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Extraordinary Rendition: The Price of Secrecy

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Extraordinary Rendition: The Price of Secrecy

Keywords

Secrecy, Rendition, Extradition, kidnappings, Prohibition on torture, Extraordinary Rendition Doctrine, Congressional Authority, European investigations, interrogation, Foreign relations

EXTRAORDINARY RENDITION: THE PRICE OF SECRECY

LOUIS FISHER*

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INTRODUCTION

Sweeping interpretations of presidential power and government secrecy after 9/11 bore fruit in the area of “extraordinary rendition.” Under this doctrine, the President claims to possess inherent authority to seize individuals and transfer them to other countries for interrogation and torture. In the past, Attorneys General and other legal commentators understood that: (1) Presidents needed congressional authority for these transfers and (2) the purpose was to bring the person *to trial*. Until recently, the Justice Department held that the President could not order someone extradited or rendered without authority granted by a treaty or statute. That view of the law changed radically after 9/11. The Bush Administration sent persons to other countries not to try them in open court but to interrogate and abuse them in secret. In lawsuits challenging this practice, the Bush Administration regularly invoked the state secrets privilege.¹

Part I of this Article identifies the legal principles that guide extradition, rendition, and kidnappings. Not until recent years did the Executive Branch ever claim independent authority to transfer suspects to another country without the support of a treaty or a statute, and in the infrequent cases where administrations did assert such authority it was for the purpose of bringing an individual to trial with associated judicial safeguards. Part II concentrates on extraordinary rendition, prohibitions on torture, precedents under the Clinton Administration, and changes after 9/11. Part III analyzes the legal arguments presented by the Bush Administration to justify extraordinary rendition, European investigations, and explanations offered by Secretary of State Condoleezza Rice. Part IV covers litigation on extraordinary rendition, including the trials of Maher Arar and Khaled El-Masri. Part V concludes by examining the standards that distinguish the Central Intelligence Agency’s (“CIA”) interrogations from those conducted pursuant to the Army Field Manual.

I. LEGAL PRINCIPLES

Rendition, used as a substitute for an extradition treaty, means surrendering someone to another jurisdiction for trial. The verb “render” is used in the sense of giving up or delivering up. *Black’s Law Dictionary* defines “rendition” this way: “The return of a fugitive from one state to the state where the fugitive is accused or convicted

1. See *infra* Part IV.

of a crime.”² Rendition, therefore, applies to a judicial process: someone accused of a crime or someone already convicted. It has no application to detainees or enemy combatants held indefinitely by executive officials with no plan to bring them before a federal judge for trial.³ Rendition often seems indistinguishable from the definition of extradition: “The official surrender of an alleged criminal by one state or nation to another having jurisdiction over the crime charged; the return of a fugitive from justice, regardless of consent, by the authorities where the fugitive is found.”⁴ Over time, rendition became associated with kidnappings and forcible abductions but still for the purpose of bringing someone to trial.⁵

A. Requiring a Statute or Treaty

For most of U.S. history, presidents had no independent or exclusive authority over extraditions and renditions. Congressional action was needed. In a letter to President George Washington in 1791, Secretary of State Thomas Jefferson discussed the legal principles that guided the delivery of fugitives from one country to another.⁶ First, he looked to other countries’ practices and noted that their renditions were done under treaties or conventions specifying “precisely the cases wherein such deliveries shall take place.”⁷ The United States, on the other hand, did not have similar treaties governing fugitives, “and no authority has been given to our Executives to deliver them up.”⁸ Congress needed to act, either by statute or treaty, to ensure that fugitives were not surrendered to “tyrannical laws.”⁹ The following year, in a letter to Charles Pinckney, Jefferson underscored the risks of giving up fugitives to a despotic government instead of to a free one.¹⁰ Even under relatively free

2. BLACK’S LAW DICTIONARY 1322 (8th ed. 2004).

3. *See id.* (describing the captured person as accused of a crime or convicted of a crime).

4. *Id.* at 623.

5. *See infra* Part I.C.

6. 22 THE PAPERS OF THOMAS JEFFERSON 266 (Charles T. Cullen ed., Princeton Univ. Press 1986) (1791).

7. *See id.* at 266 (looking to conventions between France and Spain, France and Sardinia, France and Germany, and others as examples of clearly articulated extradition).

8. *See id.* (commenting that England had become a hiding ground for both criminals and the innocent because it lacked extradition treaties and that the United States was similarly open to fugitives).

9. *See id.* at 267 (recommending conventions as a first step toward protecting against inappropriate renditions).

10. *See* 23 THE PAPERS OF THOMAS JEFFERSON 360 (Charles T. Cullen ed., Princeton Univ. Press 1990) (1792) (explaining that despots do not wish allow the opportunity for subjects to flee from the oppression of their laws).

governments, such as England's, Jefferson found the punishments so disproportionate to the crimes that the thought of rendition or extradition was repugnant.¹¹ In a paper prepared in 1792, he noted that in England "to steal a hare is death, the first offence."¹² In his view, all excess punishments were a crime.¹³ It followed that "to remit a fugitive to excessive punishment is to be *accessary* to the crime."¹⁴ Jefferson believed that in deciding to return someone to another country, the Legislative Branch had to decide the seriousness of the crime.¹⁵ Also, fugitives were entitled to judicial proceedings under Justices of the Supreme Court or district judges before surrender to their governments.¹⁶

In 1793, Jefferson responded to the request by the French Minister to the United States to have certain individuals handed over because they had committed crimes against France.¹⁷ Jefferson explained that the laws of the United States "take no notice of crimes committed out of their jurisdiction."¹⁸ The "most atrocious offender . . . is received . . . as an innocent man, and [the laws] have authorized no one to seize or deliver him."¹⁹ The consular convention with France included a provision for delivering up captains and crew members, but such actions required the review of the district judges of each state.²⁰ Alleged criminals "cannot be given up, and if they be the crew of a vessel, the act of Congress has not given authority to any one officer to send his process through all the States of the Union."²¹

Attorneys general repeatedly held that extradition and rendition require congressional action by statutes or treaties. In 1797, Attorney General Charles Lee advised the State Department about a dispute that had arisen with Spain.²² The Minister of Spain reported that his country's territorial rights had been violated by the actions of a Spanish subject who had taken refuge in Florida.²³ Lee conceded

11. See 1 AMERICAN STATE PAPERS: FOREIGN RELATIONS 258 (Washington D.C., Gales and Seaton 1833) (warning that crimes against property were particularly susceptible to disproportionate punishment).

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* See also his draft of a convention with Spain, *id.* at 257 (detailing the role of the U.S. judiciary in examining the evidence against a fugitive before approving extradition).

17. *Id.* at 177.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. 1 Op. Att'y Gen. 68 (1797).

23. *Id.* at 68-69.

that it would be an offense against the law of nations for any person within the United States “to go into the territory of Spain with intent to recover their property by their own strength, or in any other manner than its laws authorize and permit.”²⁴ But the Constitution gave to the Legislative Branch, “in express words, the power of passing a law for punishing a violation of territorial rights.”²⁵ No law covered the particular dispute with Spain.²⁶ To resolve the matter, Congress had to act. The President had no independent or unilateral powers to transfer the offenders to Spain.²⁷

In 1821, Attorney General William Wirt prepared a lengthy analysis on the President’s authority to deliver to another country subjects of that nation charged with offenses.²⁸ Could the President act under his interpretation of the law of nations? After exploring the major treatises on international law, Wirt concluded that the “duty to deliver up criminals is so vague and uncertain as to the offences on which it rests”²⁹ that nations decided to enter into treaties to identify the particular crimes that would trigger extradition.³⁰ Without specific authority granted by the legislative branch, either by treaty or statute, “the President has no power to make the delivery.”³¹

Attorney General Roger Taney followed similar reasoning in 1833. Portugal wanted two seamen, confined in Boston, turned over to face charges of piracy.³² Taney said that no law of Congress authorized the President to deliver up anyone found in the United States charged with having committed a crime against a foreign nation, nor was there any treaty stipulation with Portugal for the delivery of offenders.³³ Congress had decided, by an act of March 3, 1819, that it was the duty of government to bring individuals charged with piracy to trial in the circuit court for the district into which they were brought or where they were found.³⁴ It was not “in the power of the President to send them to any other tribunal, domestic or foreign,

24. *Id.*

25. *Id.* at 69.

26. *Id.*

27. *See id.* at 69–70 (arguing that while failing to comply with an extradition request could harm diplomatic relations, current laws did not provide for such a process).

28. 1 Op. Att’y Gen. 509 (1821).

29. *Id.* at 519.

30. *Id.* at 519–20.

31. *Id.* at 521.

32. 2 Op. Att’y Gen. 559 (1833).

33. *Id.*

34. *Id.*

upon the ground that evidence to convict them can more conveniently be obtained there.”³⁵

In 1841, Attorney General Hugh Legaré examined whether states could enter into “any agreement or compact, express or implied” to send “fugitives from justice” back to a requesting foreign country.³⁶ They could not do so, he said, without the consent of Congress.³⁷ Moreover, executive department practice indicated that “the President is not considered as authorized, in the absence of any express provision by treaty, to order the delivering up of fugitives from justice.”³⁸ It was, therefore, best “to refer the whole matter to Congress.”³⁹ Legaré found that these executive power policies set by Jefferson “and sanctioned after the lapse of upwards of thirty years” were now “too solemnly settled” to disregard.⁴⁰ In 1853, Attorney General Caleb Cushing endorsed Legaré’s opinion.⁴¹ Treaties stipulated that extradition must be preceded by judges and magistrates hearing evidence of criminality and certifying the charge before the President may turn the individual over to another country.⁴²

35. *Id.*

36. See 3 Op. Att’y Gen. 661, 661 (1841) (opining on a request by the Governor General of Canada to the Governor of New York to return a person who fled to that state).

37. *Id.*

38. *Id.* at 661.

39. *Id.* at 662.

40. *Id.* For another example of an Attorney General opinion deciding, on the basis of a treaty and congressional statutes, that the President is authorized to send a fugitive from the United States to England *for trial*, see 4 Op. Att’y Gen. 201 (1843).

41. See 6 Op. Att’y Gen. 85, 86 (1853) (arguing that because it was “settled politic doctrine of the United States” that states should not render fugitives to other countries without an express agreement in place, and larceny was not included in any U.S.-British treaty, the United States should not ask Great Britain to return a larceny suspect to New York). In other opinions, Attorney General Cushing recognized that the President was restricted by treaty language and judicial decisions in cases of extradition. See, e.g., 6 Op. Att’y Gen. 431 (1854) (advising against requesting Great Britain to render a larceny suspect because larceny was not included in any treaties between the United States and Britain); 6 Op. Att’y Gen. 91, 95–96 (1853) (explaining that while the President may issue a mandate to begin extradition proceedings, only the courts may examine the evidence to determine whether the extradition is warranted, and the President may not order the extradition without certification by a magistrate); 6 Op. Att’y Gen. 217 (1853) (finding that under a treaty between the United States and Prussia, as well as under U.S. law, extradition could not be certified without evidence providing “reasonable cause” to believe the allegations were true). Attorney General Taney voiced similar sentiments in an 1831 opinion. See 2 Op. Att’y Gen. 452 (1831) (stating that the absence of an extradition treaty precluded the President from rendering a person found in possession of stolen diamonds).

42. E.g., Treaty to Settle and Define the Boundaries Between the Territories of the United States and the Possessions of Her Britannic Majesty in North America; for the Final Suppression of the African Slave Trade; and for the Giving up of Criminals, Fugitives from Justice, in Certain Cases, U.S.-Gr. Brit., art. X, Aug. 9, 1842, 8 Stat. 576

Administrations that did depart from those principles paid a political price. During the Civil War, President Lincoln ordered the seizure of a Spanish subject (Jose Arguelles) and his return to Cuba for trial.⁴³ No extradition treaty existed.⁴⁴ Lincoln was rebuked in some quarters for exercising an “absolute despotism.”⁴⁵ The Senate and the House requested that the Lincoln Administration explain what authority had permitted the President to deliver Arguelles to Spain.⁴⁶ Secretary of State William H. Seward defended Lincoln’s action under “the law of nations,”⁴⁷ but Article I of the Constitution clearly gives that power to Congress.⁴⁸ New York proceeded to indict for kidnapping the U.S. Marshal and the four deputies who had seized Arguelles.⁴⁹ Although the prosecution went no further, the damage done to Lincoln and presidential power was substantial.⁵⁰ Arguelles was convicted, fined, and sentenced to nineteen years “at the chain.”⁵¹

The President’s dependence on treaties and statutes to transfer someone to another country was well established throughout most of America’s history. The Supreme Court in 1936 spoke unanimously

(specifying that evidence be weighed under local law during the extradition certification hearing).

