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109TH CONGRESS, 2d Session | HOUSE OF REPRESENTATIVES | REPORT 109–374

# DIRECTING THE SECRETARY OF STATE, THE SECRETARY OF DEFENSE, THE SECRETARY OF HOMELAND SECURITY, AND THE ATTORNEY GENERAL, AND REQUESTING THE PRESIDENT, TO PROVIDE CERTAIN INFORMATION TO THE HOUSE OF REPRESENTATIVES RELATING TO EXTRAORDINARY RENDITION OF CERTAIN FOREIGN PERSONS

FEBRUARY 10, 2006.—Referred to the House Calendar and ordered to be printed

Mr. HYDE, from the Committee on International Relations, submitted the following

## ADVERSE REPORT

together with

## DISSENTING VIEWS

[To accompany H. Res. 593]

The Committee on International Relations, to whom was referred the resolution (H. Res. 593) directing the Secretary of State, the Secretary of Defense, the Secretary of Homeland Security, and the Attorney General, and requesting the President, to provide certain information to the House of Representatives relating to extraordinary rendition of certain foreign persons, having considered the same, reports unfavorably thereon without amendment and recommends that the resolution not be agreed to.

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## PURPOSE AND SUMMARY

House Resolution 593 requests the President and directs the Secretary of State, the Secretary of Defense, the Secretary of Homeland Security, and the Attorney General to transmit to the House of Representatives not later than 14 days after the date of the

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adoption of the resolution all documents and records in their possession relating to the rendition, transfer, or return to a foreign country of any foreign person who has been imprisoned, detained, or held for transfer to another country by, or has otherwise been in the custody of, a department, agency, or official of the United States Government, or any contractor of any such department or agency.

## BACKGROUND AND NEED FOR THE LEGISLATION

House Resolution 593 is a resolution of inquiry, which pursuant to Rule XIII, clause 7 of the Rules of the House of Representatives, directs the Committee to act on the resolution within 14 legislative days or a privileged motion to discharge the Committee is in order. H. Res. 593 was introduced and referred to the Committee on International Relations on December 8, 2005. The Committee held a markup session on February 8, 2006. The Committee ordered H. Res. 593 reported adversely on February 8, 2006.

Under the Rules and Precedents of the House, a resolution of inquiry is one of the methods used by the House to obtain information from the executive branch. According to Deschler's Procedure it is a "simple resolution making a direct request or demand of the President or the head of an executive department to furnish the House of Representatives with specific factual information in the possession of the executive branch." [1]

On December 8, 2005, Rep. Markey of Massachusetts introduced H. Res. 593. The resolution seeks all documents and records in the possession of the President, the Secretary of State, the Secretary of Defense, the Secretary of Homeland Security, and the Attorney General relating to the rendition, transfer, or return to a foreign country of any foreign person who has been imprisoned, detained, or held for transfer to another country by, or has otherwise been in the custody of, a department, agency, or official of the United States Government, or any contractor of any such department or agency.[2]

The Committee has now reported twelve resolutions of inquiry. In the debate surrounding these most recent resolutions, proponents have accused the United States Government of abusing detainees in its custody and of capturing suspected terrorists and delivering them to countries for the purpose of torture. The accusations come despite President Bush's repeated assurances that the United States does not believe in the use of torture. In January of 2005, the President told the American people that, "Torture is never acceptable, nor do we hand over people to countries that do torture." Secretary of State Condoleezza Rice has likewise stated, without qualification, that, "The United States has not transported anyone, and will not transport anyone to a country when we believe he will be tortured. Where appropriate, the United States seeks assurances that transferred persons will not be tortured."

