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ARE YOU A TERRORIST OR AN AMERICAN?:AN ANALYSIS OF IMMIGRATION LAWPOST 9/11: INTRODUCTION

Mark A. Drumbl
Washington and Lee University School of Law, drumblm@wlu.edu

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I. Commentary on Cole Lecture

Let me begin by underscoring my appreciation to the *Journal of Civil Rights and Social Justice* for organizing this symposium on such a timely issue. Let me also thank Professor Cole for his thought-provoking presentation addressing complex questions of human rights and national security. I am delighted to offer some brief—and, by virtue of time limitations, necessarily superficial—responsive comments to Professor Cole's remarks.[1]

Specifically, I would like to consider transnational issues implicated by Administration policies in the war on terror. I focus on deportation and rendition (sometimes called extraordinary rendition) of terror suspects. In both of these cases, official policies have been animated by a desire to hem in the law in the name of protecting national security.

Fast-track deportation proceedings have been introduced regarding non-citizen terror suspects present in the U.S.[2] For example, if the Department of Justice proves to an immigration judge that an alien is a terrorist and that his or her removal under normal deportation procedures would pose a risk to our national security, then that individual simply can be removed from the U.S.[3] The government can use classified information in this regard, which is reviewed by a judge *ex parte* and *in camera*.[4] The alien at that point can be removed basically to any country so designated by the Attorney General.[5] In October 2006, several months after this symposium was held, the Military Commissions Act (MCA) was enacted. The MCA establishes military commissions to try a number of alien unlawful

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* Professor of Law and Ethan Allen Faculty Fellow and Director, Transnational Law Institute, Washington and Lee University, Lexington, Virginia.

1 Professor Drumbl's commentary stems from Professor Cole's lecture at Washington and Lee presented on February 23, 2006.

2 8 U.S.C. § 1534 (2001); *see also* CHARLES GORDON, STANLEY MAILMAN, & STEPHEN YALE-LOEHR, 5–64 IMMIGRATION LAW AND PROCEDURE § 64.07 (2006) (discussing deportation procedures for criminals).

3 *See, e.g.*, Cheema v. Ashcroft, 383 F.3d 848 (9th Cir. 2003) (finding that Sikh man sending money to Sikh resistance organizations in India constituted terrorist activities, but there was no showing that his acts presented a danger to national security; thus the two-part test for barring withholding deportation under the Immigration and Nationality Act § 241(b)(3)(B) was not met).

4 8 U.S.C. § 1534 (2001).

5 *Id.*

combatants detained at Guantanamo Bay and, in a new wrinkle, has been applied to a foreign national arrested in the U.S. If applied to immigrants and non-immigrants lawfully admitted to the U.S., which is the position of the Administration, the MCA would subject them to prosecution by military commission if believed to be unlawful enemy combatants and would remove any right of *habeas corpus* to any court. The MCA therefore opens up the newest round in the interactions between immigration law and the war on terror.

Thus far, however, actual practice has not centered on foreign nationals physically present in the U.S.[6] The vast majority of terror suspects may be under the control of U.S. forces but are not physically located in the U.S.[7] In some cases, the U.S. has an interest in sending those suspects to places—outside of the U.S.—where their activities may be investigated, where they may be detained, or where they may face prosecution.[8]

By outsourcing these investigations, detentions, and prosecutions, the U.S. avoids the prospect that those suspects can claim statutory or, possibly, constitutional rights that may be applicable to proceedings conducted in the U.S. itself.[9] In some cases, outsourcing requires physically getting the terror suspect, who may be under U.S. control, to a foreign jurisdiction willing to receive him or her:[10] a transfer is involved.