43. William G. Weaver & Robert M. Pallitto, *The Law: “Extraordinary Rendition” and Presidential Fiat*, 36 PRESIDENTIAL STUD. Q. 102, 106 (2006).

44. *Id.*

45. *Id.*

46. See CONG. GLOBE, 38th Cong., 1st Sess. 2484, 2545 (1864) (adopting a resolution asking the President to inform them “under what authority of law or treaty” he had allowed the rendition); H.R. EXEC. DOC. NO. 38-1, at 35–37 (1865) (calling for a “full and careful examination” of whether the President had the authority to send Arguelles back to Spain).

47. S. EXEC. DOC. NO. 38-48, at 2 (1864). For a more thorough analysis by Secretary Seward, see his June 24, 1864 letter to Rep. James F. Wilson, Chairman of the House Judiciary Committee, H.R. EXEC. DOC. NO. 38-1, at 35–56 (1865).

48. See U.S. CONST. art. I (assigning Congress the power to “define and punish . . . offenses against the law of nations”).

49. Weaver & Pallitto, *supra* note 43, at 107 (recounting that the United States invoked a wartime statute providing that an order by the President could serve as a defense to prosecution in any court).

50. See *id.* at 107–08 (describing the conflict between state and federal authorities over the issue and the “substantial political and legal risk” that such unilateral executive action brought); see also EDWARD MCPHERSON, *THE POLITICAL HISTORY OF THE UNITED STATES OF AMERICA DURING THE GREAT REBELLION* 355 (Washington D.C., Philp & Solomons 1864) (documenting a House resolution that Lincoln’s action was “a violation of the Constitution of the United States and of the law of nations, and in derogation of the right of asylum”); CHRISTOPHER H. PYLE, *EXTRADITION, POLITICS, AND HUMAN RIGHTS* 102–03 (Temple Univ. Press 2001) (recalling the public outcry over the decision to send Arguelles back to Cuba); HENRY J. RAYMOND, *THE LIFE AND PUBLIC SERVICES OF ABRAHAM LINCOLN* 564–67 (New York, Derby & Miller 1865) (noting that Lincoln drew criticism for the Arguelles case not only from political opponents but also his supporters).

51. H.R. EXEC. DOC. NO. 38-1, at 86 (1865).

about the President's lack of authority to act independently and unilaterally in such matters:

It rests upon the fundamental consideration that the Constitution creates no executive prerogative to dispose of the liberty of the individual. Proceedings against him must be authorized by law. There is no executive discretion to surrender him to a foreign government, unless that discretion is granted by law. It necessarily follows that as the legal authority does not exist save as it is given by act of Congress or by the terms of a treaty, it is not enough that statute or treaty does not deny the power to surrender. It must be found that statute or treaty confers the power.⁵²

In 1979, the Office of Legal Counsel ("OLC") reviewed the President's power to transfer someone in U.S. custody to another country.⁵³ The legal analysis was prompted by the revolution in Iran, the presence of the deposed Shah in the United States, and the call for his return.⁵⁴ Finding no treaty authority to deport or render him,⁵⁵ the Justice Department looked to statutory authority and found that it could transfer the Shah to another country but not to Iran.⁵⁶ The statute prevented the government from forcing someone to return to a country where he would be subject to political persecution, as would have been the case with the Shah.⁵⁷ The legal rule was plain: "The President cannot order any person extradited unless a treaty or statute authorizes him to do so."⁵⁸

B. *Prisoners of War*

In a 2004 article, John Yoo broadly defended the President's authority to transfer suspected terrorists to other countries.⁵⁹ He said that the authority is derived from the President's powers under Article II, especially the Commander-in-Chief Clause.⁶⁰ In his search for historical examples, however, Yoo could cite to only a statute that granted the President authority to return French citizens to France in

52. *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 9 (1936).

53. 4A Op. Off. Legal Counsel 149 (1980).

54. *Id.*

55. *See id.* (noting the absence of any extradition treaty between the United States and Iran).

56. *See id.* at 150–52 (finding deportation permissible under the Immigration and Nationality Act because the Shah's presence in the United States could be prejudicial to the public interest but his deportation to Iran could impermissibly place him at risk of political persecution).

57. *See id.* at 151–52 (referring to § 243(h) of the Immigration and Nationality Act).

58. *Id.* at 149.

59. John Yoo, *Transferring Terrorists*, 79 NOTRE DAME L. REV. 1183 (2004).

60. *Id.* at 1184, 1192–1205.

the 1790s⁶¹ and statutes authorizing retaliation against prisoners of war during the War of 1812.⁶² Transfers of prisoners of war to other countries sometimes put them to work on construction projects but did not subject them to interrogation and torture.⁶³

According to Yoo, the President may “dispose of the liberty of captured enemy personnel as he sees fit,”⁶⁴ relying on Article II powers. At the same time, Yoo states that the President is “subject to certain constraints,” including treaties and international law.⁶⁵ However, those constraints may not exist if, as Yoo argues, “statutes and treaties must be interpreted so as to protect the President’s constitutional powers from impermissible encroachment and thereby to avoid any potential constitutional problems.”⁶⁶ In short, presidential power will trump conflicting statutes and treaties. On the other hand, presidential power to transfer military detainees abroad for torture is “significantly constrained” by domestic law that applies criminal penalties to conspiracy to commit torture outside the United States.⁶⁷ But law enforcement is within the President’s power, and he may decide to tell the Attorney General not to prosecute offenders.

For Yoo, the “rule of law” has two meanings. Once the threshold of war is crossed, the new condition “changes the law’s form and substance.”⁶⁸ Matters are then “governed by the laws of war.”⁶⁹ In other words, law before the war (treaties and statutes) becomes subordinate to executive-made “laws of war.” Yoo concludes, “[t]his is not to say that these transfers [of suspects] are wholly ungoverned by law. It is only to make clear that these transfers are governed by a different set of rules—the laws of war—than those that apply in domestic, peacetime affairs.”⁷⁰ This new set of rules depends on limitations developed wholly within the Executive Branch.

61. *Id.* at 1206.

62. *Id.* at 1211–12, 1221.

63. *Id.* at 1218 (reporting that the United States transferred prisoners of war to France, Belgium, and Luxembourg to work on public works projects during World War II).

64. *Id.* at 1222.

65. *Id.* at 1223.

66. *Id.* at 1230.

67. *Id.* at 1232.

68. *Id.* at 1235.

69. *Id.*

70. *Id.*

C. Kidnappings

Both before and after the 1980 OLC opinion, governments kidnapped and forcibly abducted individuals without treaty or statutory authority in order to bring them to trial.⁷¹ One scholar remarked on the strangeness of this practice: "It is a crime for private persons to receive stolen goods, but it is lawful for American courts to receive stolen people."⁷² Courts did not officially sanction kidnapping or illegal abductions, but they tolerated them under what is gently called the "rule of noninquiry."⁷³ How someone was brought to court did not matter. Forcible abduction was first sanctioned by the Supreme Court in 1886, allowing the conviction of a man improperly transferred from Peru to the United States.⁷⁴ It was reaffirmed in 1952 to bring a defendant from Illinois to Michigan.⁷⁵

Known as the *Ker-Frisbie* doctrine, these two cases announced that the government's power to prosecute someone "is not impaired by the illegality of the method by which it acquires control over him."⁷⁶ Jurisdiction obtained through "an indisputably illegal act" could be held by courts even though it rewarded "police brutality and lawlessness."⁷⁷ The continued vitality of *Ker-Frisbie*, however, seemed undercut by the due process cases in the 1950s and 1960s⁷⁸ with the Supreme Court objecting to government practices that "shock[] the conscience."⁷⁹ Some courts looked to guidance from Justice Brandeis's 1928 dissenting opinion in *Olmstead v. United States*,⁸⁰ when he warned that crime is contagious: "If the government becomes a lawbreaker, it breeds contempt for the law."⁸¹

In 1974, the United States Court of Appeals for the Second Circuit concluded that the *Ker-Frisbie* doctrine could not be "reconciled with

71. Michael H. Cardozo, Note and Comment, *When Extradition Fails, Is Abduction the Solution?*, 55 AM. J. INT'L L. 127 (1961); see also D. Cameron Findlay, *Abducting Terrorists Overseas for Trial in the United States: Issues of International and Domestic Law*, 23 TEX. INT'L L.J. 1 (1988); G. Gregory Schuetz, Comment, *Apprehending Terrorists Overseas Under United States and International Law: A Case Study of the Fawaz Younis Arrest*, 29 HARV. INT'L L.J. 499 (1988).

72. PYLE, *supra* note 50, at 263.

73. *Id.* at 6, 263-99.

74. *Ker v. Illinois*, 119 U.S. 436, 444-45 (1886) (acknowledging that the kidnapped defendant or Peru could seek redress for the forcible seizure while affirming the defendant's conviction).

75. See *Frisbie v. Collins*, 342 U.S. 519, 522-23 (1952) (holding that due process could be satisfied by a fair trial even if the respondent was brought to court in violation of the Federal Kidnapping Act).

76. *United States v. Toscanino*, 500 F.2d 267, 271 (2d Cir. 1974).

77. *Id.* at 272.

78. *Id.* at 272-75.

79. *Id.* at 273 (citing *Rochin v. California*, 342 U.S. 165, 172-73 (1952)).

80. 277 U.S. 438 (1928).

81. *Toscanino*, 500 F.2d at 274 (citing 277 U.S. 438, 484-85 (1928)).

the Supreme Court's expansion of the concept of due process" and that a court must reject jurisdiction when a defendant is brought before it through "the government's deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights."⁸² The circumstances of the case before the Second Circuit included allegations that the defendant was kidnapped in Uruguay, brought to Brazil for interrogation and torture, drugged by Brazilian-American agents, and placed on a Pan American Airways flight to the United States, where he was taken into custody by an Assistant U.S. Attorney.⁸³ Upon remand, a district court decided (without an evidentiary hearing) that the defendant had failed to show that U.S. officials participated in the abduction or torture.⁸⁴

This type of abduction, however repugnant, was for the purpose of *bringing someone to trial*. Other cases could be cited, such as Israeli agents kidnapping Adolf Eichmann from Argentina in 1960 and bringing him to Israel to be tried.⁸⁵ Because there was no extradition treaty between Israel and Argentina, the U.N. Security Council asked Israel to pay reparations to Argentina, and Israel complied.⁸⁶ Throughout the 1980s, the United States began to forcibly abduct alleged terrorists and drug lords in other countries and bring them to trial. In 1986, President Reagan authorized the CIA to kidnap criminal suspects.⁸⁷ As part of the U.S. intervention in Panama in December 1989, U.S. troops captured Antonio Noriega and brought him to trial in the United States.⁸⁸ President George H. W. Bush directed that Noriega be "turned over to civil law enforcement officials of the United States."⁸⁹ In 1992, the Supreme Court held that the government may kidnap people from foreign countries to try them in the United States.⁹⁰ The decision provoked the charge from domestic critics and foreign countries that U.S. presidents could act in defiance of international law, an impression the George H.W. Bush

82. *Id.* at 275.

83. *Id.* at 269–70.

84. *United States v. Toscanino*, 398 F. Supp. 916, 917 (E.D.N.Y. 1975) (basing its decision on an eleven page affidavit submitted by the defendant).

85. *PYLE*, *supra* note 50, at 272–73.

86. *Id.*

87. *Id.* at 275.

88. *Id.* at 277–78.

89. Memorandum Directing the Apprehension of General Manuel Noriega and Others in Panama Indicted in the United States for Drug-Related Offenses, 25 WEEKLY COMP. PRES. DOC. 1976 (Dec. 25, 1989).

