

## Panel 2: How Are Laws Applied and Detention Practices Reformed?

### Litigation: Taking Cases and Those Responsible to Court

*Remarks of Steven Watt\**

**T**HANK YOU AND GOOD MORNING. I'D LIKE TO SPEAK ABOUT THE RIGHT TO A REMEDY AND ACCESS TO JUSTICE IN U.S. COURTS for victims of the "extraordinary rendition" program, which, as I will explain, is in effect a program established by the Bush administration to facilitate forced disappearances and torture and to attempt to evade accountability for these egregious human rights abuses.

There is no dispute now, that the U.S. is the home of the "extraordinary rendition" program. This is supported by credible testimony from victims of the program, widespread media reporting – we've even got books on the evolution and operation of the program. There have been criminal investigations outside the United States into the operations of the CIA in European nations. And there have been public inquiries in Europe and Canada into the operation of the program. And, most importantly, there has been official acknowledgement by former President Bush and more recently President Obama of the existence of the detention and interrogation program run by the United States.

Yet today, despite these admissions and investigations, there has been no criminal investigation conducted in the United States into the program's operation or those persons responsible. Nor to date has there been any form of effective Congressional oversight of the program and those persons involved. In the absence of such criminal investigation and prosecution or effective Congressional oversight, U.S. advocates, including the ACLU, concerned about the program's operation, seeking to bring it to an end, and to secure accountability of those involved (including redress for many known victims of the program) have resorted to civil suits in U.S. courts. From this litigation, it has become apparent, that although on paper, legal mechanisms exist in the U.S. legal system to achieve accountability, advocates in practice have encountered significant obstacles in bringing these lawsuits. Today, I want to address in detail one of those impediments; the so-called "state secrets privilege" and touch briefly upon another of those obstacles; claims to governmental immunity.

So, just to make sure that we're all on the same page, what exactly is the "extraordinary rendition" program? Based upon the accounts of those that have come out the other end of the program, there are four common elements to "extraordinary rendition." First, you have the apprehension of a person – a foreign national – suspected of involvement in terrorist-related activities, outside the United States. The apprehension is usually carried out by the CIA; the government agency that has taken the

lead in devising and developing the program. The CIA does not work in isolation but is supported by other government departments as well as local intelligence forces in the country where the suspect is apprehended. All these operative events take place outside the United States.

After the suspect is apprehended, they are kidnapped and secretly transferred to a facility, again, outside the United States, and which is run by the CIA – so called "black-site" detention facilities – or one run by a foreign government. The third component, is the use of torture and other cruel, inhuman, and degrading treatment or punishment during the suspects detention and interrogation. And this is the genesis of the "extraordinary rendition" program; to facilitate forced disappearance and torture without accountability. As the U.S. government has repeatedly argued in legal pleadings: foreign nationals held outside the United States do not benefit from the protections of the [U.S.] Constitution and they have no international legal protections which are enforceable before U.S. courts.

The fourth and final component of the program is the release of the individual from custody or their "warehousing" at a CIA "black site" facility; at the behest of a foreign government or alternatively, at Guantánamo.

Separately and taken together, these practices violate a host of national and international laws. In the United States, there are a number of laws on the books which allow for criminal prosecution of torturers and establishing civil liability for those who participate in egregious human rights violations, including forced disappearance and torture. In the criminal context, you have a specific act of Congress that's called the Overseas Torture Act (§ 2340) which allows for the criminal prosecution of U.S. officials who engage in torture overseas. This act permits prosecution of those officials who not only directly engage in torture but also those who conspire in torture. So you can see how this would allow for the prosecution of officials involved in extraordinary rendition: The U.S. has an agreement with another country such as, for example, Egypt, where the use of torture is routine, to detain and interrogate a person

The War Crimes Act – as amended by the Military Commissions Act – also criminalizes certain "grave breaches" of the Geneva Conventions including those who torture or are complicit in the practice.

U.S laws also provide for torturers to be held civilly liable. The first of those laws, dates back to 1789, the Alien Tort Claims Act. This Act allows aliens – not U.S. citizens – to sue for certain violations of customary international and treaty-based law including the prohibitions on forced disappearance and torture. As interpreted by U.S. courts, the ATCA permits both individuals and corporate entities to be defendants and establishes liability not only for those persons who are directly

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involved in these violations but also those that are complicit in them, including those who aid and abet or conspire in violations of international human rights law.

The second piece of legislation, is the Torture Victim Protection Act. This Act allows both U.S. citizens and non-U.S. citizens to sue for summary execution and for torture. But there's a wrinkle in this piece of legislation because it only permits suit against defendants who commit torture under "color of foreign law." The Torture Victim Protection Act allows civil suits against not only those directly responsible for torture but also those defendants who conspire to commit or aid and abet torture under color of foreign law.

