

# Extraordinary Rendition and U.S. Counterterrorism Policy

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## Abstract

This article examines the United States Government policy of extraordinary rendition as a response to terrorism. The paper provides a working definition of the term, outlines why it has become controversial, and uses case studies to examine success and failures of extraordinary rendition in practice. The paper concludes with lessons learned—more specifically, policy amendments—that are necessary to keep extraordinary rendition as a viable tool for the Obama Administration and mitigate political fallout against the United States from both its allies and enemies. This paper argues that extraordinary rendition provides flexibility to policymakers to detain terrorists in cases where an attack may be forthcoming and when other approved legal processes are slow to react. Therefore, instead of ending extraordinary renditions altogether, the United States should reevaluate how it implements the policy on a tactical, operational, and strategic level and amend it based on the recommendations put forward in this article.

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## Introduction

Few policies of the Bush Administration's Global War on Terror have inspired more rebuke by U.S. allies and been seized upon by U.S. adversaries more than that of extraordinary rendition. Simple in its basic concept, yet bungled in execution, the U.S. Government has used extraordinary rendition with zeal since September 11, 2001 (9/11). The primary intent of extraordinary rendition is to remove terrorists from the streets and inhibit their ability to plan and execute terrorist operations.

Proponents of the policy argue that it effectively removes terrorists from the streets and makes America and the world safer. Detractors often retort by saying the policy completely undermines greater U.S. foreign policy goals, is not in the spirit of U.S. and international law, and is linked directly with the torture of detainees.

A full accounting of the policy's effects has yet to be undertaken—or provided—by the United States Government, but lessons can be learned from its use over the past decade. It is imperative to learn these lessons now because the U.S. will continue to be judged and closely scrutinized on how it implements controversial counterterrorism policies in the future. However, U.S. officials should be careful not to dismiss the policy out of hand because unpredictable failures do not conclusively undermine its overall efficacy. With several adjustments to current policy, extraordinary rendition can continue to be a useful tool in the fight against terrorism. The purpose of this paper is to define the controversy surrounding extraordinary rendition policy, use several case studies to assess its overall efficacy as a counterterrorism tool for the United States Government, and put forward several recommendations to strengthen the policy for use in the future.

## Extraordinary Rendition: A Working Definition

Rendition is defined simply as any time a fugitive is surrendered by one country and given to another.<sup>2</sup> It should not to be confused with extradition, which is a subset of rendition characterized by a legal process and considered to be the official vehicle to transfer suspects in custody between foreign governments.<sup>3</sup> Extraordinary rendition, or irregular rendition, is a policy where individuals known to be members or affiliates of terrorist organizations are seized and covertly transferred to a third-country detention facility for debriefing.<sup>4</sup> The process is extrajudicial, done in secret, and typically not carried out exclusively by U.S. personnel.<sup>5</sup>

Targeted individuals are often seized by local authorities in a particular country at the behest of—or based on the intelligence from—personnel from the Central Intelligence Agency (CIA), Federal Bureau of Investigation (FBI) or the Diplomatic Security Service (DSS). The suspects are then transported using U.S. assets to one of many destinations, including Egypt, Syria, Romania, Jordan, Poland, or Afghanistan. Some individuals are destined for known prisons operated by host governments, but others are held in "black sites" which are operated by the U.S. Government in foreign territories.<sup>6</sup> The primary intent of extraordinary rendition is to

pull terrorists off the streets. In this way it differs from simple covert rendition because the individuals are usually not destined for a courtroom of any kind, but rather they are to be detained and interrogated indefinitely, often without official charges filed against them.<sup>7</sup>

## What Makes It So *Extraordinary*?

Extraordinary rendition is not extraordinary because it is a new or novel concept. It is extraordinary because, as a counterterrorism tool, it circumvents official legal structures and processes to detain known or suspected terrorists. The extraordinary rendition program in its current incarnation began in 1995 during the Clinton Administration and was designed by CIA officials heading the Usama bin Ladin Issue Station (originally code-named Alec Station).<sup>8</sup> Its primary goals were to take individuals off the streets that were known to be planning or have planned terrorist operations and to seize evidence in their possession at the time of capture.<sup>9</sup>