Renditions are legal under U.S. and international law. U.S. regulations implementing Article 3 of the United Nations Convention against Torture permit the consideration of diplomatic assurances

[1] Deschler's Precedents, H. Doc. No. 94–661, 94th Cong., 2d Sess., vol. 7, ch. 24, section 8.
[2] H. Res. 593, 109th Cong. (December 8, 2005).

in removal/extradition decisions.[3] In its Second Periodic Report to the United Nations Committee against Torture, the United States reported that it: ". . . obtains assurances, as appropriate, from the foreign government to which a detainee is transferred that it will not torture the individual being transferred. If assurances [are] not considered sufficient when balanced against treatment concerns, the United States would not transfer the person to the control of that government unless the concerns are satisfactorily resolved."[4]

The United States Government has an obligation to protect its citizens. We have to work with our allies to find practical ways to defend ourselves against our enemies. Rendition is a legal way to hold these enemies accountable for their crimes. As Secretary Rice stated before departing for her recent trip to Europe, "[f]or decades, the United States and other countries have used 'rendition' to transport terrorist suspects from the country where they were captured to their home country or to other countries where they can be questioned, held, or brought to justice."[5]

To the extent Congressional oversight of the Executive's use of rendition is necessary, such oversight is inappropriate for the International Relations Committee because of the extreme sensitivity of the material at issue. Materials regarding rendition necessarily include operational techniques that can alert our enemies to our methods. The Supreme Court has cautioned against Congressional action that "interferes with the command of the forces and the conduct of [military] campaigns."[6] Both the Chairman of the House Permanent Select Committee on Intelligence, Rep. Hoekstra, and the Chairman of the House Armed Services Committee, Rep. Hunter, agreed that investigations into extraordinary rendition were within the jurisdiction of the Intelligence Committee.[7] Senator Rockefeller, the Vice-Chairman of the Senate Select Committee on Intelligence, in arguing for a review of rendition, stated, "[n]o other committee in Congress has the jurisdiction to review this issue."

Because rendition is an important and legal tool in the war on terror, and because its review is more appropriate for the Intelligence Committees, which are better-suited for investigating highly sensitive issues, the Committee voted to report House Resolution 593 adversely.

## HEARINGS

The Committee did not hold hearings on H. Res. 593.

## COMMITTEE CONSIDERATION

On February 8, 2006, the Full Committee marked up the resolution, H. Res. 593, pursuant to notice, in open session. The Committee agreed to a motion to report the resolution adversely to the House by a record vote of 24 ayes to 16 nays.

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[3] 8 C.F.R. § 208.16–18, 1208.16–18 (relating to removal of aliens); 22 C.F.R. § 95.2 (relating to extradition of persons).

[4] Second Periodic Report of the United States of America to the Committee against Torture, submitted May 6, 2005.

[5] Secretary of State Condoleezza Rice, *Remarks Upon Her Departure to Europe* (December 5, 2005).

[6] *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2, 139 (1836).

[7] 151 *Congressional Record* H 11859 (Dec 15, 2005).

## VOTES OF THE COMMITTEE

Clause (3)(b) of rule XIII of the Rules of the House of Representatives requires that the results of each record vote on an amendment or motion to report, together with the names of those voting for or against, be printed in the Committee report. The following record votes occurred during consideration of H. Res. 593:

*Vote to report to the House adversely:*

Voting yes: Hyde, Smith (NJ), Burton, Ros-Lehtinen, Rohrabacher, Royce, King, Chabot, Tancredo, Issa, Flake, Davis, Green, Weller, Pence, McCotter, Harris, Wilson, Boozman, Barrett, Mack, Fortenberry, McCaul, and Poe.

Voting no: Leach, Paul, Lantos, Faleomavaega, Sherman, Wexler, Engel, Delahunt, Crowley, Berkley, Napolitano, Schiff, Watson, Smith (WA), Chandler and Cardoza.

H. Res. 593 was ordered reported adversely to the House by a vote of 24 ayes to 16 noes.

## COMMITTEE OVERSIGHT FINDINGS

The Committee held no oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives.

## CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee finds the authority for this resolution in article I, section 1 of the Constitution.

## DISSENTING VIEWS

We are deeply disappointed with the majority's rejection of this resolution of inquiry relating to U.S. policy towards torture and cruel, inhumane and degrading treatment, particularly in the context of the rejection of two other related resolutions on the same day. We believe that in order to fulfill our constitutional responsibilities, this Committee and the Republican-controlled Congress more generally must immediately do more to investigate the issues presented by these resolutions.