The question whether detainees at Guantanamo Bay are able to invoke the jurisdiction of U.S. courts was addressed by the U.S. Supreme Court in *Rasul v. Bush*.[11] The Court held that the federal district courts have jurisdiction to hear *habeas* petitions brought on behalf of Guantanamo detainees.[12] Legislation was subsequently enacted that guts the jurisdiction to hear *habeas* petitions that the Supreme Court found to exist in *Rasul*.[13] In light of this legislation, the administration notified all U.S. district court judges that it would seek the dismissal of all lawsuits brought by

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[6] *See* Bob Herbert, *Our Friends, the Torturers*, N.Y. TIMES, Feb. 18, 2005, at A27 (discussing the case of Maher Arar, a Canadian citizen seized at John F. Kennedy airport and sent to Syria).

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *See* Rasul v. Bush, 542 U.S. 466, 484 (2004) (permitting federal jurisdiction to hear challenges of detainees at Guantanamo Bay). The detainees were foreign citizens who were captured abroad but denied they had engaged in aggression against the United States. *Id.* at 471. The Court found that the federal courts have jurisdiction over the detainees because they had been imprisoned in the territory under the exclusive jurisdiction and control of the U.S. *Id.* at 483.

[12] *Id.*

[13] 28 U.S.C. § 2241 (2006). S. 7(a) of the 2006 MCA also eliminates *habeas corpus*: "No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination."

Guantanamo Bay detainees in which they challenge their detentions.[14] One hundred and sixty such cases are at issue.[15]

In ideal-type situations, transfers take the form of extradition. So, for example, when an individual is present in one jurisdiction but is charged with criminal activity in another jurisdiction whose courts have some contact with the alleged crime, the second jurisdiction—known as the requesting jurisdiction—informs the first jurisdiction—known as the requested jurisdiction—of its interest in obtaining custody over the suspect.[16] Extradition also can arise when it comes to transferring a person, if already convicted, to serve a sentence (for example, the Kindler extradition matter between Canada and the U.S.).[17] Extradition, which only can be effected pursuant to a treaty, mandates some general procedural principles.[18] Although the requested jurisdiction is not to review the charges brought in the requesting jurisdiction, it is to satisfy itself that there is some basis to the charges, that the requested person is in fact the appropriate person, that the charges do not relate to political offenses, and that possible sentences do not infringe human rights standards.[19] As such, extradition can trigger slow and lengthy procedures.

In some cases, a deportation hearing can serve as a *de facto* extradition hearing when the accused is in the U.S., but is not a citizen of the U.S., and the state of which he or she is a national (and to which he or she would be sent) intends to issue legal process.[20] However, there are fewer safeguards in cases of deportation hearings than in the case in which a U.S. citizen present in the U.S. is requested for extradition.[21]

Rendition is very different, as it involves the custodians of the suspect simply dropping the suspect off with custodians of another state.[22] There is no public process, no public authorization, no oversight of even

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[14] Neil A. Lewis, *U.S. to Seek Dismissal of Guantanamo Suits*, N.Y. TIMES, Jan. 4, 2006, at A11.

[15] *Id.*

[16] *See* Marian Nash Leich, *Extradition*, 76 AM. J. INT'L L. 154 (1982) (discussing extradition generally as the guidelines for U.S. Foreign Service).

[17] *Id.*; *see also* Kindler v. Canada, (1991) 2 S.C.R.779 (finding that the government policy that allowed extradition of convicted criminals to a country where they may face death penalty was valid under the Canadian Charter of Rights and Freedoms).

[18] Leich, *supra* note 16, at 154.

[19] *Id.*

[20] *See* Michael J. Bowe, Note, *Deportation as De Facto Extradition: The Matter of Joseph Doherty*, 11 N.Y.L. SCH. J. INT'L & COMP. L. 263, 281–82 (1990) (examining the relationship between international extradition and deportation and how deportation can serve as *de facto* extradition).

[21] *Id.* at 269.