The TVPA, for example, was used to seek civil accountability of those U.S. officials involved in the "extraordinary rendition" of Maher Arar. Maher Arar was rendered by U.S. officials from the United States to Syria with the express intention that he be detained and interrogated under torture there. Maher's torture, therefore, was committed by U.S. officials under color of Syrian law as the officials involved in the process of transferring him to the custody of Syria knew – and indeed intended – that he be subjected to torture.

The U.S. Constitution also prohibits torture and allows for civil liability for those officials involved in the practice. Unlike the Bush administration's view, our position is that those protections are afforded to U.S. and non-U.S. citizens alike, whenever and wherever they are held by U.S. officials; in other words there are no restrictions on the protections afforded by the U.S. constitution.

Finally in 1998, Congress enacted the Foreign Affairs Reform and Restructuring Act, which domestically incorporates U.S. obligations under Article 3 of CAT and makes it the policy of the United States not to send a person to a country where there is a substantial likelihood of torture. The Act directs government departments to implement regulations to give effect to this policy statement and both the Department of Justice and Department of State have done so.

There are a number of international laws binding on the United States which prohibit extraordinary rendition: the ICCPR and the Convention against Torture, being the most obvious ones. However, the U.S. entered a certain reservation to these treaties – they are so-called "non-self executing" provisions, which impose restrictions on an individual's right to directly enforce these treaty protections in U.S. courts. That being said, these provisions also form a part of customary international law, which forms part of the law of the United States and is binding on it.

These civil laws have formed the basis of three civil suits filed in U.S. courts seeking to challenge the operation of the extraordinary rendition program and to hold accountable those individuals – as well as the corporate entities – responsible. To begin on a positive note, U.S. advocates have not been altogether unsuccessful in using U.S. courts to challenge some of the worst counter-terrorism policies and practices employed by the Bush administration. Many of you'll be aware that in a series of cases, the Supreme Court struck down the former executive's effort to detain foreign nationals at Guantánamo indefinitely without review and to try Guantánamo prisoners before Bush-created military commissions. But these cases, as you'll note, all concern U.S. detention policies. To date, however,

lower courts in the United States – without exception – have repeatedly declined to recognize that victims of U.S. rendition, detention, and torture policies have a right to civil redress in U.S. courts for their injuries. These courts have done so in one of two ways: they've either dismissed those claims from the very outset, without consideration of the merits of the victims' claims, on the basis of the so-called "state secrets privilege." Or, they've upheld government claims to official immunity for their actions without consideration of evidence verifying the nature and extent of the torture victims' claims, including official documents from the United States government proving that techniques were employed that constitute torture or other cruel, inhuman, or degrading treatment and that these techniques were employed as a matter of policy.

U.S. courts have held that even if the U.S. does indeed forcibly disappear persons or torture them as a matter of policy, victims of these policies have no remedy in the courts of the United States.

Let me illustrate how this has worked in practice by reference to two cases in which I've been involved on behalf of seven victims of the extraordinary rendition program: *El-Masri vs. Tenet* and *Mohammed v. Jeppesen*. In the time remaining, I'll touch on the immunity issues.

Turning to the factual background of the *El-Masri* case. At the end of 2003, as Khalid El-Masri, a German citizen of Lebanese descent, was crossing the border between Serbia and Macedonia, he was apprehended by officials at the border and thereafter detained for twenty-three days by agents of the Macedonian intelligence. While detained, he was interrogated about his alleged associations with Islamic fundamentalist groups in his home country, Germany. After twenty-three days of such questioning, El-Masri is handed over to a CIA "black rendition team"; he's stripped, he's beaten, he's drugged, and he's chained spread-eagled to the floor of a plane before being flown to Afghanistan and held in a secret over-seas prison run by the CIA. There, he is held for over five months. Shortly after his transfer to Afghanistan media reports suggest that senior officials within the United States government were made aware that they were holding an innocent man in a secret over-seas prison. Orders were given for his release but he languishes under horrendous conditions until his release months later. Rather than being released back to his home in Germany El Masri is flown to Albania and unceremoniously dumped on a hilltop in the dead of night to make his own way home to Germany. Following his return, much, if not all of his story, has subsequently been corroborated by independent evidence, including testimony from U.S. officials, and evidence uncovered in a German criminal investigation and Parliamentary inquiry into his case.

In December of 2005, we, the ACLU, filed a civil case on Khalid El-Masri's behalf. We filed suit under the Constitution and under the Alien Tort Claims Act. We named George Tenet, head of the CIA at the time Khalid El-Masri was rendered as a defendant and three U.S.-based aviation corporations, which facilitated the rendition. Flight records we obtained showed that these aviation corporations either owned or operated the aircraft used by the CIA in El-Masri's rendition. We also alleged that these corporations knew or reasonably should have been aware that they were complicit in El-Masri's torture. Shortly after filing suit, the United States government sought to intervene in

the litigation to invoke the state secrets privilege and to have the case immediately dismissed with no consideration of the evidence.