At this time, Presidential approval was required for an extraordinary rendition to occur; and, according to officials involved, interrogation of rendered individuals by U.S. Government personnel was not part of the program.<sup>10</sup> Also, captives were only to be transferred to countries where they were wanted for a criminal offense. After 9/11, the policy was amended by lifting the above restrictions and allowed for a U.S. role during interrogations.<sup>11</sup> Both the Clinton and George W. Bush Administrations sought assurances that foreign governments would not torture detained individuals, but the veracity of these claims, and the expectation that host governments would actually comply, is questionable.<sup>12</sup> Over time, the program shifted from using an interagency approach to a largely CIA-managed program based on a classified Presidential Directive issued by President Bush.<sup>13</sup>

## What Has Made It Controversial?

In theory, extraordinary rendition is not overly controversial, but U.S. management and execution of the policy has created strong opposition from human rights groups. For example, Ramzi Yousef was a target of U.S. rendition who was openly tried and convicted in a U.S. court of law for the bombing of the World Trade Center in 1993. Yousef's rendition and conviction faced little opposition because the moral imperative of a free society to protect its people from terrorism is widely accepted. Extraordinary renditions—where individuals simply disappear on "ghost planes," are never charged with crimes, and are detained indefinitely—are what troubles most observers.<sup>14</sup>

During the early years of the program, very few people even knew extraordinary renditions were taking place. As of 1998, thirteen suspected international terrorists had been detained and delivered to the United States to stand trial.<sup>15</sup> However, the program was expanded significantly after 9/11 because the political landscape had changed and the Bush administration was obliged to take increasingly aggressive actions to combat terrorism. These renditions only became public when exposed by inquisitive journalists. In 2004, then-CIA Director George Tenet testified to the 9/11 Commission that about seventy total renditions had occurred since 9/11, and all were sent to foreign countries.<sup>16</sup> Later, it was determined that in certain cases, the United States Government seized persons and transferred them to countries where torture was common in detention facilities, leading some to call extraordinary rendition policy "outsourcing torture."<sup>17</sup>

Critics of extraordinary rendition commonly argue that U.S. treaty obligations, particularly Article III of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, clearly states that "[n]o State Party shall expel, return (*refouler*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."<sup>18</sup> They are also keen to point out that specific individuals were held at U.S.-operated "black sites" in foreign locations, subsequently interrogated, and in all probability tortured by U.S. personnel, which would be a clear violation of U.S. laws.<sup>19</sup> U.S. Government excesses in this regard are widely documented, particularly with respect to the use of stress positions, walling, and water boarding, and their legality is questionable. It is not the purpose of this paper to discuss torture, but rather the specific counterterrorism tool known as extraordinary rendition and its effect on national security policy writ large.

The controversy between extraordinary rendition and torture is a tangled web of legal nuance, and there is truly no clear-cut answer on the legality of either. However, as Princeton Professor Emeritus and just-war theorist Michael Walzer argues, "it is important to stress that the moral reality of war is not fixed by the actual activities of soldiers, but by the opinions of mankind."<sup>20</sup> Today, it is clear that a policy of *inter arma silent leges* (in time of war, law is silent) is unacceptable. So, too, is the solicitation of creative legal opinions that seek to contravene the spirit of known domestic and international laws. Having squandered much of the political good will that came as a result of 9/11 by fighting a questionable war in Iraq, the U.S. will continue to be judged and scrutinized on how it implements controversial policies. Consequently, it is imperative to wholly understand the benefits and costs of extraordinary policies using case studies of successes and failures.

## Whether to Extraordinarily Render Someone: Evidence from Case Studies

Proponents of rendition policy are likely to point to notable successes or rely on the mantra that successes can't be revealed to the public. Detractors of the policy will highlight the most embarrassing episodes of mistaken identity and try to draw broad conclusions that undermine the policy as a whole. Nevertheless, U.S. policymakers should not expect zero defects when a particular counterterrorism policy is implemented, even though the consequences of failure can be politically detrimental. Therefore, the next section will examine the benefits and drawbacks of extraordinary rendition using several case studies in order to determine its efficacy overall.

