

A Call to End All Renditions

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Binyam Mohamed, an Ethiopian residing in Britain, said he was tortured after being sent to Morocco and Afghanistan in 2002 by the U.S. government. Mohamed was transferred to Guantánamo in 2004 and all terrorism charges against him were dismissed last year. Mohamed was a victim of *extraordinary rendition*, in which a person is abducted without any legal proceedings and transferred to a foreign country for detention and interrogation, often tortured.

Mohamed and four other plaintiffs are accusing Boeing subsidiary Jeppesen Dataplan, Inc. of flying them to other countries and secret CIA camps where they were tortured. In Mohamed's case, two British justices accused the Bush administration of pressuring the British government to block the release of evidence that was "relevant to allegations of torture" of Mohamed.

Twenty-five lines edited out of the court documents included details about how Mohamed's genitals were sliced with a scalpel as well as other torture methods so extreme that waterboarding "is very far down the list of things they did," according to a British official quoted by the *Telegraph* (UK).

The plaintiffs' complaint quotes a former Jeppesen employee as saying, "We do all of the extraordinary rendition flights - you know, the torture flights." A senior company official also apparently admitted the company transported people to countries where they would be tortured.

Obama's Justice Department appeared before a three-judge panel of the Ninth U.S. Circuit Court of Appeals Monday in the *Jeppesen* lawsuit. But instead of making a clean break with the dark policies of the Bush years, the Obama administration claimed the same "state secrets" privilege that Bush used to block inquiry into his policies of torture and illegal surveillance. Claiming that the extraordinary rendition program is a state secret is disingenuous since it has been extensively documented in the media.

"This was an opportunity for the new administration to act on its condemnation of torture and rendition, but instead it has chosen to stay the course," said the ACLU's Ben Wizner, counsel for the five men.

If the judges accept Obama's state secrets claim, these men will be denied their day in court and precluded from any recovery for the damages they suffered as a result of extraordinary rendition.

Two and a half weeks before Obama's representative appeared in the Jeppesen case, the new President had signed Executive Order 13491. It established a special task force "to

study and evaluate the practices of transferring individuals to other nations in order to ensure that such practices comply with the domestic laws, international obligations, and policies of the United States and do not result in the transfer of individuals to other nations to face torture or otherwise for the purpose, or with the effect, of undermining or circumventing the commitments or obligations of the United States to ensure the humane treatment of individuals in its custody or control.”

This order prohibits extraordinary rendition. It also ensures humane treatment of persons in U.S. custody or control. But it doesn’t specifically guarantee that prisoners the United States renders to other countries will be free from cruel, inhuman or degrading treatment that doesn’t amount to torture. It does, however, aim to ensure that our government’s practices of transferring people to other countries complies with U.S. laws and policies, including our obligations under international law.

One of those laws is the International Covenant on Civil Political Rights (ICCPR), a treaty the United States ratified in 1992. Article 7 of the ICCPR prohibits the States Parties from subjecting persons “to torture or to cruel, inhuman, or degrading treatment or punishment.” The Human Rights Committee, which is the body that monitors the ICCPR, has interpreted that prohibition to forbid States Parties from exposing “individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement*.”

Order 13491 also mandates, “The CIA shall close as expeditiously as possible any detention facilities that it currently operates and shall not operate any such detention facility in the future.” The order does not define “expeditiously” and the definitional section of the order says that the terms ‘detention facilities’ and ‘detention facility’ “do not refer to facilities used only to hold people on a short-term, transitory basis.” Once again, “short term” and “transitory” are not defined.

In his confirmation hearing, Attorney General Eric Holder categorically stated that the United States should not turn over an individual to a country where we have reason to believe he will be tortured. Leon Panetta, nominee for CIA director, went further and interpreted Order 13491 as forbidding “that kind of extraordinary rendition, where we send someone for the purposes of torture or for actions by another country that violate our human values.”

But alarmingly, Panetta appeared to champion the same standard used by the Bush administration, which reportedly engaged in extraordinary rendition 100 to 150 times as of March 2005. After September 11, 2001, President Bush issued a classified directive that expanded the CIA’s authority to render terrorist suspects to other States. Former Attorney General Alberto Gonzales said the CIA and the State Department received assurances that prisoners will be treated humanely. “I will seek the same kinds of assurances that they will not be treated inhumanely,” Panetta told the senators.

Gonzales had admitted, however, “We can’t fully control what that country might do. We obviously expect a country to whom we have rendered a detainee to comply with their representations to us . . . If you’re asking me, ‘Does a country always comply?’ I don’t have an answer to that.”

The answer is no. Binyam Mohamed’s case is apparently the tip of the iceberg. Maher Arar, a Canadian born in Syria , was apprehended by U.S. authorities in New York on September

26, 2002, and transported to Syria , where he was brutally tortured for months. Arar used an Arabic expression to describe the pain he experienced: “you forget the milk that you have been fed from the breast of your mother.” The Canadian government later exonerated Arar of any terrorist ties. Thirteen CIA operatives were arrested in Italy for kidnapping an Egyptian, Abu Omar, in Milan and transporting him to Cairo where he was tortured.

Panetta made clear that the CIA will continue to engage in rendition to detain and interrogate terrorism suspects and transfer them to other countries. “If we capture a high-value prisoner,” he said, “I believe we have the right to hold that individual temporarily to be able to debrief that individual and make sure that individual is properly incarcerated.” No clarification of how long is “temporarily” or what “debrief” would mean.

When Sen. Christopher Bond (R-Mo.) asked about the Clinton administration’s use of the CIA to transfer prisoners to countries where they were later executed, Panetta replied, “I think that is an appropriate use of rendition.” Jane Mayer, columnist for the *New Yorker*, has documented numerous instances of extraordinary rendition during the Clinton administration, including cases in which suspects were executed in the country to which the United States had rendered them. Once when Richard Clarke, President Clinton’s chief counter-terrorism adviser on the National Security Council, “proposed a snatch,” Vice-President Al Gore said, “That’s a no-brainer. Of course it’s a violation of international law, that’s why it’s a covert action. The guy is a terrorist. Go grab his ass.”

There is a slippery slope between ordinary rendition and extraordinary rendition. “Rendition has to end,” Michael Ratner, president of the Center for Constitutional Rights, told Amy Goodman on *Democracy Now!* “Rendition is a violation of sovereignty. It’s a kidnapping. It’s force and violence.” Ratner queried whether Cuba could enter the United States and take Luis Posada, the man responsible for blowing up a commercial Cuban airline in 1976 and killing 73 people. Or whether the United States could go down to Cuba and kidnap Assata Shakur, who escaped a murder charge in New Jersey .

Moreover, “renditions for the most part weren’t very productive,” a former CIA official told the *Los Angeles Times*. After a prisoner was turned over to authorities in Egypt , Jordan or another country, the CIA had very little influence over how prisoners were treated and whether they were ultimately released.

The U.S. government should disclose the identities, fate, and current whereabouts of all persons detained by the CIA or rendered to foreign custody by the CIA since 2001. Those who ordered renditions should be prosecuted. And the special task force should recommend, and Obama should agree to, an end to all renditions.

Marjorie Cohn is a professor at Thomas Jefferson School of Law and president of the National Lawyers Guild. She is the author of Cowboy Republic: Six Ways the Bush Gang Has Defied the Law. Her new book, Rules of Disengagement: The Politics and Honor of Military Dissent (with Kathleen Gilberd), will be published in April 2009. Her articles are archived at www.marjoriecohn.com.

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