The United States has been a leader in human rights throughout its history. President Woodrow Wilson countered colonialism by advocating self-determination. Eleanor Roosevelt led the fight to adopt the Universal Declaration of Human Rights in the 1940's, which was the first international instrument to prohibit torture and cruel, inhumane and degrading treatment. President's Truman and Kennedy put protecting freedom at the heart of U.S. foreign policy. President Carter renewed the focus of U.S. foreign policy on human rights and democracy. And President Ronald Reagan helped shepherd the Convention Against Torture and Cruel, Inhumane and Degrading Treatment.

With respect to our own institution, over the past 15 years, this House has been at the forefront of efforts to combat torture around the world. In 1992, Congress adopted a measure to create a private cause of action in U.S. courts against those who perpetrate torture. In 1994, this very committee adopted the implementing legislation for the Convention Against Torture, clearing the way for U.S. ratification of that critical treaty. And since 1998, our committee has adopted a number of measures to provide relief to victims of torture around the world. The Congressional attention to this matter is a legacy of which we should all be proud. It is based on our own shared values that torture and inhumane treatment is not acceptable anywhere, and should be stamped out wherever it exists.

It is therefore with dismay that we have learned of the abuses of individuals who have been detained by the U.S. Government, either at the hands of our military force who we believe have not been given the proper leadership or at the hands of agents of foreign governments to whom the United States has have turned over a number of individuals. These revelations, most graphically demonstrated in the images of the abuse at Abu Ghraib prison in Iraq which were seared into the minds of millions of people around the globe. Indeed, beyond the simple moral imperative to stop such abuses and the historic commitment of the United States to abide by its international obligations, the international reaction to the images at Abu Ghraib demonstrates to us that these events do not merely implicate the principles described above, but go to the core of our national security. For it is these graphic images that are used by our enemies in Al-Qaeda and its affiliates to generate

greater hostility against this country and recruit more terrorists to be used to attack us and our friends and allies.

It is against this backdrop that the three resolutions of inquiry have been filed, seeking in the absence of any comprehensive investigation by our Republican colleagues, information on the Administration's approach to interrogation of suspected terrorists and the treatment of detainees. Such an investigation is critical and long overdue to counter the notion that the United States does not care about these abuses. By launching a thorough investigation and tracing the evidence wherever it leads, we can help repair our damaged leadership in the area of human rights. We hope that these three resolutions will help contribute to a new momentum to launching such an investigation.

H. Res. 593, introduced by our colleague Representative Markey addresses the issue of the U.S. policies towards extraordinary rendition. "Rendition" is a term used in the international law enforcement community for the transfer of suspects from one country to another. Extradition, generally pursuant to treaty, is the formal mechanism for renditions, although occasionally removal or deportation of an alien without a formal extradition process is another lawful manner of rendition. Transfers are also effectuated through a process as "extraordinary rendition" or "irregular rendition," which involves the extrajudicial transfer of a person from one State to another.

Renditions are not new and have long been a tool for international law enforcement cooperation. However, this practice has come more into the public eye since September 11, 2001. According to press reports, the President has expanded the CIA's authority to conduct renditions, and some reports suggest that over 100 terrorism related renditions have occurred. These renditions of terrorist suspects have been surrounded by allegations of abuse by the receiving country, confusion as to what type of assurances regarding treatment have been obtained by the U.S. and allegations that the rendition occurred without the consent of the country from which the suspect was transferred. Examples of such cases include:

- A dual Canadian-Syrian citizen, Maher Arar, was allegedly rendered to Syria, where he was allegedly tortured and interrogated for suspected terrorist activities with the acquiescence of the United States. Canada has established a commission to review this episode and Arar has filed a suit in U.S. courts.
- U.S. intelligence operatives allegedly seized in Italy and rendered to Egypt an Islamic cleric, allegedly without the consent of the Italian Government. Italy has issued arrest warrants for thirteen persons allegedly involved in the case.
- Mamdouh Habib, an Egyptian-born Australian in American custody, was allegedly transported from Pakistan to Afghanistan to Egypt to Guantánamo Bay. Now back home in Australia, Habib alleges that he was tortured during his six months in Egypt with beatings and electric shocks, and hung from the walls by hooks.