90. *United States v. Alvarez-Machain*, 504 U.S. 655 (1992).

and Clinton Administrations attempted to dispel through various initiatives.⁹¹

II. ADDING AN ADJECTIVE

Putting “extraordinary” in front of rendition changes the meaning fundamentally. A process formerly bound by statutory and treaty law—reinforced by procedural safeguards in court—now entered the realm of independent and arbitrary executive law. Checks and balances disappeared. Presidents claimed the right not only to act in the absence of statutory or treaty authority but even in violation of it. After 9/11, officials in the Bush Administration defended the need to detain and interrogate suspected terrorists outside the country.⁹² In that sense, extraordinary rendition has parallels to putting detainees in the U.S. military prison at Guantánamo Bay, an effort to place them beyond the reach of judicial supervision and review.⁹³ Rendition operates within the rule of law; extraordinary rendition falls outside. Rendition brings suspects to federal or state court; extraordinary rendition does not. The harsh and aggressive methods used in extraordinary rendition would undermine potential prosecutions because a court would exclude confessions or evidence that had been illegally coerced.⁹⁴

A. *Prohibitions on Torture*

In a series of statutes, the United States condemned torture and specifically prohibited the transfer of anyone to a country that practiced torture. In 1992, Congress passed the Torture Victim Protection Act.⁹⁵ The Act establishes a civil action to recover damages from an individual who engages in torture or extrajudicial killing.⁹⁶ Anyone who, “under actual or apparent authority, or color of law, of

91. LOUIS FISHER & DAVID GRAY ADLER, AMERICAN CONSTITUTIONAL LAW 711 (7th ed. 2007) (recounting the White House press release on the day of the decision, congressional hearings on the abduction of foreign nationals, and negotiations between the United States and Mexico regarding cross-border abductions).

92. See *infra* Part III (detailing the Bush Administration’s defenses of its practice of extraordinary rendition).

93. See *infra* Part II.C (discussing changes to CIA practices after 9/11); see also *infra* notes 128–137 (describing some of the CIA operations that became public after 9/11).

94. See *infra* Part II.A (defining torture); see, e.g., Dana Priest, *Wrongful Imprisonment: Anatomy of a CIA Mistake*, WASH. POST, Dec. 4, 2005, at A1 [hereinafter Priest, *Wrongful Imprisonment*] (describing the standard procedure of the Rendition Group of the CIA’s Counterterrorism Center as involving blindfolding and cutting of the clothes of captives before administering an enema and sleeping pills and then travel to a cooperative detention facility or to a covert CIA prison).

95. Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350).

96. *Id.* § 2.

any foreign nation,” subjects someone to torture shall be liable for damages to that individual.⁹⁷ The statute applied to torture committed by someone from a foreign nation.⁹⁸

In 1998, as part of the Foreign Affairs Reform and Restructuring Act, Congress stated:

It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.⁹⁹

The statute directed federal agencies to implement the obligations of the United States under Article 3 of the United Nations Convention Against Torture (“CAT”).¹⁰⁰ Regulations provide that if there is a decision to remove an alien to another country where torture is possible, an immigration judge must determine whether torture is more likely than not to occur.¹⁰¹

In 1998, Congress passed the Torture Victims Relief Act.¹⁰² The first finding states: “The American people abhor torture by any government or person. The existence of torture creates a climate of fear and international insecurity that affects all people.”¹⁰³ The second finding says: “Torture is the deliberate mental and physical damage caused by governments to individuals to destroy individual personality and terrorize society. The effects of torture are long term. Those effects can last a lifetime for the survivors and affect future generations.”¹⁰⁴ The third finding explains that torture is often used “as a weapon against democracy.”¹⁰⁵ Part of the statute authorizes funds to “use the voice and vote of the United States to support the work of the Special Rapporteur on Torture and the Committee Against Torture established under the [CAT].”¹⁰⁶ Article 3 of the CAT provides: “No 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

97. *Id.*

98. *Id.*

99. Pub. L. No. 105-277, § 2242(a), 112 Stat. 2681-761, 822 (1998) (codified at 8 U.S.C. § 1231).

100. *Id.* § 2242(b).

101. 8 C.F.R. § 208.16(c)(4) (2008).

102. Pub. L. No. 105-320, 112 Stat. 3016 (1998) (codified at 22 U.S.C. § 2152).

103. *Id.* § 2(1).

104. *Id.* § 2(2).

105. *Id.* § 2(3).

106. *Id.* § 6(c)(2).

subjected to torture.”¹⁰⁷ The Reagan Administration and the Senate added this qualification: “[T]he United States understands the phrase, ‘where there are substantial grounds for believing that he would be in danger of being subjected to torture,’ as used in Article 3 of the Convention, to mean ‘if it is more likely than not that he would be tortured.’”¹⁰⁸ Even that looser definition would cover renditions to such countries as Egypt and Syria.

B. Renditions Under Clinton

On June 21, 1995, President Clinton signed Presidential Decision Directive (“PDD”) 39, setting forth the U.S. policy on counterterrorism.¹⁰⁹ PPD 39 authorized the Secretary of State and the Attorney General to “use all legal means available to exclude from the United States persons who pose a terrorist threat and deport or otherwise remove from the United States any such aliens.”¹¹⁰

On September 3, 1998, Federal Bureau of Investigation (“FBI”) Director Louis J. Freeh advised the Senate Judiciary Committee about the use of force to abduct suspects *to bring them to trial*.¹¹¹ The rendition process was controlled by PDD 77, “which sets explicit requirements for initiating this method for returning terrorists to stand trial in the United States.”¹¹² He said that over the past decade the United States had “successfully returned 13 suspected international terrorists to stand trial in the United States for acts or planned acts of terrorism against U.S. citizens.”¹¹³ Under this procedure, whatever force was used in making the arrests should not have compromised evidence needed for trial.

During hearings on February 2, 2000, before the Senate Intelligence Committee, CIA Director George Tenet described the rendition program: “Since July 1998, working with foreign

107. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, G.A. Res. 39/46, Annex, U.N. Doc. A/Res/39/46/Annex (Dec. 10, 1984).

108. See S. TREATY DOC. NO. 100-20, at 6 (1988) (transmitting a message from President Reagan to the Senate recommending specific reservations to the CAT); S. REP. NO. 101-30, 1 (1990) (requesting advice and consent from the Senate to those reservations).

109. Presidential Decision Directive 39: U.S. Policy on Counterterrorism (June 21, 1995), available at <http://www.fas.or/irp/offdocs.pdd39.htm>.

110. *Id.* at 2. The PDD included procedures for apprehending and returning indicted terrorists to the United States for prosecution. *Id.* at 5.

111. *U.S. Counter-Terrorism Policy: Hearing Before the S. Comm. on the Judiciary*, 105th Cong. 33 (1998) (statement of Louis J. Freeh, Director, Federal Bureau of Investigation).

112. *Id.* at 36.

113. *Id.*

governments worldwide, we have helped to render more than two dozen terrorists to justice. More than half were associates of Osama Bin Ladin's Al-Qaida organization."¹¹⁴ Bringing suspects "to justice" implies delivering them for trial, but the phrase is somewhat vague and Tenet did not say that all the suspects were brought to the United States. Paul Pillar, deputy chief of the CIA's Counterterrorist Center, interpreted Tenet's testimony to mean that some of the two dozen suspects were brought to the United States to stand trial, but "most were delivered to other countries where they were wanted for their crimes."¹¹⁵ Does "wanted for crimes" mean being turned over to the judicial system or, instead, for interrogation and torture? If the latter, it is the first step toward extraordinary rendition. Turning suspects over to another country, like Egypt, means losing control over how the person is treated.

At a congressional hearing on April 17, 2007, Michael Scheuer described his duties during the Clinton Administration as supervising the abduction of suspected terrorists.¹¹⁶ He testified that the CIA's rendition program began in late summer 1995: "I authored it and then ran and managed it against al-Qaeda leaders and other Sunni Islamists from August, 1995, until June, 1999."¹¹⁷ The purpose was "to take men off the street who were planning or had been involved in attacks on the United States or its allies"¹¹⁸ and "to seize hard copy or electronic documents in their possession when arrested."¹¹⁹ However, "interrogation was never a goal under President Clinton."¹²⁰ The men captured were not to be brought to the United States or held in U.S. custody.¹²¹ The CIA was "to take each captured al-Qaeda leader to the country which had an outstanding legal process for him."¹²² If the country had not filed charges against the individual, abduction was

114. *Current and Projected National Security Threats to the United States: Hearing Before the S. Select Comm. on Intelligence*, 106th Cong. 12 (2000) (statement of George J. Tenet, Director, Central Intelligence Agency).

115. PAUL R. PILLAR, *TERRORISM AND U.S. FOREIGN POLICY* 118 (2001).

116. *Extraordinary Rendition in U.S. Counterterrorism Policy: The Impact on Transatlantic Relations: J. Hearing Before Subcomm. on International Organizations, Human Rights, and Oversight and the Subcomm. on Europe of the H. Comm. on Foreign Affairs*, 110th Cong. 12-41 (2007) (statement of Michael F. Scheuer, Former Chief, Bin Laden Unit, Central Intelligence Agency).

117. *Id.* at 12.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

not authorized.¹²³ “As a result, many al-Qaeda fighters we knew of and who were dangerous to America could not be captured.”¹²⁴

Scheuer testified that “no rendered al-Qaeda leader has ever been kidnapped by the United States. They have always first been either arrested or seized by a local security or intelligence service.”¹²⁵ The purpose of the Bush Administration was quite different: abduct suspected terrorists (with or without local help), interrogate them under CIA custody,¹²⁶ and transfer them to another country for additional interrogation and most likely torture.¹²⁷

C. Changes After 9/11

Abu Ghraib put the spotlight on the CIA. Agency officers conducted harsh, unsupervised interrogations at that prison and others.¹²⁸ Newspaper reports in September 2004 disclosed that the agency had hidden at least two dozen detainees from Red Cross inspectors.¹²⁹ The CIA moved these men, called “ghost detainees,” out of Iraqi prisons for interrogation at other undisclosed locations made inaccessible to the Red Cross.¹³⁰ Permission for these transfers came from a confidential OLC draft opinion that specialists in international law condemned as sanctioning violations of the Geneva Conventions.¹³¹ There should never have been any doubt about the prospects of torture. The U.S. State Department for years had condemned a number of countries for torturing and abusing detainees. Here is the department’s description of the practices followed by Egypt in 2003:

123. *See id.* (noting that this rule restricted the United State’s efforts at combating Al-Qaeda).

124. *Id.*

125. *Id.* at 18.

126. *See id.* at 12–13 (stating that after 9/11, operatives have most often remained in U.S. custody and been interrogated by U.S. officers).

127. 151 Cong. Rec. E282 (daily ed. Feb. 18, 2005) (statement by Rep. Edward J. Markey).

128. Douglas Jehl, *C.I.A. Cites Order on Supervised Interrogations*, N.Y. TIMES, Sept. 11, 2004, at A7.

129. *See, e.g., id.*

130. *Id.*

131. *See* Douglas Jehl, *U.S. Action Bars Rights of Some Captured in Iraq*, N.Y. TIMES, Oct. 26, 2004, at A1 (referencing the draft U.S. Department of Justice Office of Legal Counsel memorandum, dated March 19, 2004, available at http://www.washingtonpost.com/wp-srv/nation/documents/doj_memo031904.pdf); Dana Priest, *Memo Lets CIA Take Detainees Out of Iraq*, WASH. POST, Oct. 24, 2004, at A1 (describing critics as challenging the draft opinion—allowing the CIA to take Iraqis out of the country for brief periods and to permanently remove those deemed illegal aliens under local immigration law—for violating the basic rights of Article 49 of the Geneva Convention, which includes insurgents).