### Successful Extraordinary Renditions

There have been many successful extraordinary renditions, most having occurred in the years following 9/11. Notorious terrorists such as Khalid Shaikh Muhammed (KSM), Abu Zubaydah, Ibn Shaikh al-Libi, Walid Bin 'Attash, Muhammed Saad Iqbal Madni, and Encep Nuraman (*nom de guerre—Hambali*) were all apprehended and rendered as part of the U.S. program. Successful extraordinary renditions may yield valuable intelligence that enhances the ability of the United States Government to understand terrorist leadership or networks and derail possible future plans after thorough debriefing. Notwithstanding what happens after the suspects are apprehended, the successful cases analyzed here are unique in that the removal of these individuals from the street dealt a debilitating blow to their terrorist networks in the near- and mid-term.<sup>21</sup>

#### *Khalid Shaikh Muhammad (KSM): The 9-11 Mastermind*

KSM, known as the self-proclaimed mastermind of the 9/11 attacks, was detained in Rawalpindi, Pakistan on March 1, 2003.<sup>22</sup> KSM was a known al-Qaida (AQ) operator and wanted terrorist for over fifteen years prior to his arrest. He was a known associate of Usama bin Ladin and Ramzi Yousef. At the time of his capture, he was a head AQ operational planner, military committee leader, and media operations director for *Al-Sahab*.<sup>23</sup> In addition to the litany of operations he lays claim to, he was also said to be plotting attacks against the United Kingdom just prior to his arrest and rendition.<sup>24</sup> KSM's extraordinary rendition yielded intelligence with regard to the structure and future plans of AQ, and he was the highest positioned AQ operative ever captured. His knowledge of the AQ network, as well as intimate details about past operations, contributed to greater

understanding of AQ and ongoing transnational terrorism efforts. Without a doubt, KSM's rendition and subsequent detention can be considered a major victory for United States counterterrorism efforts.

### *Abu Zubaydah: The Facilitator*

Abu Zubaydah was arrested in Faisalabad, Pakistan on March 28, 2002.<sup>25</sup> Zubaydah, a native of both Palestine and Saudi Arabia, was a known AQ affiliate and operational planner responsible for facilitating the movement of key radical Islamic ideologues around the globe to support training and missions.<sup>26</sup> He was also the overseer of the *Khalden* Group of terror training camps located in Afghanistan for nearly five years.<sup>27</sup> Zubaydah is most notable for his admission that KSM was a primary planner behind the 9-11 attacks. While Zubaydah's role in AQ has likely been overstated, U.S. and foreign intelligence operatives had been tracking Zubaydah for nearly twenty years prior to his arrest as he facilitated operations in the terrorist underworld. His detention dealt a debilitating blow to AQ operations in the near- and mid-term, and his rendition provided the United States Government with significant intelligence related to the structure and leadership of AQ.

## A Policy in Question: Botched Extraordinary Renditions

Although the amount of known botched extraordinary rendition mistakes is few, these failures overshadow rendition successes and have a significant effect on how the policy is viewed by critics. Commonly agreed-upon failed renditions often include Khaled al Masri, Abu Omar, and Maher Arar. Certain organizations have seized on these unfortunate missteps to broadly condemn extraordinary rendition policy because the failures undermine the general United States' contention that it, as a nation, is morally superior to the terrorists it fights.<sup>28</sup> Indeed, these failures do expose weaknesses of execution, such as poor tradecraft, public relations difficulties, and the challenges of identifying actual terrorists. The failures have also strained and jeopardized U.S. relations between key allies in the war against terrorism.

### *Khaled al Masri: A Public Relations Failure*

One of the most public failures of extraordinary rendition to date has been the capture and detention of Khaled al Masri. Al Masri, a Lebanese-born German citizen, was captured while vacationing in Macedonia in 2003.<sup>29</sup>

Al Masri's detention quickly became a rallying cry for anti-rendition critics, and the failure of the United States Government to contradict his public statements has led to a public relations fiasco.