The Administration has stated publicly that renditions have occurred but have denied all wrongdoing. For example, Attorney Gen-

eral Gonzales has been quoted as saying that the U.S. does not send any person "to countries where we believe or we know that they're going to be tortured". The CIA Director has said that "we have more oversight [over renditions] than we did before". Secretary of State Rice stated before her December trip to Europe that "the United States has not transported anyone, and will not transport anyone to a country where we believe he will be tortured. Where appropriate the United States seeks assurances that transferred persons will not be tortured."

However, there is little publicly available information from government sources regarding the nature and type of renditions, the type of assurances that have been obtained by the United States, and what type of monitoring there is of these assurances to ensure that these statements are validated by the facts. To date, we are not aware of any Congressional hearing that has taken place specifically on the subject of torture.

We note that Representative Markey, the sponsor of H. Res. 593, has introduced H.R. 952, the Torture Outsourcing Prevention Act of 2005, which would prohibit rendition to any country that commonly uses torture during detention and which was referred to the Committee on International Relations. The Committee has not considered nor held a hearing on the legislation, in that context we deeply regret the opposition of our Republican colleagues to Mr. Markey's resolution.

H. Res. 624, introduced by Mr. Ackerman, addresses the Administration's approach to the application of the Convention Against Torture and the Geneva Conventions and the role of the State Department in devising that approach.

The United States is obligated under the Convention Against Torture to ban not only torture but also cruel, inhumane and degrading treatment. In addition, under Common Article 3 of the Geneva Conventions, the United States has a duty to treat all prisoners of war or civilian detainees humanely. The application of these international treaty obligations, however, has been controversial. In early 2002, the President decided that the Geneva Conventions did not apply to detainees that the Administration determined to be "unlawful enemy combatants." In mid-2002, the Justice Department provided a memorandum to then White House Counsel Alberto Gonzales strictly limiting the application of the Convention Against Torture, a memorandum which was subsequently withdrawn after it became public. In 2003, a Defense Department working group established procedures based on this memorandum, which was subsequently overturned when it became public. And in 2005, Attorney General Gonzalez declared that the Convention Against Torture did not limit the United States actions outside the United States, which was immediately disputed by former Legal Adviser Abe Sofaer, who helped shepherd the treaty through the Senate in 1984.

The shifting interpretation of U.S. legal obligations under these various conventions as applied by the U.S. government led to confusion, with some military officers expressing their severe discomfort with the lack of standards as to what is considered "humane" under U.S. law. Many argue that this confusion contributed to a number of abuses by U.S. military and civilian forces since Sep-

tember 11th, 2001. In addition to the abuses that took place in Abu Ghraib in the Fall of 2003, according to several outside groups, there have been 87 documented deaths in U.S. custody. Allegations of abuse relating to misuse of the Koran to other inhumane practices have been widely reported in the press.

This changing mosaic of interpretation of key human rights obligations of the United States raises the question of how our Government reached its legal conclusions. Press reports suggest that lawyers in the Justice Department and the White House reached decisions about the application of the Geneva Conventions prior to consulting with the Department of State's legal office, the Office of the Legal Adviser, and only made modest changes after a formal objection was lodged by then Secretary of State Powell. The various memoranda prepared by the Justice Department and the Defense Department regarding treatment of detainees and the application of the Convention Against Torture were apparently done without any consultation whatsoever with the Office of the Legal Adviser.

If these allegations are accurate, this process represents a fundamental breakdown in government. The Office of the Legal Adviser is the foremost repository of U.S. Government expertise on international law. While the Justice Department has been given the formal responsibility of providing legal opinions on behalf of the U.S. Government, failure to consult with the State Department, perhaps because of fears as to what the Department would argue, is not a process which is designed to lead to a coherent and accurate conclusion on this matter. Indeed, not only has the Administration admitted that some of its own original legal theories were, at a minimum, overbroad, but these problems have caused significant friction with U.S. allies and the international community.

Although there have been numerous (although arguably incomplete, as will be discussed below) investigations into the actual abuses themselves, and there have been some hearings in the Senate where the issue of the overruling of Defense Department military and career lawyers has been discussed, we are not aware of any hearing regarding the failure of the White House and the Justice Department to have a full and formal vetting of controversial legal theories with the Department of State.