[Victims were] stripped and blindfolded; suspended from a ceiling or doorframe with feet just touching the floor; beaten with fists, whips, metal rods, or other objects; subjected to electrical shocks; and doused with cold water. Victims frequently reported being subjected to threats and forced to sign blank papers for use against the victim or the victim's family in the future should the victim complain of abuse. Some victims, including male and female detainees and children reported that they were sexually assaulted or threatened with rape themselves or family members.¹³²

Beginning in December 2004, Dana Priest of the *Washington Post* wrote a series of articles describing how the CIA transported suspected terrorists to undisclosed locations for abusive interrogations beyond the reach of federal courts.¹³³ The agency used a Gulfstream V turbojet, often seen "at military airports from Pakistan to Indonesia to Jordan."¹³⁴ At times, the suspects could be seen hooded and handcuffed before being boarded.¹³⁵ The CIA called the activity "rendition," but it was not an operation to bring suspects to trial.¹³⁶ Human rights organizations objected that the CIA's purpose was to transfer captives to countries that used brutal interrogation methods outlawed in the United States and in violation of the Convention on Torture.¹³⁷

Other news reports claimed that the CIA conducted its program under a classified directive signed by President Bush shortly after 9/11, allowing the agency to transport suspects without receiving case-by-case approval from the White House, the State Department, or the Justice Department.¹³⁸ Former detainees, subjected to these transfers, described what they called "brutal" interrogation techniques.¹³⁹ The Bush Administration, declining to confirm or deny the CIA program, insisted that it did not hand over people to face torture.¹⁴⁰ Former government officials estimated that the

132. 2 DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2003 1826-27 (2004).

133. See, e.g., Priest, *Memo Lets CIA Take Detainees Out of Iraq*, *supra* note 131, at A1; Dana Priest, *Jet Is an Open Secret in Terror War*, WASH. POST, Dec. 27, 2004, at A1 [hereinafter Priest, *Jet Is an Open Secret*].

134. Priest, *Jet Is an Open Secret*, *supra* note 133.

135. *Id.*

136. *Id.*

137. *Id.* See generally STEPHEN GREY, GHOST PLANE: THE TRUE STORY OF THE CIA TORTURE PROGRAM (2006); TREVOR PAGLEN & A. C. THOMPSON, TORTURE TAXI: ON THE TRAIL OF THE CIA'S RENDITION FLIGHTS (2006); Jane Mayer, *Outsourcing Torture: The Secret History of America's "Extraordinary Rendition" Program*, NEW YORKER, Feb. 14, 2005, at 106-23.

138. See, e.g., Douglas Jehl & David Johnston, *Rule Change Lets C.I.A. Freely Send Suspects Abroad*, N.Y. TIMES, Mar. 6, 2005, at A1.

139. *Id.*

140. *Id.*

agency had flown “from 100 to 150 suspected terrorists” to interrogation sites.¹⁴¹ The countries receiving suspects—Egypt, Syria, Saudi Arabia, Jordan, and Pakistan—were identified by the State Department as habitually using torture.¹⁴² According to an Administration spokesman, the CIA followed guidelines that required the receiving country to assure that prisoners would be treated humanely and that U.S. personnel would monitor compliance.¹⁴³ CIA Director Porter Goss acknowledged that the United States had a limited capacity to enforce these promises: “once they’re out of our control, there’s only so much we can do.”¹⁴⁴ Former prisoners subjected to CIA transfers said they had been beaten, shackled, humiliated, subjected to electric shocks, and survived other abusive treatments.¹⁴⁵ Those eventually released include Maher Arar and Khaled El-Masri,¹⁴⁶ discussed later in this Article.

III. ADMINISTRATION DEFENSES

In October 2004, James L. Pavitt, the recently retired director of CIA operations worldwide, claimed that the policy of extraordinary rendition had been “carefully vetted and approved by the National Security Council and disclosed to the appropriate congressional oversight committees.”¹⁴⁷ Briefings and consultation with lawmakers do not make an illegal program legal. Pavitt spoke after the Justice Department, “at the CIA’s request, drafted a confidential memo in March [2004] authorizing the agency to transfer detainees out of Iraq for interrogation.”¹⁴⁸ The memo concluded that the Geneva Conventions allowed the CIA to take Iraqis and non-Iraqis out of the country for questioning.¹⁴⁹ Experts in international law rejected that reading of Geneva.¹⁵⁰

On March 7, 2005, Attorney General Gonzales defended the practice of what was now called “extraordinary rendition.”¹⁵¹ Although U.S. officials, meeting in private with reporters, referred to

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *See id.* (detailing the accounts of ill-treatment inflicted on various detainees).

146. *Id.*

147. Dana Priest, *Ex-CIA Official Defends Detention Policies*, WASH. POST, Oct. 27, 2004, at A21.

148. *Id.*

149. *Id.*

150. *Id.*

151. R. Jeffrey Smith, *Gonzales Defends Transfer of Detainees*, WASH. POST, Mar. 8, 2005, at A3.

the threat of CIA transfers as an effective method of obtaining intelligence from suspected terrorists, Gonzales said that U.S. policy was not to send detainees “to countries where we believe or we know that they’re going to be tortured.”¹⁵² For countries with a history of torture, the Bush Administration would seek assurances that such techniques would not be used against detainees transferred to those countries.¹⁵³ He conceded that the Administration “can’t fully control” what other nations do.¹⁵⁴ One CIA officer involved with renditions called the assurances given by other countries “a farce.”¹⁵⁵

A. *European Investigations*

In February 2003, an Egyptian cleric (Abu Omar or Hassan Mustafa Osama Nasr) was seized by the United States on a sidewalk in Milan and taken out of Italy.¹⁵⁶ Italian investigators, searching for his kidnappers, visited the Aviano Air Base in northern Italy and insisted on seeing records of any American planes that had flown into or out of the joint U.S.-Italian military facility around the time of the abduction.¹⁵⁷ They also sought the logs of vehicles that had entered the base.¹⁵⁸ Italian authorities suspected that Abu Omar was abducted as part of the CIA extraordinary rendition program.¹⁵⁹ Law enforcement authorities in other countries, including Germany and Sweden, also investigated whether U.S. agents had violated their sovereignty by seizing suspects and transferring them to other locations for abusive interrogations.¹⁶⁰

German prosecutors tried to determine who apprehended Khaled El-Masri, a German citizen vacationing in Macedonia.¹⁶¹ He was

152. *Id.*

153. *Id.*

154. *Id.*

155. See Dana Priest, *CIA’s Assurances on Transferred Suspects Doubted*, WASH. POST, Mar. 17, 2005, at A1 (quoting an anonymous CIA officer involved with renditions).

156. For further details on Abu Omar, see Margaret L. Satterthwaite, *Rendered Meaningless: Extraordinary Rendition and the Rule of Law*, 75 GEO. WASH. L. REV. 1333, 1340–42 (2007). See also the writings of Leila Nadya Sadat: *Ghost Prisoners and Black Sites: Extraordinary Rendition Under International Law*, 37 CASE W. RES. J. INT’L L. 309 (2006) and *Extraordinary Rendition, Torture, and Other Nightmares from the War on Terror*, 75 GEO. WASH. L. REV. 1200 (2007) (examining the U.S. practice of extraordinary rendition—transferring detainees abroad for detention and interrogation—and concluding that rendition does not comply with either international human rights norms or the laws of war).

157. Craig Whitlock, *Europeans Investigate CIA Role in Abductions*, WASH. POST, Mar. 13, 2005, at A1.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

taken to an American prison in Afghanistan in January 2004.¹⁶² A parliamentary investigation in Sweden found that CIA agents wearing hoods had orchestrated the December 2001 abduction of two Egyptian nationals, transferring them to Egypt for interrogation and torture.¹⁶³ Swedish authorities admitted that they had invited the CIA to assist in the operation but vowed never again to let the agency take charge of such operations.¹⁶⁴ One police chief told reporters “[i]n the future we will use Swedish laws, Swedish measures of force and Swedish military aviation when deporting terrorists.”¹⁶⁵

News reports disclosed that the CIA had been interrogating suspects at secret facilities (“black sites”) in Eastern Europe.¹⁶⁶ Although the *Washington Post* knew the identities of two countries in Eastern Europe (later identified as Poland and Romania), it decided not to publish the names at the request of officials in the Bush Administration.¹⁶⁷ There was also a black site in Thailand.¹⁶⁸ Two al Qaeda operatives (Abu Zubaida and Ramsi Binalshibh) were kept there until Thai officials insisted that the facility be closed.¹⁶⁹ Without affirming the existence of the secret prisons in Eastern Europe, the CIA asked the Justice Department to open a criminal investigation to determine who leaked the highly classified information to the *Washington Post*.¹⁷⁰

In November 2005, several European governments opened investigations into the CIA planes that flew regularly over the continent to carry suspects to interrogation facilities.¹⁷¹ Officials in Spain, Sweden, Norway, and the European Parliament began formal inquiries and sought information from the United States about the CIA flights.¹⁷² Prosecutors in Italy filed a formal extradition request for twenty-two U.S. citizens alleged to be CIA operatives, charged with

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*; see also Craig Whitlock, *New Swedish Documents Illuminate CIA Action*, WASH. POST, May 21, 2005, at A1 (detailing a Swedish parliamentary probe that revealed “degrading and inhumane” rendition practices by CIA operatives on Swedish soil).

166. See, e.g., Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005, at A1.

167. See *id.* (referring only to “black sites” in “several democracies in Eastern Europe”).

168. *Id.*

169. *Id.*

170. David Johnston & Carl Hulse, *C.I.A. Asks for Criminal Inquiry Over Secret-Prison Article*, N.Y. TIMES, Nov. 9, 2005, at A18.

171. Craig Whitlock, *Europeans Probe Secret CIA Flights*, WASH. POST, Nov. 17, 2005, at A22.

172. *Id.*

abducting Abu Omar.¹⁷³ A German prosecutor opened a criminal investigation into that same abduction to determine whether the CIA broke German law by bringing him first to Ramstein Air Base before flying him to Cairo.¹⁷⁴ Another German prosecutor began a criminal investigation involving the seizure of El-Masri in Macedonia.¹⁷⁵ Ireland and Denmark objected to the presence of CIA-operated aircraft in their countries.¹⁷⁶

B. Rice Offers an Explanation

On behalf of the European Union, British Foreign Secretary Jack Straw wrote to Secretary of State Condoleezza Rice in late November 2005, asking her to clarify the issue of CIA detention camps in Europe.¹⁷⁷ The top judicial figure in the Union warned that any E.U. country that hosted CIA prisons risked losing its E.U. voting rights.¹⁷⁸ Poland was already an E.U. member, and Romania had applied to join. On the eve of Rice's five-day trip to Europe, the *New York Times* reported that CIA-operated planes had made 307 flights in Europe since 9/11: ninety-four in Germany, seventy-six in England, thirty-three in Ireland, sixteen in Portugal, fifteen in Spain, fifteen in the Czech Republic, thirteen in Greece, six in Poland, five in Italy, four in Romania, and lesser amounts in a dozen other countries.¹⁷⁹

In an effort to rebut criticism of extraordinary rendition, Secretary Rice issued a detailed statement on December 5, 2005.¹⁸⁰ White House Press Secretary Scott McClellan told reporters there had been "an interagency input into her response."¹⁸¹ The Rice statement reads very much like a committee product, with each agency contributing its agenda but no one in charge to provide accuracy, credibility, and coherence. Instead of a persuasive refutation, Rice confused the CIA operation with traditional rendition and offered assurances that seem crafted by attorneys to mask meaning, conceal illegality, and insert

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. Glenn Kessler, *U.S. Will Address E.U. Questions on CIA Prisons*, WASH. POST, Nov. 30, 2005, at A1.

178. *Id.*

179. Ian Fisher, *Reports of Secret U.S. Prisons in Europe Draw Ire and Otherwise Red Faces*, N.Y. TIMES, Dec. 1, 2005, at A14.

180. Condoleezza Rice, U.S. Sec'y of State, Remarks Upon Her Departure for Europe (Dec. 5, 2005), *available at* <http://www.state.gov/secretary/rm/2005/57602.htm>.

181. Scott McClellan, White House Press Sec'y, White House Press Briefing 7 (Dec. 2, 2005), *available at* <http://www.whitehouse.gov/news/releases/2005/12/print/20051202-2.html>.

hidden messages. As explained in the next thirteen points, the statement was much too artfully worded.