[22] *See* David Weissbrodt & Amy Bergquist, *Extraordinary Rendition: A Human Rights Analysis*, 19 HARV. HUM. RTS. J. 123 (2006) (discussing extraordinary rendition generally); *see also* Robert Verkaik, *The Big Question: What Is Extraordinary Rendition, and What Is Britain's Role in It?*, THE INDEPENDENT, June 8, 2006, at 33 (describing the history of extraordinary rendition and evaluating U.S. and U.K. involvement in the rendition).

superficial evidence, no sunshine; in fact, renditions often are conducted in secret. Obversely, rendition can involve abduction. For example, it can involve agents in one state kidnapping the suspect from another state and interrogating or trying that individual in the state where the kidnappers render that suspect.[23] This is what happened to Adolf Eichmann when Israeli security forces abducted him in Argentina, which had refused his extradition, and then brought him to Jerusalem to face prosecution, before a court of law that respected due process, for his role in the Holocaust.[24] Eichmann was convicted of crimes against the Jewish people and executed.[25] The Alvarez-Machain dispute between the U.S. and Mexico also involved the issue of forcible abduction.[26]

The policy purpose of rendition in the war on terror is not to abduct suspects in order to institute regular criminal proceedings in the U.S.[27] Rather, it is two-fold: first, to abduct so as to interrogate and, secondly, to transfer that individual to third-party states for detention, including third-party states with disturbing human rights records that include torture of detainees.[28]

Let us start with the first purpose. The case of a German national, Khaled el-Masri, stands out. El-Masri, while in Macedonia, was abducted by the United States.[29] He was detained in Macedonia and then irregularly rendered to a U.S. prison in Kabul, Afghanistan.[30] There he claims he was beaten and tortured for five months.[31] His family was not informed that he was gone.[32] Evidence has come to light that Germany was complicit in the abduction and interrogation, which is causing quite a stir in Germany.[33]

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[23] Weissbrodt & Bergquist, *supra* note 22, at 127.

[24] Anthony J. Colangelo, *The New Universal Jurisdiction: In Absentia Signaling Over Clearly Defined Crimes*, GEO. J. INT'L L. (2005); *see also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 432 (describing the facts and case of Adolf Eichmann).

[25] Stuart Taylor, *Steps to Deport Nazi Backers Cause Legal Concern*, N.Y. TIMES, May 9, 1983, at A17.

[26] Thomas F. Liotti, *Citizens Up for Grabs*, NEWSDAY, July 5, 1992, at 29; *see also* United States v. Alvarez-Machain, 504 U.S. 655 (1992) (finding where forcible abduction was not specifically prohibited by the US-Mexican Extradition Treaty, forcible abduction was a valid means of attaining jurisdiction over a defendant for U.S. prosecution).

[27] Verkaik, *supra* note 22.

[28] *Id.*

[29] Bob Herbert, *Our Dirty War*, N.Y. TIMES, Apr. 20, 2006, at A27.

[30] *Id.*; *see also* Don Van Natta Jr., *Germany Weighs if it Played Role in Seizure by U.S.*, N.Y. TIMES, Feb. 21, 2006, at A1 (discussing in depth el-Masri's case).

[31] Herbert, *supra* note 29.

[32] Khaled el-Masri, *America Kidnapped Me*, L.A. TIMES, Dec. 18, 2005, at M5.

[33] Opinion, *Checkbook Diplomacy*, THE JOURNAL NEWS, Dec. 16, 2005, at 6B; Souad Mekhennet & Craig S. Smith, *German Spy Agency Admits Mishandling Abduction Case*, N.Y. TIMES, June 2, 2006, at A8.

After five months, el-Masri was released.[34] No charges were filed.[35] He returned to Germany.[36] The U.S. government now states that his detention was made in mistake.[37] Terror suspects also have been abducted in Milan.[38] President Bush confirmed the existence of CIA-run prisons in Eastern Europe and Asia in which "tough" interrogation practices took place.