Allegedly, in court documents filed by al Masri and his legal team, al Masri was detained and tortured for nearly six months by the United States in Afghanistan.<sup>30</sup> He was released in 2004 without explanation, let alone any specific criminal charges, in Albania on the side of a mountain.<sup>31</sup> Al Masri has since returned to Germany and filed legal action against the United States for cruel, inhumane, and degrading treatment.<sup>32</sup> Concurrently, the German Government launched a full investigation of his case and learned many details of the covert extraordinary rendition policy, even after U.S. officials insisted that the Germans not pursue an inquiry.<sup>33</sup>

Al Masri's story has garnered significant attention from the press, the American Civil Liberties Union (ACLU), and the German Government. Some argue that he is one of nearly three dozen so-called "erroneous renditions," where the U.S. intelligence community simply picked up the wrong person based on poor intelligence.<sup>34</sup> Recently, the U.S. Supreme Court supported the White House's legal argument against al Masri—essentially a non-argument by way of the state secrets privilege—and decided not to hear his case, which has fueled further speculation and discontent toward the policy of extraordinary rendition.

In nearly all aspects, al Masri's case was mishandled by the United States Government. It was learned early in his detention that he was probably the victim of mistaken identity.<sup>35</sup> However, instead of developing a coherent repatriation plan with German authorities, the United States proceeded in secret to destroy any evidence of his actual detention and left him for dead in the middle of nowhere. Even after the U.S. extraordinary rendition program was exposed, the United States failed to account for its mistakes in the al Masri case and control the public relations backlash.

### *Osama Nasr (Abu Omar): Shoddy Tradecraft*

Abu Omar's case is particularly illustrative of the perpetual challenge of maintaining secrecy when executing covert actions such as extraordinary renditions. Abu Omar was detained in Milan, Italy in 2003 and rendered to Cairo, Egypt via U.S. airbases in both Italy and Germany. He was residing in Italy after having been granted refugee status because it was believed that if he returned to his native Egypt, he would be ill-treated, based on his history as a radical, outspoken religious cleric. Much is pres-

ently known about his case because there were several witnesses to his capture, and he was able to communicate with Italian magistrates while in captivity in Egypt.<sup>36</sup>

Upon receiving information from Abu Omar in captivity, Italian magistrates started tracking leads, such as mobile phone and flight records, around the time of his capture. After a rigorous investigation, they exposed an obvious truth: U.S. operatives did not cover their tracks.<sup>37</sup> During the course of the investigation, Italian police raided houses and found personnel dossiers, fake identity cards, and U.S. passports. They also found phone records and wiretaps to synchronize the abduction with a U.S.-operated flight out of Aviano Airbase. Some of the operatives didn't even use false names, which made it extremely easy for the magistrates to identify personnel captured on closed-circuit cameras.<sup>38</sup> Further investigation uncovered a broader conspiracy, as evidence of collusion between U.S. and Italian secret services was discovered along with receipts to nefarious journalists being paid to distribute misleading information.

The end result was damning evidence that the United States was involved in Abu Omar's capture, and indictments for U.S. citizens were issued by the Italian Government. In November of 2009, the Italian Government convicted twenty-two of the suspected U.S. operatives and one U.S. Air Force officer in absentia—the first convictions related to the extraordinary rendition program by any foreign government.

The careless tradecraft of U.S. personnel led to the unraveling of the entire U.S. extraordinary rendition apparatus. Investigators were able to show not only how Abu Omar was captured, but also the developed network of planes, flight plans, and transfers that led to his arrival in Egypt. Furthermore, they were able to understand how the United States was able to secure partnerships with European intelligence services to affect detentions on their territory.<sup>39</sup> Just as with Germany in the Al Masri case, U.S. relations with Italy soured when the public learned the extent of the details surround the Abu Omar case.

## Extraordinary Rendition: Recommendations

### *Refine Tactical and Operational Tradecraft*

The failed cases described in this article exposed major weaknesses in the ability of the United States to successfully execute a broadly scoped extraordinary rendition policy. U.S. officials failed to properly cover their tracks during several renditions and left far too much evidence behind

that implicated the United States Government. The actions of certain operatives were amateur at best and not reflective of the high standards normally ascribed to U.S. clandestine operations. Given the high political risk of a failed or exposed rendition, the United States should only assign its most seasoned veterans and proven operators to conduct extraordinary renditions. At a minimum, the United States must review its tactical and operational procedures to establish a set of best practices to be used for future extraordinary renditions and codify these results as a doctrine. By learning from the mistakes prevalent throughout the al Masri and Abu Omar cases, U.S. officials can amend their operational procedures accordingly and maintain a high degree of secrecy.