Point One: Rice maintained that “[f]or decades, the United States and other countries have used ‘renditions’ 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.”¹⁸² In the past, in cases of forcible abductions of questionable legality, the purpose was to bring drug lords and suspected terrorists *to trial*, not for abusive interrogations.¹⁸³ Point two: Rice claimed that rendition “is not unique to the United States, or to the current administration,”¹⁸⁴ giving two examples. Ramzi Yousef was brought to the United States after being charged with the 1993 World Trade Center bombing and a plot to blow up airlines over the Pacific Ocean.¹⁸⁵ “Carlos the Jackal,” captured in Sudan, was brought to France.¹⁸⁶ Those examples have nothing to do with extraordinary rendition. The individuals were not taken to a secret interrogation center, outside the judicial process, and subjected to torture. They were brought to court to face public charges, trial, conviction, and sentencing.¹⁸⁷

Three: As to charges of torture and inhumane treatment, Rice insisted that “[t]he United States does not permit, tolerate, or condone torture under any circumstances.”¹⁸⁸ Contradicting that claim is the Bybee memo and reports from detainees held at Abu Ghraib, Kandahar, Bagram, Guantánamo, and other U.S. facilities.¹⁸⁹ Four: “The United States does not transport, and has not transported, detainees from one country to another for the purpose of interrogation using torture.”¹⁹⁰ The key word here is “purpose.” The Administration would argue that the primary purpose was not

182. Rice, *supra* note 180.

183. See, e.g., *United States v. Alvarez-Machain*, 504 U.S. 655 (1992) (concerning a Mexican citizen kidnapped from Mexico and brought to the United States to stand trial for murder).

184. Rice, *supra* note 180.

185. *Id.*

186. *Id.*

187. See *United States v. Yousef*, 327 F.3d 56, 173 (2d Cir. 2003) (upholding Ramzi Yousef's conviction for charges related to the 1993 World Trade Center Bombing); Doreen Carvajal, *Carlos the Jackal to Be Tried for Role in 4 Bombing Attacks in '80s*, N.Y. TIMES, May 5, 2007, at A5 (reporting that Carlos the Jackal, already serving a life sentence for killing French police officers, will now be tried in connection with bombings that took place in the eighties).

188. Rice, *supra* note 180.

189. See, e.g., Memorandum from the U.S. Dep't of Justice Office of Legal Counsel to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), available at <http://www.washingtonpost.com/wpshr/nation/documents/dojinterrogationmemo20020801.pdf>.

190. Rice, *supra* note 180.

“interrogation using torture” but “interrogation to obtain intelligence,” with torture an incidental and secondary result. Five: “The United States does not use the airspace or the airports of any country for the purpose of transporting a detainee to a country where he or she will be tortured.”¹⁹¹ Again, the Administration could say that the overriding purpose was to gather intelligence.

Six: “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.”¹⁹² Torture is not eliminated by “beliefs” and “assurances.” Seven: “With respect to detainees, the United States Government complies with its Constitution, its laws, and its treaty obligations. Acts of physical or mental torture are expressly prohibited.”¹⁹³ The Bybee memo, as endorsed by White House Counsel Gonzales, did not accept restrictions imposed by statutes and treaties.¹⁹⁴ Eight:

Violations of these and other detention standards have been investigated and punished. There have been cases of unlawful treatment of detainees, such as the abuse of a detainee by an intelligence agency contractor in Afghanistan or the horrible mistreatment of some prisoners at Abu Ghraib that sickened us all and which arose under the different legal framework that applies to armed conflict in Iraq. In such cases the United States has vigorously investigated, and where appropriate, prosecuted and punished those responsible.¹⁹⁵

This last point raised several issues. Rice now stated, contrary to her earlier claim, that the United States did torture detainees. Was this merely an unfortunate result of prison guards poorly trained and supervised? Reference to “the different legal framework” appeared to offer a green light or justification to what was done. As to vigorous investigations and punishments, no penalties were meted out to the civilian and military leaders who consciously crafted and approved a system of interrogation that waived treaty and statutory restrictions and would have been prohibited under the Army Field Manual.¹⁹⁶

191. *Id.*

192. *Id.*

193. *Id.*

194. See Memorandum from the U.S. Dep’t of Justice Office of Legal Counsel to Alberto R. Gonzales, *supra* note 189, at 31 (arguing that a statute or treaty prohibiting torture could be unconstitutional to the extent that it infringes on the President’s Commander in Chief authority to conduct war).

195. Rice, *supra* note 180.

196. JAMEEL JAFFER & AMRIT SINGH, ADMINISTRATION OF TORTURE: A DOCUMENTARY RECORD FROM WASHINGTON TO ABU GHRAIB AND BEYOND 42–44 (2007).

Nine: "It is also U.S. policy that authorized interrogation will be consistent with U.S. obligations under the Convention Against Torture, which prohibits cruel, inhuman, or degrading treatment."¹⁹⁷ "Consistent with" is not the same as being in compliance. "Consistent with" invites administrative choice and discretion instead of being legally bound. It is a matter of public record that confidential memos prepared by OLC and the Working Group developed policies that deliberately skirted statutory and treaty obligations.¹⁹⁸

Ten: "The intelligence so gathered has stopped terrorist attacks and saved innocent lives—in Europe as well as in the United States and other countries. The United States has fully respected the sovereignty of other countries that cooperate in these matters."¹⁹⁹ A very shrewd sentence. It implies that abusive interrogations helped gather intelligence that thwarted terrorist plots, helped protect Europe, and reminded some countries that they cooperated in the CIA flights and were fully complicit in what was done.

Eleven: "Because this war on terrorism challenges traditional norms and precedents of previous conflicts, our citizens have been discussing and debating the proper legal standards that should apply. President Bush is working with the U.S. Congress to come up with good solutions."²⁰⁰ The first sentence draws attention to a new and different standard of interrogating detainees, apparently justifying harsh methods that in the past had been forbidden. Whatever public discussions were underway were the result of leaks of secret memos and the Abu Ghraib scandal. Far from working with Congress, President Bush threatened to veto the McCain anti-torture amendment until congressional support reached supermajorities to easily override a veto.²⁰¹ Bush then issued a signing statement that left the meaning of the statutory prohibition subject to his interpretation of presidential authority under Article II.²⁰²

197. Rice, *supra* note 180.

198. See, e.g., Jaffer & Singh, *supra* note 196, at 42–44, A-1 to A-7, A-72, A-97 to A-97; Memorandum from John C. Yoo, Deputy Assistant Attorney Gen., U.S. Dep't of Justice Office of Legal Counsel to William J. Haynes II, Gen'l Counsel, U.S. Dep't of Def. (March 14, 2003), available at http://www.aclu.org/pdfs/safefree/yoo_army_torture_memo.pdf.

199. Rice, *supra* note 180.

200. *Id.*

201. See Eric Schmitt et al., *President Backs McCain on Abuse*, N.Y. TIMES, Dec. 16, 2005, at A1 (reporting that Bush reluctantly agreed to back the McCain amendment after a veto threat was met with intense bipartisan congressional resistance).

202. See Charlie Savage, *Bush Could Bypass New Torture Ban*, BOSTON GLOBE, Jan. 4, 2006, at A1 (stating, according to the White House and legal specialists, that the signing statement could give Bush the authority to waive the restrictions).

Twelve: “The United States is a country of laws. My colleagues and I have sworn to support and defend the Constitution of the United States. We believe in the rule of law.”²⁰³ It is true that the United States is a country of laws and that Rice and her colleagues took an oath to support and defend the Constitution. It is also true that key Administration officials, in secret, regularly rejected the binding nature of statutes and treaties and accepted the President’s “inherent” authority as superior to legislative and judicial constraints.²⁰⁴

Thirteen: “It is up to those governments and their citizens to decide if they wish to work with us to prevent terrorist attacks against their own country or other countries, and decide how much sensitive information they can make public. They have a sovereign right to make that choice.”²⁰⁵ A rather gratuitous concession that allies in Europe and elsewhere are sovereign countries capable of governing themselves. Also, it appears to be a somewhat veiled warning that it would not be in their interest to publicly release information about CIA flights and the scope of their cooperation. She added a similar note of caution: “Debate in and among democracies is natural and healthy. I hope that that debate also includes a healthy regard for the responsibilities of governments to protect their citizens.”²⁰⁶ Translation: Being too open has a downside; countries in Europe should understand the need to keep CIA operations secret.

C. *How Allies Reacted*

Press accounts clarified some points. When Rice said the United States always respects the sovereignty of foreign countries when conducting intelligence operations on their soil (or over it), executive officials translated that as diplomatic code that the United States had received permission for the CIA activities.²⁰⁷ A member of the German Parliament’s foreign policy committee remarked: “She’s trying to throw the ball back into the European field.”²⁰⁸ After public disclosure of the prison camps, ABC News reported that two of the facilities had been closed and eleven top al Qaeda detainees

203. Rice, *supra* note 180.

204. See *supra* note 198 (highlighting documents in which the United States avoided obligations resulting from its treaties and statutes).

205. *Id.*

206. *Id.*

207. Glenn Kessler, *Rice Defends Tactics Used Against Suspects*, WASH. POST, Dec. 6, 2005, at A1.

208. *Id.*

transported out of Europe before Rice's arrival.²⁰⁹ They may have been moved to new CIA camps in the North African desert.²¹⁰

Although Rice did not formally acknowledge the CIA program, she did so implicitly. A reporter noted, "[w]ithout the debate over the covert jails, there would have been no reason for her statement."²¹¹ To a Conservative member of the British Parliament, her statement "was drafted by lawyers with the intention of misleading an audience."²¹² A Labor member of the British Parliament found her assertions "wholly incredible."²¹³ A U.S. editorial dismissed Rice's statement as "the same legalistic jujitsu and morally obtuse double talk that led the Bush Administration into a swamp of human rights abuses in the first place."²¹⁴

Some European leaders were offended by what they found to be a patronizing tone in Rice's statement, with the United States claiming a superior capacity to deal with events after 9/11.²¹⁵ The Conservative member from England said he "resent[ed] the fact that [his] country is foolishly being led into a misguided approach into combating terrorism by this administration."²¹⁶ European countries had "far greater experience over many decades dealing with terrorism, and many of us have learned the hard way that dealing in a muscular way can often inflame the very terrorism you're trying to suppress."²¹⁷

Toward the end of Rice's trip, European leaders began to fall in line, uniformly expressing their satisfaction with her explanations. Bernard Bot of the Netherlands said she "has covered basically all of our concerns," dismissing talk about secret prisons as "pure speculation."²¹⁸ Rice had "made it quite clear" that the United States did not violate international law.²¹⁹ To German Foreign Minister Walter Steinmeier, Rice had "reiterated that in the United States international obligations are not interpreted differently than in Europe."²²⁰ (That could mean that European countries and the

209. *Id.*

210. Joel Brinkley, *U.S. Interrogations Are Saving European Lives, Rice Says*, N.Y. TIMES, Dec. 6, 2005, at A3.

211. *Id.*

212. Richard Bernstein, *Skepticism Seems to Erode Europeans' Faith in Rice*, N.Y. TIMES, Dec. 7, 2005, at A25 (quoting Andrew Tyrie).

213. *See id.* (quoting Andrew Mullin).

214. Editorial, *A Weak Defense*, WASH. POST, Dec. 6, 2005, at A28.

215. Bernstein, *supra* note 212.

216. *Id.*

217. *Id.*

218. Glenn Kessler, *Europeans Search for Conciliation with U.S.*, WASH. POST, Dec. 9, 2005, at A16.

219. *Id.*

220. *Id.*

United States jointly agreed to violate international law.) NATO Secretary General Jaap de Hoop Scheffer announced that Rice had “cleared the air.”²²¹ What became clear was not Rice’s explanations but the inability of European leaders to exercise any level of independent thought.

D. At Last: Coming Clean

When Rice returned from her trip to Europe, the State Department reiterated that it would deny the International Committee of the Red Cross access to “a very small, limited number” of prisoners held in secret around the world.²²² An inadvertent confirmation of what she had denied? A lengthy story in the *Washington Post* on December 30, 2005, described the survival of secret CIA prisons, with some closed down in Europe and detainees transferred to other locations: “[V]irtually all the programs continue to operate largely as they were set up.”²²³ In April 2006, investigators for the European Parliament reported that the CIA had flown 1000 undeclared flights over European territory since 2001.²²⁴ They said at times the planes stopped to pick up suspects and take them to other countries for torture.²²⁵

Dick Marty, a Swiss lawyer working for the Council of Europe, released findings in June 2006, concluding that at least nine European nations colluded with the CIA to capture and secretly transfer suspected terrorists.²²⁶ In addition to Poland and Romania, he listed Bosnia, Britain, Germany, Italy, Macedonia, Sweden, and Turkey.²²⁷ Five other nations—Cyprus, Greece, Ireland, Portugal, and Spain—allowed CIA-chartered flights to land at their airports and transfer detainees to other locations.²²⁸ The investigation, conducted without subpoena powers, could not provide hard facts to establish the existence of secret prisons. Instead, it relied on flight data and

221. *Id.*; see also Joel Brinkley, *Rice Appears to Reassure Some Europeans on Treatment of Terror Detainees*, N.Y. TIMES, Dec. 9, 2005, at A6 (reporting on Rice’s trip to Europe and the seemingly satisfied response of foreign leaders).