This is not an academic question. With the enactment of the McCain Amendment banning torture and cruel, inhumane and degrading treatment as part of the FY2006 Defense Authorization and Appropriations Acts, there remain a number of open questions regarding the application and implementation of these legal standards. Failure of the Administration to fully consult the agencies and offices that have the greatest expertise may well lead to future mistakes and problems in the implementation of this critical amendment.

H. Res. 642, introduced by Representative Lee, addresses the issues related to detainee treatment that arose prior to Secretary of State Rice's December trip to Europe. That trip, which had been billed as intending to turn a new page in the Translatlantic relationship instead centered on news reports from November 2005 which indicated that the United States had secret facilities in European countries, including using a Soviet-era compound in Eastern Europe, where "ghost detainees" who had not been reported to

the International Committee of the Red Cross were being detained and interrogated. These reports set off a fire storm of criticism on the eve of a Secretary Rice's trip, overshadowed her own agenda, and forced the United States to make new pronouncements regarding its detainee policy.

H. Res. 642 asks for information related to these announcements immediately before and during the trip. For example, prior to the trip, Attorney General Gonzales had stated that the Convention Against Torture does not obligate the U.S. Government outside the United States, a position that was the subject of strenuous objections by former U.S. officials. During the trip, Secretary Rice seemed to back track, suggesting that "as a matter of policy , the United States obligations under the CAT, which prohibits . . . cruel and inhumane and degrading treatment, those obligations extend to U.S. personnel wherever they are, whether they are in the United States or outside the United States." Whether this constitutes a change in legal position or a statement of policy remains unclear. Secretary Rice had a number of discussions with leaders of Western European countries that defused to some degree the tensions over the reports of secret detention facilities. However, both the Council of Europe and the European Parliament have ongoing investigations of European complicity with the U.S. practice of extraordinary renditions and the issue of the secret prisons, although a recent interim report of the Council of Europe did not find any "irrefutable evidence" of secret facilities. The breadth of these inquiries raises the question as to why the U.S. Congress is not pursuing its own investigation. Ms. Lee's resolution tries to start such an investigation.

The gaps in Congress' investigation of the torture issue presented by these resolutions of inquiry points to a lack of oversight and points to the problem of unity of government. In addition to issues relating to extraordinary rendition, secret facilities in Europe and broken government processes, many point to other gaps or questions in the Administration's own investigation of terrorism abuses:

- The Independent Commission headed by former Secretary of Defense Schlesinger that "there is both institutional and personal responsibility at higher levels," but there have been no prosecutions against senior officers for the abuses themselves.
- For example, Colonel Thomas Pappas, who commanded the military intelligence unit at Abu Ghraib, has not been prosecuted but was given a reprimand, paid a $4000 fee, and now has been given immunity for testifying against two dog handlers, and an officer under his command.
- Lieutenant General Randall Schmidt, who investigated allegations by the FBI of interrogation abuses at Guantanamo, recommended a reprimand of General Geoffrey Miller, who some have alleged recommended the use of dogs to intimidate detainees, but General Miller's commanding officer rejected this recommendation.
- And now, General Miller has invoked his right against self-incrimination.

- Moreover, the Independent Commission and one investigating officer, General Fay, also have stated that detainee treatment by other government agencies remains unclear.

We urge our Republican colleagues to support the establishment of an independent commission to investigate these abuses, as proposed by our colleague Representative Waxman and Senator Levin. By doing so we can prove to the world that we are serious about accountability for human rights violations and counter the damage to our national security done by them.

The questions presented by the three resolutions rejected by the Majority and the questions described above demand answers. Our failure to even ask these questions is a fundamental abdication of Congress' constitutional responsibility to conduct oversight of the Executive Branch. We urge our members to reconsider and schedule hearings in the near future.

TOM LANTOS.
HOWARD L. BERMAN.
GARY L. ACKERMAN.
ENI F. H. FALEOMAVAEGA.
DONALD M. PAYNE.
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ROBERT WEXLER.
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BEN CHANDLER.

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