Very briefly, the state secrets privilege is a common law evidentiary privilege. It has no Constitutional basis. Properly invoked, it can be used by the government to exclude discrete pieces of evidence in any case where consideration of that evidence in court would be harmful to the country's national security. When we talk about national security in this context, we refer to means and methods of interrogation gathering and U.S. relations with other foreign powers.

The privilege has been recognized by the Supreme Court since 1954 and the Supreme Court in turn developed it from an analogous common law evidentiary privilege recognized under the English common law, Crown Privilege. In support of its position that litigation of El Masri's case would be harmful to national security, the government produced two affidavits; that was the extent of the "evidence" they produced for the court substantiating dismissal from the very outset. Both were produced by the former director of the CIA, Porter Goss; one was made public and the other for the judge's eyes only so we weren't privy to that one and have no idea what case the government made for outright dismissal of the litigation.

Following the court's consideration of the government's affidavits and extensive submissions that we made; and a brief oral argument, the court upheld the government's state secrets claim, finding that the very subject matter of the litigation – the United States' operation of a rendition, detention and interrogation program was a state secret and that there were no procedures available to U.S. courts that would adequately protect its national security interests, while at the same time allowing Khalid El-Masri his day in court. As an alternative to dismissal, we had argued that the court had mechanisms at its disposal that could accommodate those competing interests. For example, we suggested that there be closed hearings; not the best but its better than throwing it out of court from the very beginning. We also suggested appointment of a Special Master or entering Protective Orders – all mechanisms that U.S. courts routinely employ and in fact have employed in post-9/11 litigation, including Guantánamo habeas litigation where national security issues arise all the time.

The court, however, found none of these alternatives to dismissal appropriate and effectively ignored all the publicly available and very reliable information substantiating most of Khalid's testimony, and admissions from the Bush administration that it did indeed operate a rendition, detention and interrogation program. The court upheld the government's claim to national security and dismissed the case from the very outset. The decision from the lower court was upheld by the court of appeals on arguably broader grounds. The court of appeals found that there was a constitutional basis for the government's assertion of the state secrets privilege; it wasn't just evidentiary in nature. The end of the road domestically for Khalid came in October 2007 when the Supreme Court, without comment, declined to even review the court of appeals' decision.

From the *El Masri* case and another challenge to the "extraordinary rendition" program that we filed in October 2007 on the behalf of five other victims of the extraordinary rendition program, *Mohamed v. Jeppesen*, it's clear that U.S. courts

are prepared to accept, *carte blanche*, government assertions of national security, even where the allegations against the government are its involvement in egregious human rights violations such as forced disappearance and torture, and even when those allegations are corroborated by reliable, official, and publicly available sources.

In *Jeppesen*, we sued Jeppesen DataPlan, a wholly owned subsidiary of the Boeing aerospace company. Jane Mayer – who is here today – initially identified Jeppesen's involvement in the "extraordinary rendition" program, by reporting a conversation she had with an unnamed former employee of Jeppesen, who had been in company meetings where senior officials openly discussed the corporations involvement in the CIA "torture flights." Based on this and other evidence linking Jeppesen to the rendition of our five clients, we sued the company for knowingly assisting the CIA in the forcible disappearance and torture of our five clients. Specifically, our publicly available evidence showed that Jeppesen provided crucial flight and logistical support services to aircraft used by the CIA in the rendition of the five men.

All of the men are non-U.S. citizens and all were rendered to detention and interrogation in CIA "black-site" detention facilities or by foreign governments. Jeppesen is the only named defendant in the case, which is brought under the Alien Tort Claims Act. Just as in the *El-Masri* case, even before discovery, the United States sought to intervene in the litigation to seek dismissal of the case from the very outset. The lower court, simply accepted the government's assertion of harm to national security interests, ignored publicly available evidence pointing to Jeppesen's involvement and dismissed the case. We appealed the case to the Ninth Circuit and were hopeful that the newly installed Obama administration would adopt a more reasonable approach in the litigation with regard to assertion of the privilege.

Obama immediately on taking office promised greater transparency and openness in government. However, during the hearing on the appeal, government lawyers expressly adopted the same position on state secrets as the Bush administration, to seek immediate dismissal of the case. The judges seemed slightly incredulous, by the stance of the government and from their pointed questioning of the government suggested they may be open to the possibility of a remand to the lower court to have the state secrets privilege invoked as it should be, not to have a litigation dismissed from the outset, but rather in a more discrete way over any evidence that may compromise U.S. national security interests.

What is apparent from these two cases is that the Bush administration and now the Obama administration is using the state secrets privilege not as it was initially crafted, as a shield to protect sensitive national security interests, but rather as a sword to cover up mistakes, embarrassment, and worse still, egregious human rights violations. And, U.S. courts, by simply accepting these claims without further searching inquiry, are turning a blind eye to publicly available evidence and facilitating a government cover-up. The whole world now knows the fundamental facts of these cases, yet the victims of the "extraordinary rendition" program have been denied their day in a U.S. court to have their claims adjudicated. What the state secrets privilege has morphed into is a form of governmental immunity. **HRB**