222. Steven R. Weisman, *U.S. Rebuffs Red Cross Request for Access to Detainees Held in Secret*, N.Y. TIMES, Dec. 10, 2005, at A10.

223. Dana Priest, *Covert CIA Program Withstands New Furor*, WASH. POST, Dec. 30, 2005, at A1.

224. Dan Bilefsky, *European Inquiry Says C.I.A. Flew 1,000 Flights in Secret*, N.Y. TIMES, Apr. 27, 2006, at A12.

225. *Id.*

226. Craig Whitlock, *European Probe Finds Signs of CIA-Run Secret Prisons*, WASH. POST, June 8, 2006, at A16.

227. *Id.*

228. *Id.*

satellite photos to make the case.²²⁹ For example, a Boeing jet with tail number N313P departed Kabul, Afghanistan, on September 22, 2003, landed in Szymany, Poland, remained there for sixty-four minutes, and continued to Bucharest, Romania, and Rabat, Morocco.²³⁰ The eight locations frequently cited for the conduct of abusive interrogations were identified: Algiers; Amman, Jordan; Baghdad; Cairo; Islamabad, Pakistan; Kabul; Rabat; and Tashkent, Uzbekistan.²³¹

The Bush Administration had taken pains not to acknowledge extraordinary rendition. After publication of the detailed report by the Council of Europe, President Bush confirmed the existence of the CIA program during a news conference on June 9, 2006.²³² He was asked point-blank: “This week, a report from the European Council talked about some CIA flights, illegal CIA flights with the prisoners in Europe, and illegal CIA presence also in some European countries. Have these flights taken place, and did you discuss this in your meeting today?”²³³ Evidently prepared for the question, Bush said that “in cases where we’re not able to extradite somebody who is dangerous, sometimes renditions take place. It’s been a part of our Government for quite a period of time—not just my Government, but previous administrations have done so in order to protect people.”²³⁴ Bush did not explain that previous renditions were for the purpose of bringing suspects to trial.

The decision to close down (at least temporarily) the CIA prisons was triggered in part by the Supreme Court’s June 2006 decision in *Hamdan v. Rumsfeld*.²³⁵ The Court ruled that detainees must be protected by the Geneva Conventions, including the provisions of Common Article 3 and its prohibitions on torture and humiliating, degrading treatment.²³⁶ The FBI and the CIA had clashed repeatedly over methods of interrogation. FBI agents insisted that persuasion was more effective in obtaining intelligence than coercive

229. *Id.*

230. *Id.*

231. *Id.*; see also Stephen Grey & Doreen Carvajal, *Secret Prisons in 2 Countries Held Qaeda Suspects, Report Says*, N.Y. TIMES, June 8, 2007, at A12; Molly Moore, *Report Gives Details on CIA Prisons*, WASH. POST, June 9, 2007, at A1; Molly Moore & Julie Tate, *European Report Addresses CIA Sites*, WASH. POST, June 8, 2007, at A16; Craig Whitlock, *European Report Details Flights By CIA Aircraft*, WASH. POST, Nov. 29, 2006, at A14.

232. President’s News Conference With Prime Minister Anders Fogh Rasmussen of Denmark, 42 WEEKLY COMP. PRES. DOC. 1105, 1111 (June 9, 2006).

233. *Id.*

234. *Id.*

235. 126 S. Ct. 2749 (2006).

236. *Id.* at 2796.

techniques.²³⁷ CIA officials insisted on tougher, more aggressive approaches.²³⁸ Over time, the CIA prevailed.²³⁹

On September 6, 2006, in a lengthy statement, President Bush provided details of the CIA rendition program.²⁴⁰ In addition to the suspects held at Guantánamo, “a small number of suspected terrorist leaders and operatives captured during the war have been held and questioned outside the United States, in a separate program operated by the Central Intelligence Agency.”²⁴¹ He claimed that information obtained from these interrogations “saved innocent lives by helping us stop new attacks—here in the United States and across the world.”²⁴² He insisted that the CIA “procedures were designed to be safe, to comply with our laws, our Constitution, and our treaty obligations.”²⁴³ Fourteen men held in CIA custody would be transferred to Guantánamo, where questioning would comply with the new Army Field Manual.²⁴⁴

Bush’s announcement put an end to Rice’s efforts to dissemble and misrepresent the CIA program. Her counterparts in Europe were similarly discredited. Sarah Ludford, a British member of the European Parliament and vice chairman of a parliamentary inquiry into the secret prisons, said that Bush “has now left the Europeans high and dry.”²⁴⁵ British Prime Minister Tony Blair, she noted, “can be as loyal as he likes to George Bush, but George Bush, when it suits him, will turn around and pull the rug out from under his feet.”²⁴⁶ Javier Solana, the European Union’s foreign policy chief, announced that “no country in the E.U., or candidate country, as far as I know, has had secret prisons.”²⁴⁷ The issue was not simply *having* secret prisons. It was the willingness of E.U. countries to *assist* in transferring suspects to secret prisons for torture. A November 2006 report by the European Parliament confirmed that “many governments cooperated passively or actively” with the CIA and knew

237. David Johnston, *At a Secret Interrogation, Dispute Flared Over Tactics*, N.Y. TIMES, Sept. 10, 2006, at A1.

238. *Id.*

239. *Id.*

240. Remarks on the War on Terror, 42 WEEKLY COMP. PRES. DOC. 1569, 1570 (Sept. 6, 2006).

241. *Id.*

242. *Id.* at 1570–71.

243. *Id.* at 1571.

244. *Id.* at 1573–74.

245. Kevin Sullivan, *Detainee Decision Greeted Skeptically*, WASH. POST, Sept. 7, 2006, at A17.

246. *Id.*

247. Brian Knowlton, *Europeans’ Views Mixed on News of C.I.A. Camps*, N.Y. TIMES, Sept. 8, 2006, at A25.

that individuals were being abducted and transported to places for illegal interrogation methods.²⁴⁸ When released in February 2007, the report admonished fifteen European nations and Turkey for helping the CIA.

In addition to the fourteen men transferred to Guantánamo, others had been held in CIA custody and subjected to interrogation methods that would have been prohibited for the U.S. military. Marwan Jabour, picked up in May 2004, endured more than two years of incarceration, including being beaten and burned in Pakistan.²⁴⁹ He was moved to other CIA facilities, including one in Afghanistan.²⁵⁰ Released on June 30, 2006, at a border crossing between Israel and Gaza, he was never charged with anything or told why he was now being set free.²⁵¹ Following the transfer of the fourteen men, the Bush Administration continued to have suspected terrorists seized and placed in CIA custody overseas, with some moved to Guantánamo.²⁵²

E. Italian and German Investigations

In October 2006, prosecutors in Italy sought the indictment of Nicolo Pollari, the head of military intelligence (Sismi) since 2001.²⁵³ He was charged with complicity in the abduction of Abu Omar by U.S. intelligence agents.²⁵⁴ The investigation targeted government officials who had cooperated with the United States in violation of the laws of Italy. Twenty-five operatives of the CIA were also named in the case.²⁵⁵ A month later, Pollari lost his job.²⁵⁶ Also removed from their positions were General Mario Mori, head of Italy's civilian intelligence agency, and Emilio Del Mese, a national intelligence

248. Brian Knowlton, *Report Rejects European Denial of C.I.A. Prisons*, N.Y. TIMES, Nov. 29, 2006, at A15.

249. Dafna Linzer & Julie Tate, *New Light Shed on CIA's 'Black Site' Prisons*, WASH. POST, Feb. 28, 2007, at A1.

250. *Id.*

251. *Id.*

252. *E.g.*, Dafna Linzer, *CIA Held Al-Qaeda Suspect Secretly*, WASH. POST, Apr. 28, 2007, at A16; Mark Mazzetti & David S. Cloud, *C.I.A. Held Qaeda Leader in Secret Prison for Months*, N.Y. TIMES, Apr. 28, 2007, at A9; Scott Shane, *Rights Groups Call for End to Secret Detention of Suspects*, N.Y. TIMES, July 7, 2007, at A18; *see* Jane Mayer, *The Black Sites: A Rare Look Inside the C.I.A.'s Secret Interrogation Program*, NEW YORKER, Aug. 13, 2007, at 46.

253. Ian Fisher & Elisabetta Povoledo, *Italy's Top Spy is Expected to Be Indicted in Abduction Case*, N.Y. TIMES, Oct. 24, 2006, at A3.

254. *Id.*

255. *Id.*

256. Sarah Delaney & Craig Whitlock, *Italian Spy Chief Out; Investigated in Abduction*, WASH. POST, Nov. 21, 2006, at A24.

coordinator.²⁵⁷ Testimony in the trial disclosed details about who participated in the abductions and how they were carried out.²⁵⁸ In February 2007, Italy indicted twenty-six Americans (most of them CIA officers) for the abduction of Abu Omar.²⁵⁹ At the same time, the Swiss government authorized an investigation into the flight that was said to have carried him from Italy to Germany through Swiss airspace before landing in Egypt.²⁶⁰ On February 28, 2007, the State Department announced that the United States would refuse to extradite CIA officers to Italy on the kidnapping charges.²⁶¹

In late January 2007, German prosecutors issued arrest warrants for thirteen CIA operatives involved in the kidnapping of Khaled El-Masri in Macedonia.²⁶² According to hotel records and flight logs, the crew of the CIA plane that took El-Masri to Afghanistan stayed for a few days at the Spanish resort island of Majorca.²⁶³ Although most of them used aliases, the hotel records show their passport numbers, hotel bills, and aviation records.²⁶⁴ News reports called attention to another German citizen, Mohammed Haydar Zammar, who was arrested in Morocco and secretly transferred to Syria with the help of the CIA, assisted by German federal police.²⁶⁵ In September 2007, German authorities dropped their efforts to have the thirteen CIA agents extradited to Germany.²⁶⁶ U.S. officials made it clear they would not cooperate. However, the arrest warrants remained in effect in the event the CIA employees decided to travel to Germany or elsewhere in the European Union.²⁶⁷

257. *Id.*

258. Craig Whitlock, *Testimony Helps Detail CIA's Post-9/11 Reach*, WASH. POST, Dec. 16, 2006, at A1.

259. *Id.*

260. Sarah Delaney & Craig Whitlock, *Milan Court Indicts 26 Americans in Abduction*, WASH. POST, Feb. 17, 2007, at A1; Ian Fisher, *Italians Indict C.I.A. Operatives in '03 Abduction*, N.Y. TIMES, Feb. 17, 2007, at A1.

261. Craig Whitlock, *U.S. Won't Send CIA Defendants to Italy*, WASH. POST, Mar. 1, 2007, at A12. For more on the Italian investigation, see GREY, *supra* note 137, at 190–213.

262. Craig Whitlock, *Germans Charge 13 CIA Operatives*, WASH. POST, Feb. 1, 2007, at A1 [hereinafter Whitlock, *Germans Charge 13 CIA Operatives*].

263. *Id.*

264. Mark Landler, *German Court Challenges C.I.A. Over Abduction*, N.Y. TIMES, Feb. 1, 2007, at A1; Whitlock, *Germans Charge 13 CIA Operatives*, *supra* note 262; Craig Whitlock, *Travel Logs Aid Germans' Kidnap Probe*, WASH. POST, Feb. 2, 2007, at A11.