Secondly: at the time of this symposium, according to media reports, from 100 to 150 suspected terrorists have been rendered to various jurisdictions, including Egypt, Syria, Saudi Arabia, Jordan, Spain, and Pakistan.[39] Allegations abound that some individuals who have been rendered have been tortured in these countries.[40] There is no viable way for such detainees to challenge their indefinite detention in these countries.[41]

Rendition has been suggested as a method to clean out detention facilities in Guantanamo and CIA facilities in foreign jurisdictions.[42] In addition to the aforementioned countries, Guantanamo detainees have been rendered to Afghanistan, the Sudan (whose government the U.S. Administration has called genocidal), Yemen, Morocco, France, Russia, Sweden, Kuwait, the UK, Belgium, Tajikistan, and even Iran.[43] Some individuals rendered to the UK were released shortly after their arrival insofar as there was no evidence to justify even the issuance of an indictment against them.[44] They made allegations of abuse while in U.S. custody.[45]

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[34] Khaled el-Masri, *Extraordinary Rendition: American Civil Liberties Union Questions Abduction of Khaled el-Masri by George Tenet of Central Intelligence Agency*, HARPER'S MAGAZINE, Feb. 1, 2006, at 21.

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] Elisabetta Povoledo, *Italian Leader Chastises U.S. In Kidnapping Case in Milan*, N.Y. TIMES, July 2, 2005, at A4.

[39] Douglas Jehl & David Johnston, *Rule Change Lets C.I.A. Freely Send Suspects Abroad*, N.Y. TIMES, Mar. 6, 2005, at 1.

[40] *Id.* (discussing, *inter alia*, the cases of Maher Arar, who was rendered to Syria and Mamdouh Habib who was rendered to Egypt, all of whom alleged being tortured or beaten).

[41] Scott Shane, *Torture Victim Had No Terror Link, Canada Told U.S.*, N.Y. TIMES, Sept. 25, 2006, at A10.

[42] *See, e.g.*, Josh White & Robin Wright, *Afghanistan Agrees To Accept Detainees: U.S. Negotiating Guantanamo Transfers*, WASHINGTON POST, Aug. 5, 2005, at A01 (discussing the Bush Administration's attempt to render 70% of Guantanamo detainees to Afghanistan, Saudi Arabia, and Yemen, in efforts to ameliorate prison populations).

[43] *Five Guantanamo Detainees Transferred to Afghanistan; Action Leaves about 445 Still at U.S. Site in Cuba*, STATE DEPARTMENT DOCUMENTS AND PUBLICATIONS, Aug. 26, 2006, http://usinfo.state.gov/usinfo (last visited Nov. 2, 2006) (search "Five Guantanamo Detainees" and follow the first link with this article's title).

[44] *See* Kim Sengupta, *Victory for UK Residents in Guantanamo*, THE INDEPENDENT, Feb. 17, 2006, at 20 (discussing the release of former Guantanamo prisoners sent back to the UK and released without charge).

[45] *See* Sheryl McCarthy, *Guantanamo Abuses Amount to War Crimes*, NEWSDAY, Aug. 26, 2004, at A48 (discussing the release of UK citizens from Guantanamo and suggesting that the U.S. needs to act within the law even during times of war).

A blanket policy of rendition runs counter to the spirit of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),[46] along with other international treaties regarding human rights and refugees.[47] The Convention Against Torture, to which the U.S. is a party, provides that a person cannot be returned (*refouler*) to a jurisdiction where there are substantial grounds for believing that the individual would be in danger of being tortured.[48] That said, the U.S. has *'refouled'* persons to such jurisdictions.[49] In one high-profile case, a Canadian national was detained by U.S. officials while transferring planes in New York City and sent, first to Jordan, and then to Syria, where he was kept for one year and where he was tortured.[50] In response, the U.S. position is that it is not aware such jurisdictions would torture the individual in question; that the Convention does not apply to activities the U.S. conducts extraterritorially; that the Convention is not self-executing; that the application of the Convention to the war on terror may be unconstitutional; and that the definition of torture is limited, insofar as the U.S. is concerned, to something of a higher threshold than the definition in Article 1 of the Convention.[51]

The CIA also approved a policy of rendering suspects captured in Iraq who are not Iraqi nationals outside of the country for interrogation and

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[46] United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature Dec. 10, 1984, 1465 U.N.T.S. 85., 23 I.L.M. 1027 [hereinafter CAT].

