facilities in Lithuania, which they had obtained from 'former CIA officials directly involved in or briefed on' the programme (Cole 2009). Subsequent investigations by the Lithuanian Parliament, the Seimas, have conclusively proved that Lithuanian State Security Department worked alongside the CIA to construct and maintain two facilities to hold detainees on behalf of the CIA between 2002 and 2005 or 2006. Little is known about the first of these, Project No 1, which apparently did not become operational for detention facilities. ABC News found that Project No 2 was constructed on the site of a former horse-riding school about 15 miles from Vilnius, and evidence suggests that this is where the HVDs were held. 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' (Cole 2009). 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 9 months, until their September 2006 transfer to Guantánamo (Cole 2009). 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 2008a). 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 2008b). 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 2008b).

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 *Boumediene 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 2008a).<sup>3</sup> The timing of this judgement is significant. Less than three weeks before this ruling, the Council of Europe's investigation into the complicity of European states in rendition, led by Dick Marty, published its first report, which set out the nature of the 'global spider's web' of rendition and secret detention and provided substantial new evidence of individual rendition operations (Marty 2006).

Shortly after the *Hamdan v Rumsfeld* ruling, on September 2006, Bush gave a speech on terrorism in which he admitted for the first time the existence of the CIA programme to secretly detain 'a small number of suspected terrorist leaders' (George W Bush 2006). He named Abu Zubaydah and Khaled Sheikh Mohammed as being among this group held in the secret CIA programme. He stated that the CIA had used 'an alternative set of procedures' to interrogate detainees that resisted conventional interrogation methods. He insisted, however, that torture was not used and had not been authorised. Bush claimed that the programme was one of the most vital tools in the 'War on Terror'. As part of the speech, Bush announced plans to seek authorisation from Congress for the continuation of military commissions to try terror suspects. He also stated that Khalid Sheikh Mohammed, Abu Zubaydah, Ramzi bin al-Shibh, and 11 other individuals in CIA custody had been transferred to Department of Defense custody at Guantánamo Bay, where they would face trial by military commission. He also announced that the CIA's rendition programme to continue (George W Bush 2006). Shortly after Bush made his speech, the US Congress passed the Military Commissions

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<sup>3</sup> 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.

Act (MCA). This was a direct response to the Supreme Court's ruling in *Hamdan v. Rumsfeld*. 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 2008b). This was their first reversal for 60 years.<sup>4</sup> 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 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 *Boumedienne v. Bush* and *Al Odah v. United States*, by the Supreme Court came on 12 June 2008,

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<sup>4</sup> 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.

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 *Boumedienne 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 2008b).

It is worth noting that in the months leading up to the Supreme Court's judgement, pressure had been building in other quarters. In January 2007, the European Parliament's Temporary Committee on the alleged use of European countries by the CIA for the transport and illegal detention of prisoners reported its findings. Led by Giovanni Flaudio Fava, the investigation was launched to investigate whether CIA or other US agents, or agents of other states, had carried out rendition, secret detention or torture on the territory of European member states. Following Fava's report, the European Parliament passed two key resolutions, urging member states that had been complicit to act immediately to halt all such practices, to investigate them fully, and to compensate victims (EU 2007b). This is evidence of the growing unease among allies of the US about the nature of the rendition system. This may have had an impact on the commitments made by Barack Obama during his presidential campaign.

When President Obama took office, he issued 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 difficult 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.

## **Conclusion**

This paper has attempted to make two important interventions on current understandings of rendition. Firstly, it has attempted to demonstrate that rendition as deployed since 9/11 is the most recent of a raft of measures deployed by the US state to preserve a space outside of the law for dealing with perceived threats to its interests, particularly its hegemonic position. Elements of the global rendition system can be traced back to earlier, similar programmes for operating beyond the law in the treatment of individuals perceived to be a threat to the US, notably the Phoenix Programme and Operation Condor. In this regard, while scholars have attempted to trace the origins of rendition to the Reagan administration's 'rendition to justice' programme, these analyses do not go far enough in situating the latest iteration of rendition historically, or in recognising its purpose within the much wider context of US foreign policy aims.

Secondly, the paper has attempted to show that the global rendition system rolled out by the Bush administration, and continued under Obama's presidency, is a system in flux. It has been shaped far more by processes beyond the control of the US administration than is usually realised. Indeed at times it has been driven by panic over the increasing public knowledge of its unsavoury elements, fears of recriminations for those agents involved in the human rights violations that it entails, and pressure from increasing anxieties among its allies, often expressed through international institutions with power to investigate and call complicit states to account. Importantly, the legal processes undertaken to try and limit the Executive's use of extra-legal spaces have had a significant impact, often placing the US administration on the defensive, and fighting to retain those extra-legal spaces through alternative means. The global rendition system is often described as being 'US-led'. The reality, however, is messier than this would imply.

A number of important questions remain about rendition, secret detention and torture since 2009. It is far from clear how widespread this practice has been under the Obama administration, and if it is on-going, it is not known 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 through agreements with detaining states. 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. Further analysis is needed to explore how the global rendition system has continued to evolve and to determine whether it has been displaced by other extra-legal measures for dealing with individuals perceived to be a threat to US interests.





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