265. Craig Whitlock, *In Another CIA Abduction, Germany Has an Uneasy Role*, WASH. POST, Feb. 5, 2007, at A11.

266. Craig Whitlock, *Germans Drop Bid for Extraditions in CIA Case*, WASH. POST, Sept. 24, 2007, at A9.

267. *Id.*

IV. LITIGATION

In court, the Bush Administration told federal judges that terrorism suspects held in secret CIA prisons should not be permitted to reveal the “alternative interrogation methods” used to obtain information.²⁶⁸ Revealing those techniques “could reasonably be expected to cause extremely grave damage” to the nation.²⁶⁹ One lawsuit involved Majid Khan, a twenty-six-year-old Pakistani national who lived in the United States for seven years.²⁷⁰ He was seized in Pakistan, held in CIA prison camps, and eventually moved to Guantánamo as part of the group of fourteen.²⁷¹ In other cases, the Administration argued that individuals subjected to extraordinary rendition were barred from litigating their grievances because it would risk the disclosure of state secrets and encroach on independent presidential authority.²⁷² As argued in one Justice Department brief, the state secrets privilege “is based on the President’s Article II power to conduct foreign affairs and to provide for the national defense, and therefore has constitutional underpinnings.”²⁷³ Of course this is an assertion, not a fact, and has constitutional underpinnings only if the assertion finds support in court or in Congress. Otherwise, it is a mere claim by a self-interested branch.

A. *Maher Arar*

Born in Syria, Maher Arar moved to Canada with his parents when he was 17, studied at McGill University and the University of Quebec, and obtained a Master’s degree in telecommunications.²⁷⁴ He married in 1994, had a daughter in 1997, and worked in Ottawa and Boston.²⁷⁵ He returned to Ottawa in 2001 to start his own consulting

268. Respondents’ Memorandum in Opposition to Petitioners’ Motion for Emergency Access to Counsel and Entry of Amended Protective Order, *Khan v. Bush*, No. 06-CV-1690 (D.D.C. Oct. 26, 2006); Carol D. Leonnig & Eric Rich, *U.S. Seeks Silence on CIA Prisons*, WASH. POST, Nov. 4, 2006, at A1.

269. Leonnig & Rich, *supra* note 268.

270. *Id.*

271. Respondents’ Memorandum in Opposition to Petitioners’ Motion for Emergency Access to Counsel and Entry of Amended Protective Order, *Khan v. Bush*, No. 06-CV-1690 (D.D.C. Oct. 26, 2006); Leonnig & Rich, *supra* note 268.

272. See, e.g., Memorandum in Support of the United States’ Assertion of State Secrets Privilege at 2–3, *Arar v. Ashcroft*, No. 04-CV-240-DGT-VVP (E.D.N.Y. Aug. 11, 2005).

273. *Id.* at 3–4.

274. MaherArar.ca, Maher’s Story, Maher’s Statement to the Media on November 4, 2003, <http://www.maherarar.ca/mahers%20story.php>.

275. *Id.*

firm.²⁷⁶ A second child came in 2002.²⁷⁷ He is a dual citizen of Syria and Canada.²⁷⁸

In September 2002, he was with his wife and children vacationing in Tunis.²⁷⁹ In response to a request from his former employer, he returned alone to Ottawa to consult with a prospective client.²⁸⁰ On September 26, 2002, he boarded an American Airlines flight from Zurich to JFK airport in New York, arriving there at two o'clock in the afternoon en route to Montreal.²⁸¹ He was pulled aside at immigration after his name was entered into the computer, fingerprinted and photographed, and denied the opportunity to make a phone call to his family or an attorney.²⁸² He was kept at the airport until midnight and questioned by the New York Police Department and FBI agents.²⁸³ Questioning continued the next day, when he was transferred to the Metropolitan Detention Center.²⁸⁴ He learned that he was suspected of being a member of a foreign terrorist organization.²⁸⁵

On October 2, he was allowed to make a two-minute phone call and reached his mother-in-law in Ottawa, telling her of his fear of being deported to Syria.²⁸⁶ Over the next few days he met with his lawyer and a Canadian consul.²⁸⁷ He told U.S. officials that he wanted to continue to Canada and that if he were sent to Syria he would be tortured.²⁸⁸ He had every reason to fear torture. Country reports prepared by the State Department consistently referred to Syria as "a military regime with virtually absolute authority in the hands of the President," a weak Parliament, and a judiciary with no independent powers over issues of national security.²⁸⁹ The security forces committed "serious human rights abuses."²⁹⁰ Torture methods included

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.*

281. *Id.*

282. *Id.*

283. MaherArar.ca, Chronology of Events September 26, 2002 to October 5, 2003 (Nov. 4, 2003), 1, <http://www.maherarar.ca/cms/images/uploads/mahersstory.pdf> [hereinafter MaherArar.ca, Chronology of Events].

284. *Id.* at 2.

285. *Id.*

286. *Id.* at 2–3.

287. *Id.* at 3.

288. *Id.*

289. 2 DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHT PRACTICES FOR 2002 2108 (2003).

290. *Id.*

administering electrical shocks; pulling out fingernails; forcing objects into the rectum; beating, sometimes while the victim is suspended from the ceiling; hyperextending the spine; bending the detainees into the frame of a wheel and whipping exposed body parts; and using a chair that bends backwards to asphyxiate the victim or fracture the victim's spine.²⁹¹

Despite this clear understanding of how Syria treats prisoners, the commissioner of the Immigration and Naturalization Service ("INS") in Washington, D.C. certified that Arar's removal to Syria was consistent with Article 3 of the CAT.²⁹² After about a week at the Metropolitan Detention Center, U.S. officials flew him to Washington, D.C. and from there to Amman, Jordan, where he was blindfolded, chained, and put in a van.²⁹³ Whenever he tried to move or talk he was beaten.²⁹⁴ On October 9 he was driven to Damascus, Syria, and imprisoned at the Palestine Branch of the Syrian military intelligence.²⁹⁵ He was placed in a cell, called a "grave," where he would remain for months.²⁹⁶ It measured "three feet wide, six feet deep, and seven feet high."²⁹⁷ It had a metal door that prevented light from entering.²⁹⁸ There was "no light source in the cell."²⁹⁹ From October 11 to 16 he was taken for interrogation and "beaten on his palms, wrists, lower back and hips with a shredded black electrical cable . . . about two inches in diameter."³⁰⁰ His interrogators threatened him with electric shocks and with a car tire "into which prisoners are stuffed, immobilized, and beaten."³⁰¹ Under those conditions, he falsely confessed that he received military training in Afghanistan.³⁰² In the second week he was forced into the tire, immobilized, but not beaten.³⁰³

On October 23, he met with a Canadian consul after being warned not to say anything about the beatings.³⁰⁴ In early November he was told to sign and place his thumbprint on every page of a hand-written document about seven pages long.³⁰⁵ Not allowed to read this

291. *Id.* at 2109.

292. GREY, *supra* note 137, at 68.

293. MaherArar.ca, Chronology of Events, *supra* note 283, at 4.

294. *Id.*

295. *Id.*

296. *Id.* at 5.

297. *Id.*

298. *Id.*

299. *Id.*

300. *Id.*

301. *Id.*

302. *Id.*

303. *Id.* at 6.

304. *Id.*

305. *Id.*

document, he was also forced to sign and place his thumbprint on other documents.³⁰⁶ From October 23, 2002 to February 8, 2003, he met six times with the Canadian consul.³⁰⁷ In early April, he was placed in an outdoor court, the first time in six months that he had seen sunlight.³⁰⁸ A seventh visit with the Canadian consul took place on August 14, when for the first time he described his cell and the beatings.³⁰⁹ Five days later he was forced to sign and put his thumbprint on a page that said he went to a training camp in Afghanistan.³¹⁰ Afterwards he was transferred to a cell, twelve feet by twenty feet, with about fifty other people.³¹¹ On August 20, he was transferred to Sednaya prison and placed in a collective cell.³¹²

In late September, Arar was returned to the Palestine Branch and kept there for seven days.³¹³ At a court hearing, the prosecutor read from his confession.³¹⁴ Arar objected that he was forced to say he went to Afghanistan, but the court ignored his remarks.³¹⁵ He was forced to sign and put his fingerprint on another document.³¹⁶ He was brought back to the Palestine Branch, driven to the Canadian embassy, and then taken to the Canadian consul's house to shower before flying out of Syria and returning to Canada.³¹⁷

Arar was never formally charged with anything.³¹⁸ Syria found no evidence linking him with terrorism.³¹⁹ On what possible grounds could the United States justify sending him to a country it regards as a terrorist nation? Why entrust the questioning of a supposed terrorist to Syrian interrogators? Was Syria now a surrogate or ally of the United States in gaining intelligence? What was Syria promised in return? The United States regularly reminds other nations about the importance of safeguarding democracy, protecting the rule of law, and respecting human rights and human dignity. The extraordinary rendition of Maher Arar violated all of these principles. An expert who assisted in Canada's investigation of the Arar

306. *Id.*

307. *Id.* at 6–7.

308. *Id.* at 7.

309. *Id.* at 8.

310. *Id.*

311. *Id.*

312. *Id.*

313. *Id.* at 9.

314. *Id.*

315. *Id.*

316. *Id.*

317. *Id.*

318. *Id.*

319. See Ian Austen, *Deported Canadian Was No Threat, Report Shows*, N.Y. TIMES, Aug. 10, 2007, at A9 (noting that the Syrian Government did not view Arar as a serious security risk).

abduction concluded that his treatment at the Palestine Branch “constituted torture as understood in international law.”³²⁰

Arar filed a civil suit seeking money damages and declaratory relief from a number of U.S. officials in their individual and official capacities.³²¹ On January 18, 2005, the Justice Department filed a memorandum in support of the state secrets privilege, claiming that the documents sought by Arar were “properly classified” and that disclosure “would interfere with foreign relations, reveal intelligence-gathering sources or methods, and be detrimental to national security.”³²² Did the Bush Administration know about the methods used by Syria? The government asked the court to dismiss Arar’s case and enter judgment in favor of all U.S. officials, both in their individual and official capacities.³²³

On February 16, 2006, a federal district court held that Arar lacked standing to bring a claim against U.S. officials who were responsible for holding him incommunicado at the U.S. border and removing him to Syria for detention and torture.³²⁴ The court ruled that he failed to meet the statutory requirements of the Torture Victim Protection Act of 1992.³²⁵ Any access to remedies was foreclosed, the court said, because of national security and foreign considerations.³²⁶ The decision states that the INS Regional Director, J. Scott Blackman, determined from available information that Arar was “clearly and unequivocally a member of al Qaeda and, therefore, clearly and unequivocally inadmissible to the United States.”³²⁷ Although that determination was based on information later shown to be false, Blackman ordered Arar sent to Syria without review by an immigration judge.³²⁸ Part of the defense by the Bush Administration is that “the alleged torture occurred while Arar was in Syrian custody,” but U.S. officials knew that he would be subjected to torture there and may have sent him there for that very reason.³²⁹

320. COMMISSION OF INQUIRY INTO THE ACTIONS OF CANADIAN OFFICIALS IN RELATION TO MAHER ARAR, REPORT OF PROFESSOR STEPHEN J. TOOPE, FACT FINDER 17 (2005), available at http://epe.lac-bac.gc.ca/003/008/099/003008-disclaimer.html?orig=/100/206/301/pco-bcp/commissions/maher_arar/06-1213/www.ararcommission.ca/eng/ToopeReport_final.pdf.

321. Ian Austen, *Canada Will Pay \$9.75 Million to Man Sent to Syria and Tortured*, N.Y. TIMES, Jan. 27, 2007, at A5.

322. Memorandum in Support of the United States’ Assertion of State Secrets Privilege at 2–3, *Arar v. Ashcroft*, No. 04-CV-249-DGT-VVP (E.D.N.Y. Jan. 18, 2005).

323. *Id.* at 15.

324. *Arar v. Ashcroft*, 414 F. Supp. 2d 250, 287 (E.D.N.Y. 2006).

325. *Id.* at 266.

326. *Id.* at 281–82.

327. *Id.* at 254.

328. *Id.*

329. *Id.* at 262.