[47] *See, e.g.*, International Covenant on Civil and Political Rights, Dec. 9, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (granting broad civil and political rights to citizens of signatory nations; providing that detainment should only be on the grounds of legal procedure and that detainees have the right to trial); European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 (recognizing various human rights and fundamental freedoms, and explicitly prohibiting torture).

[48] CAT, *supra* note 46, at pt. 1 art. 3.

[49] *See, e.g.*, Bob Herbert, *The Torture of Liberty*, N.Y. TIMES, Sep. 21, 2006, at A31 (discussing the 'refoulment' of Maher Arar to Syria where he was tortured).

[50] *Id.* U.S. agents acted on "false warnings and bad information" supplied by Canadian intelligence officials. Doug Struck, *Canadian Was Falsely Accused, Panel Says*, WASHINGTON POST, Sept. 19, 2006, at A01 (reporting also that an official Canadian inquiry conducted after Arar returned to Canada (and whose findings were released after this symposium) found that Arar, a computer consultant, in fact was tortured in Syria; the inquiry also exonerated Arar, concluding "categorically there is no evidence" he did anything wrong or was a security threat).

[51] American Civil Liberties Union, *Enduring Abuse: Torture and Cruel Treatment by the United States at Home and Abroad*, April 2006, *available at* http://www.aclu.org/safefree/torture/torture_report.pdf (discussing the U.S. response to its alleged breach of the CAT, such as arguing the following: that the CAT does not apply in foreign jurisdictions, that the definition of "torture" should be much narrower, that the CAT is not self-executing, and that the CAT is unconstitutional during the "war on terror" for encroaching on the President's military powers); *see also* Jehl & Johnston, *supra* note 39 (discussing the claims of torture made against the U.S. and the U.S.'s denial of accountability and knowledge of torture). After this symposium was held, the U.S. Supreme Court ruled in *Hamdan v. Rumsfeld* that Common Article 3 of the Geneva Conventions applies to the conflict against al-Qaeda. Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2759 (2006).

detention.[52] This policy was legitimated by a draft memorandum from the Office of Legal Counsel in Washington.[53] Some international lawyers decry this policy as running afoul of Article 49 of Geneva Convention IV (on Civilians),[54] which prohibits persons detained within an occupied territory from being transported outside that territory.[55] In the Iraqi case, many of these transfers were concealed from the Red Cross; some prisoners were "ghost prisoners," in other words not registered, so that their movements could not be tracked.[56] The memorandum also permits the CIA to permanently remove persons determined to be illegal aliens under Iraqi immigration law.[57]

What do we make of these policies undertaken to protect our national security? I worry about the popular emergence of a false dichotomy between rule of law and national security. Is the law meddlesome and irritating, cloying and annoying, in the conduct of the war on terror or, as the Administration now calls it, the "long war"? Every incursion the law has made, for example through judgment of the U.S. Supreme Court, has triggered defensive maneuvers on the part of the Administration. Is this how the war on terror should be waged? I had hoped, and continue to hope, that this would be—and will become—a war waged in the name of law, not against law, and that the law itself does not become a casualty. Else we will have lost what we are truly fighting for.

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[52] Dana Priest, *Memo Lets CIA Take Detainees Out of Iraq*, WASH. POST, Oct. 24, 2004, at A01.

[53] *See id.* (referring to the draft opinion dated March 19, 2004, which discusses to both Iraqi citizens and foreigners in Iraq who are protected by the Geneva Conventions according to the memorandum).

[54] Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 49, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

[55] Priest, *supra* note 52.

[56] *Id.*

[57] *Id.*