

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

Question & Answer Session

Q Hi, my name is Richard Gurning. I have a question for Steven about the presidential order that the CIA should close their overseas detention facilities. My question is the following: does the fact that rendition takes place and is authorized by this current administration, isn't that already against human rights? Because first of all, it violates the sovereignty of the country where the person is taken and secondly, they are deprived of their rights to habeas corpus. So, I was wondering why the CIA is still allowed to carry out these renditions? Thank you.

STEVEN WATT: What Obama's executive order on renditions doesn't make clear, – as Jim Ross mentioned – is that it will bring about an end to all forms of the rendition program. What I spoke to was “extraordinary rendition”; the removal of persons to a country where there is a substantial likelihood of torture. In the executive orders, all the Obama administration has undertaken to do at this stage, is to carry out a review of the rendition program generally. However, from Panetta's testimony during his recent confirmation hearing, it seems clear that although the CIA might dismantle the “extraordinary rendition” program some aspects of the rendition, detention and interrogation program will remain in operation, even under Obama. Our position, however, that any transfer of an individual – in other words, any rendition – by the United States must be transparent and take place within the rule of law.

Q From what I've heard this morning, it strikes me that South Africa wouldn't be in violation of the Convention against Torture and I say this because of their Truth and Reconciliation Commission. We're talking now about something similar and there seems to be a conflict between impunity in regard to sentencing people to prison, it seems like a truth and reconciliation goes against the notion of impunity. Charlie Sullivan with CURE International, a prison reform organization. Could I maybe ask the Dean, what did you do regarding the Truth and Reconciliation Commission? Did you hold them in violation or did you consider it?

DEAN CLAUDIO GROSSMAN: I am happy to participate in and contribute to the discussion. First of all, if international law requires the punishment of international crimes, this creates a space internally for the promotion of important values. Imagine if international crimes did not exist, and every country was free to violate human rights. There would be no possibility for those who want positive change to resort to international law. A vacuum then, like the one that existed before World War II, is not advisable.

Second, there is always a discussion as to whether the rejection of impunity goes against the needs to ensure smooth political transition. For some, the punishment of international crimes could result in delaying or even derailing complex transitions that require realistic negotiations. I am of the school of thought that values more the deterrent impact of the concept of international crimes.

JAMES ROSS: Let me give an answer that relates to the U.S. example. Certainly, Human Rights Watch would oppose any kind of commission or investigation into torture in which those who confess to crimes got immunity from prosecution. We would view that as inconsistent with the Convention against Torture and international norms.

Q My name is Nina Kraut and I'm a local practitioner and litigator of domestic and international human rights and I'm director and founder of Center for International Free Expression. Steven, I'm curious about the Ninth Circuit case, the *Jeppesen* case, which I guess was argued two weeks ago. The Obama administration had barely gotten in. I'm not sure if Holder had even been confirmed, and if he had been, he had just been, and I wonder where the DoJ lawyers who argued that case got their marching orders from. Are they Bush leftovers, and so that position is one that changes 180 degrees. Or did they get their marching orders from Holder?

STEVEN WATT: Holder was actually confirmed at the time of the hearing on the appeal and the solicitor general, responsible for appellate litigation involving the United States was aware of the pending appeal for many weeks before the actual hearing and as undertaking a review of the position adopted by the Bush administration. The presiding judge, Judge Schroeder, at the very outset of the government's case asked the government lawyer arguing the appeal: “do you have anything that you wish to tell us? Has there been any change in position in light of the executive orders and the Obama administration's assumption of power?” The government lawyer stated that there had been no change and that the Obama government expressly adopted the arguments advanced in the briefs it had filed and the affidavits that were filed by General Hayden. He argued that the case should be dismissed from the very outset without consideration of the merits of the claims because to do otherwise would be harmful to this country's national security, regardless of the information that was presented by plaintiffs. The information that we presented on behalf of our five clients was this voluminous [motions to show large gap between his hands]. Take for example the information we presented on behalf of one of the