### *Ensure Presidential Approval of all Extraordinary Rendition Targets*

After 9/11, the use of rendition increased. One way to combat mission creep and prevent potential erroneous renditions is to return the authority to render a potential target back to the President by rescinding the Presidential Directive issued shortly after 9/11. The intelligence community, using credible sources and methods, can develop an interagency list of vetted targets for rendition and allow the President to approve or deny specific cases. This would allow the President and his staff to follow up on any intelligence shown within the targeting packets and corroborate it using all source intelligence and a formal legal review process. The challenge of creating an agreed-upon interagency list of targets would be difficult, but it is essential going forward to prevent erroneous rendition and mitigate potential fallout for political leaders.

### *Render Detainees to Known Detention Facilities Only and Frequently Monitor Them to Prevent Torture*

This article makes an important distinction between the act of extraordinary rendition and torture. However, the case studies demonstrate that there is a perceptible linkage between the two in the public consciousness because stories of abuse have become common.<sup>40</sup> To sever this linkage, the United States must only render individuals to known detention facilities and monitor their detention to prevent torture. Rather than simply seeking verbal assurances from partner nations, the United States Government should implement a policy of "trust, but check" on its allies who agree to hold captives taken as part of this program.

The United States Government should also closely scrutinize where it decides to render suspects and should favor countries with a developed

legal apparatus that might be able to convict the detainee. Even in successful renditions, evidence gained through torture—while possibly providing some immediate operational value—simply becomes unusable if the evidence ever becomes part of a legal proceeding—civil, military, or otherwise. Therefore, monitoring a detainee's condition over time, and possibly allowing the International Committee of the Red Cross (ICRC) to verify a detainee's condition, would allay the fears of opponents who argue that the United States knowingly outsources torture in violation of international laws.

### *Discontinue the Use of U.S.-Operated "Black Sites"*

The original intent of the extraordinary rendition program was never to detain individuals indefinitely in U.S.-run facilities. Rather, it was to deliver captives to face legal proceedings in a third-party country. Therefore, the United States should cease all current and future use of "black sites" in favor of delivering captives to countries where they can ultimately face legal prosecution. Such a policy would protect U.S. political leadership from fallout, conserve considerable resources, and help the United States regain its domestic and international legal and moral footing.

### *Provide Full Legal Protection for Detainees When Appropriate*

In matters of national security and in order to secure a nation, governments restrict certain legal rights from time to time. This is an unfortunate but necessary reality when fighting modern terrorism. However, the United States should limit these restrictions wherever possible and afford rights to the accused depending on the circumstances and intelligence involved. Much of the terrorist fight can be won by using traditional legal procedures to openly convict criminals. This may mean the establishment of an ad hoc terrorist tribunal system that hears certain cases and provides basic functions, such as legal counsel and allowing detainees to view certain evidence that is being held against them. Some of these adjustments are relatively simple, but would help immensely to regain the moral standing that the United States enjoyed immediately after 9/11.

## Conclusion

There are benefits and pitfalls associated with extraordinary rendition policy. To be sure, the current policy does provide the necessary framework (diplomatically and legally, from a U.S. perspective) and logistical

apparatus for pulling terrorists off the streets, which is extremely valuable as a counterterrorism tool, where legal processes lag far behind agile terrorist networks. However, it is susceptible to overuse, cases of mistaken identity, and does challenge basic U.S. values. Furthermore, botched policy implementation can lead to public relations crises and strained alliances, as evidenced by the al Masri and Abu Omar cases. However, as argued up front, U.S. counterterrorism officials should not dismiss extraordinary rendition policy because its drawbacks do not conclusively undermine its efficacy. To the contrary, with the adjustments to current policy suggested here, the United States should reevaluate how it implements the policy on a tactical, operational, and strategic level and amend it to ensure its continued relevance as a useful tool in the fight against terrorism. This fact has been recognized by the current U.S. Presidential administration because it provides flexibility and agility to detain terrorists in cases where an attack is forthcoming and when the legal process is slow to react, but formal policy changes haven't been communicated by the administration.<sup>41</sup> Only time will tell if these recommendations—in some form—are leveraged by the administration to preserve extraordinary rendition.

## About the Author

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