plaintiffs, Ahmed Agiza, a national of Egypt. Agiza was reportedly one of the very first renditions from Sweden to Egypt at the end of 2001. UN bodies investigated the case as well as national bodies office. The Swedish Ombudsman, investigated the case and based his findings on official documents that verified the facts we alleged in our complaint, including the involvement of the CIA and the Swedish government's cooperation with the CIA. Last year, the Swedish government, paid Ahmed Agiza the sum equivalent to \$450,000 for the Swedish government's involvement in his rendition and a portion of that money was in respect of the torture that he was subjected to in Egypt. So, the UN and the Swedish government from official sources have corroborated Agiza's version of events, including U.S. involvement. Yet, the position of the Obama administration is that this case should be dismissed without consideration of any of this evidence. One of the judges, Judge Canby, seemed particularly perplexed by this position, noting that the government's position would be the same if the entire rendition process, the apprehension, the kidnapping, illegal transfer, and torture occurred in Missouri; that U.S. judges must turn a blind-eye to this. The government had more than adequate time to examine the file and could have moved for further time to consider the file, and we would have consented. But they didn't do this. So, I think the version of the state secrets privilege the new administration advanced in the *Jeppesen* case, sadly, is the one that's going to be adopted by the Obama administration from here on in.

Q • Just a question for anyone on this panel, and Steven touched on this too but also Eugene said, I think, why are we turning to army standards when other agencies have much more experience with interrogations, the FBI for instance or ordinary police departments around the country. My question is, giving ICRC access to people is better than keeping them completely incommunicado, but it's not as good as something more than that. For instance, access to the judiciary, access to lawyers, all the things that we would expect someone to be provided when we treat them like a possible criminal. From the confirmation hearing, from the filing of the Bagram detainees habeas corpus application, it seems that so far, this administration is maintaining that the law of war applies, if the executive decides, and not the ordinary criminal justice laws and not human rights, etc. So, I guess my question to the panel is: do you think we can actually grapple, not with the prohibition of torture which we all agree is absolute no matter what body of law you apply, but with the safeguards and actual mechanisms that we use to give reality to that prohibition? Do you think we can actually grapple with that unless the laws of war approach is abandoned? I worry that President Bush may have lost the battle of Guantánamo, but won another much more damaging long-term war by making us think in terms first and foremost, in the paradigm of war and the laws of war when we should be thinking more broadly about criminal justice and human rights.

EUGENE FIDELL: That is a very insightful question (and that's not damning with faint praise). We should realize that the corruption that affected discourse during the last eight years had

effects more profound and harder to eradicate than any of us may have anticipated. That's my first observation. The second is, I do not believe that the early signals from this administration – and I'm thinking about the Ninth Circuit argument on state secrets – should be taken as the last word. Certainly, the President himself is, I think, quite a cautious person. I think he's a careful lawyer. He has surrounded himself, by and large, with people whose paradigm is not a military paradigm. If you look at the people that he has put in the Office of Legal Counsel, which is such a key focus for federal policy on these matters, or in the Office of White House Counsel, you don't see people who have been previously identified as buying into the Bush paradigm. That's not to say that there aren't some people who are in the administration's orbit who may be more willing to think along those lines than you or I might prefer. But I would caution that it's quite early, and our country is on fire because of the economic situation. Even President Obama is not Superman and we should, if I can say, cut him a little bit of slack. Even if Mr. Holder had been confirmed by the time of the Ninth Circuit argument and even though there was a quite methodical transition process, I don't think this should be taken as a particular indicator of where things will be at the end of the study period called for by the President's executive order.

Q • A brief comment and then a question. I am from the ACLU Human Rights Program. The brief comment is that another example of how the Obama administration is maybe trying to get more time to examine their policies, is what they said to the DC circuit on Friday in their very brief submission in the Bagram cases. They said they are basically accepting the Bush administration's reply to the court that the court does not have the jurisdiction to entertain habeas corpus petitions filed from Bagram from people who have been confined there from outside Afghanistan for several years. That's my quick comment. My question to you is: in the absence of full accountability within the United States for acts of torture and other abuses of the last seven years, do you see universal jurisdiction cases brought outside the U.S., in countries like Europe, for acts of torture committed by individuals like Rumsfeld and others. Do you see that as an option and how do you see that as a way to pressure forms of accountability here in the United States? I think that is something that hasn't been discussed, and where does that fit into all of this? Universal jurisdiction under the CAT was discussed, but not under other jurisdictions.

EUGENE FIDELL: If I can briefly comment. We're probably out of time, but what you're suggesting is that events in third countries, notably in Western Europe, might have a kind of complementarity effect, a non-ICC complementarity. And it's possible, but I actually don't see that as the way it will play out. I think there's enough of a robust debate forming right now in our country that it will never get to that point. Our policy will be driven by our domestic values without either the carrot or stick of prosecutions in other countries. We'll sort this out. **HRB**