At the end of the decision, the court examined the Bush Administration's claim that Arar's lawsuit threatened national security and foreign policy considerations. Holding that courts "must proceed cautiously" in reviewing policy-making issues that are the prerogative of the Legislative and Executive Branches, it noted that Congress had "yet to take any affirmative position on federal-court review of renditions," even though it had passed many statutes prohibiting torture.³³⁰ The court emphasized the importance of secrecy in national security and foreign affairs: "One need not have much imagination to contemplate the negative effect on our relations with Canada if discovery were to proceed in this case and were it to turn out that certain high Canadian officials had, despite public denials, acquiesced in Arar's removal to Syria."³³¹ As it turned out, Canada reached that conclusion and publicly apologized to Arar.³³²

The court warned that "an erroneous decision [by the judiciary] can have adverse consequences in the foreign realm not likely to occur in the domestic context."³³³ In this case, the erroneous decision and adverse consequences had already occurred—by the Executive Branch. Having decided statutory and constitutional claims against Arar, the court ruled that "the issue involving state secrets is moot."³³⁴ Arar's complaint about his thirteen day detention within the United States, denial of counsel, and being subject to coercive and involuntary custodial interrogation was dismissed without prejudice, permitting Arar to reargue those claims and present additional evidence.³³⁵

Seven months after the district court's ruling, a three-volume, 822-page judicial report in Canada concluded that Canadian intelligence officials had passed false warnings and bad information about Arar to the United States.³³⁶ Agents of the Canadian intelligence services, under pressure after 9/11 to find terrorists, falsely labeled him as a dangerous radical.³³⁷ The report found that Arar had no involvement in Islamic extremism and that "'categorically there is no evidence'

330. *Id.* at 281.

331. *Id.*

332. Ian Austen, *Canadians Fault U.S. for Its Role in Torture Case*, N.Y. TIMES, Sept. 19, 2006, at A1; Doug Struck, *Tortured Man Gets Apology from Canada*, WASH. POST, Jan. 27, 2007, at A14 [hereinafter Struck, *Tortured Man Gets Apology from Canada*].

333. *Arar*, 414 F. Supp. 2d at 282.

334. *Id.* at 287.

335. *Id.* at 287–88.

336. Struck, *Tortured Man Gets Apology from Canada*, *supra* note 332.

337. *Id.*

that Arar did anything wrong or was a security threat.”³³⁸ The United States refused to cooperate in the inquiry.³³⁹ Cleared by Canada, Arar remained on America’s “watch list” as a terrorist threat to the United States.³⁴⁰

On January 26, 2007, Prime Minister Stephen Harper of Canada released a letter of apology to Maher Arar and his family.³⁴¹ The government accepted all twenty-three recommendations in the judicial report, sent letters to both the Syrian and U.S. governments formally objecting to the treatment of Arar, and provided \$9.75 million in compensation.³⁴² In August 2007, newly released sections of Canada’s judicial report indicated that Canadian intelligence officials anticipated that the United States would send Arar to a third country to be tortured and that neither the Syrian government nor the FBI were convinced he was a significant security threat.³⁴³ His treatment appeared triggered by the “coerced confession of Ahmad Abou el-Maati, a Kuwaiti-born Canadian who was also imprisoned and tortured in Syria.”³⁴⁴ Arar appealed his case to the Second Circuit.³⁴⁵

B. Khaled El-Masri

Khaled El-Masri was born in Kuwait in 1963 to Lebanese parents.³⁴⁶ He grew up in Lebanon, moved to Germany in 1985, and became a German citizen in 1995.³⁴⁷ At the end of 2003, he traveled to Skopje, Macedonia, for vacation.³⁴⁸ He was detained by Macedonian border officials on December 31 because of confusion over his name.³⁴⁹ They

338. *Id.* (quoting Ontario Justice Dennis O’Connor).

339. *Id.*

340. Doug Struck, *Tortured Canadian Still on U.S. “Watch List”*, WASH. POST, Dec. 16, 2006, at A16.

341. Struck, *Tortured Man Gets Apology From Canada*, *supra* note 332.

342. Ian Austen, *Canada to Pay \$9.75 Million To Man Tortured in Syria*, N.Y. TIMES, Jan. 27, 2007, at A5; Press Release, Stephen Harper, Prime Minister of Canada, Prime Minister Releases Letter of Apology to Maher Arar and His Family Announces Completion of Mediation Process (Jan. 26, 2007), available at <http://www.pm.gc.ca/eng/media.asp?id=1510>; Struck, *Tortured Man Gets Apology*, *supra* note 332.

343. Ian Austen, *Deported Canadian Was No Threat*, N.Y. TIMES, Aug. 10, 2007, at A9.

344. *Id.*

345. *Arar v. Ashcroft*, No. CV-04-0249, 2006 WL 1875375, at *1 (E.D.N.Y. July 5, 2006) (noting Arar sought certification of final judgment on the dismissed counts in order to seek appeal).

346. See *El-Masri v. Tenet*, 437 F. Supp. 2d 530, 532 (E.D. Va. 2006) (noting that El-Masri came from Lebanese descent).

347. Declaration of Khaled El-Masri in Support of Plaintiff’s Opposition to the United States’ Motion to Dismiss or, in the Alternative, for Summary Judgment, *Khaled El-Masri v. George Tenet*, No. 1:05cv1417-TSE-TRJ (E.D. Va. April 6, 2006).

348. See Priest, *Wrongful Imprisonment*, *supra* note 94 (reporting that El-Masri went to Macedonia to “blow off steam after a spat with his wife”).

349. See *id.* (stating that his captors thought El-Masri was associated with a hijacker).

thought he was Khalid al-Masri, a suspect from the al-Qaeda Hamburg cell.³⁵⁰ There was suspicion (later shown to be false) that El-Masri's German passport was a forgery.³⁵¹ The Macedonians detained him until January 23, 2004, when they transferred him to CIA agents.³⁵² They flew him to a secret prison called the "Salt Pit" in Kabul, Afghanistan, where he was held for five months in squalid conditions.³⁵³ He was repeatedly refused counsel or access to a representative of the German government.³⁵⁴

Months later, the CIA concluded that his passport was genuine, and the United States had imprisoned the wrong man.³⁵⁵ A former senior intelligence officer remarked, "[w]hatever quality control mechanisms were in play on September 10th were eliminated on September 11th."³⁵⁶ On May 28, U.S. officials flew El-Masri from Kabul to Albania and left him alone, at night, on a hill.³⁵⁷ Three uniformed men drove him to the Tirana airport where he boarded a plane to Frankfurt.³⁵⁸ Upon reaching home in Ulm, he learned that his family, after he failed to return from his holiday in Macedonia, had moved to Lebanon.³⁵⁹ They returned to Germany and were reunited.³⁶⁰

On December 6, 2005, El-Masri sued CIA Director George Tenet, the airlines used by the CIA, and current and former employees of the agency.³⁶¹ The Bush Administration asserted the state secrets privilege to block the litigation from moving to discovery and access to government documents.³⁶² The new CIA Director, Porter Goss,

350. Khalid El-Masri, http://en.wikipedia.org/wiki/Khalid_El-Masri (last visited May 20, 2008).

351. Priest, *Wrongful Imprisonment*, *supra* note 94.

352. El-Masri v. United States, 479 F.3d 296, 300 (4th Cir. 2007).

353. See El-Masri v. Tenet, 437 F. Supp. 2d 530, 533 (E.D. Va. 2006) (noting that El-Masri contends he was at the "Salt Pit" and describing it as "an abandoned brick factory"); Priest, *Wrongful Imprisonment*, *supra* note 94 (noting that the cellar the CIA kept El-Masri in was dirty and cold).

354. See *El-Masri*, 437 F. Supp. 2d at 532–33 (claiming that while El-Masri was imprisoned in a hotel room he was refused contact with a lawyer and various German officials).

355. Priest, *Wrongful Imprisonment*, *supra* note 94.

356. *Id.*

357. Scott Shane, *German Held in Afghan Jail Files Lawsuit*, N.Y. TIMES, Dec. 7, 2005, at A25.

358. Dana Priest, *The Wronged Man: Unjustly Imprisoned and Mistreated, Khaled al-Masri Wants Answers the U.S. Government Doesn't Want to Give*, WASH. POST, Nov. 29, 2006, C1, C14.

359. Priest, *Wrongful Imprisonment*, *supra* note 94.

360. *Id.*

361. El-Masri v. Tenet, No. 1:05-cv-01417-TSE-TRJ (E.D. Va. 2005) (complaint filed); Shane, *supra* note 357.

362. *Id.* (formal claim of state secrets privilege by Porter J. Goss, Director, Central Intelligence Agency).

stated that clandestine intelligence activities, by “their very nature,” are not acknowledged by the United States and that it was necessary to protect “classified intelligence sources and methods from unauthorized disclosure and thereby avoid damage to the national security and our nation’s conduct of foreign affairs.”³⁶³ How much damage to the United States had been done by the rendition? To Goss, neither El-Masri nor his attorneys “possess[ed] the need-to-know required to access the classified information described in this declaration.”³⁶⁴

On May 12, 2006, a federal district court held that the state secrets privilege was validly asserted and dismissed El-Masri’s case.³⁶⁵ Judge Thomas S. Ellis presented a confused account of the constitutional role assigned to the courts. On the one hand he said that

[C]ourts must not blindly accept the Executive Branch’s assertion [of state secrets] . . . but must instead independently and carefully determine whether, in the circumstances, the claimed secrets deserve the protection of the privilege. . . . [T]he depth of [the] court’s inquiry increases relative to the adverse party’s need for the information the government seeks to protect. . . . [C]ourts must carefully scrutinize the assertion of the privilege lest it be used by the government to shield “material not strictly necessary to prevent injury to national security.”³⁶⁶

On the other hand, Ellis stated that “courts must also bear in mind the Executive Branch’s preeminent authority over military and diplomatic matters”³⁶⁷ and must accept the Executive’s privilege claim.

[W]henver its independent inquiry discloses a “*reasonable danger* that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged”³⁶⁸ Once a court is satisfied that the claim is validly asserted, the privilege is not subject to a judicial balancing of the various interests at stake.³⁶⁹

Judge Ellis then introduced a balancing test: “El-Masri’s private interests must give way to the national interest in preserving state secrets.”³⁷⁰ How could one individual’s “private” interest ever outweigh the claimed interest of the entire government or the

363. *Id.* at 4.

364. *Id.* at 7.

365. *El-Masri v. Tenet*, 437 F. Supp. 2d 530, 539 (E.D. Va. 2006).

366. *Id.* at 536 (citing *Ellsberg v. Mitchell*, 709 F.2d 51, 58 (D.C. Cir. 1983)).

367. *Id.*

368. *Id.* at 536–37 (quoting *United States v. Reynolds*, 345 U.S. 1, 10 (1953)).

369. *Id.* (citing *Reynolds*, 345 U.S. at 10).

370. *Id.* at 539.

nation? It depends on how one defines national interest. There was no national interest in picking up the wrong person and keeping him in prison for five months, with no ability to seek damages and no opportunity to force the government to concede a mistake and make restitution. El-Masri was not merely defending his own interests. He represented every individual, U.S. citizen or alien, who wants to avoid a like fate. It is in the national interest to prevent government abuse, especially when covered up by the state secrets privilege. It is in the national interest to have other branches of government, in this case the judiciary, independently supervise and judge unilateral and illegal executive actions. It is in the national interest to have an effective system of checks and balances and a separation of powers instead of a concentration of power.

At the end of his decision, Judge Ellis cautioned that nothing in his “ruling should be taken as a sign of judicial approval or disapproval of rendition programs; it is not intended to do either.”³⁷¹ However, by accepting the state secrets privilege as readily as he did, he removed any opportunity for judicial check, scrutiny, or constraint on the extraordinary rendition program. The “propriety and efficacy” of the program, he said, “are not proper grist for the judicial mill.”³⁷² Why not? What prevents courts from independently scrutinizing and passing judgment on abusive, illegal, and unconstitutional actions by the Executive Branch?

Putting the legal issues to the side, Judge Ellis said

[I]f El-Masri’s allegations [were] true, or essentially true, then all fair-minded people, including those who believe that the state secrets must be protected, that this lawsuit cannot proceed, and that renditions are a necessary step to take in this war, must also agree that El-Masri has suffered injuries as a result of our country’s mistake and deserves a remedy.³⁷³

The source of that remedy, he said, “must be the Executive Branch or the Legislative Branch, not the Judicial Branch.”³⁷⁴ There is no reason to expect a remedy from an Executive Branch that initiated the program and attempted to block any litigation questioning it. If there are legitimate questions of illegality and unconstitutionality, the courts are as qualified as Congress to render a judgment. To have

371. *Id.* at 540.

372. *Id.*

373. *Id.* at 541.

374. *Id.*

courts look the other way does not promote the rule of law or respect for the courts.³⁷⁵

German investigators disclosed that they had obtained a list of about twenty CIA operatives suspected in the abduction of El-Masri, but the U.S. government failed to cooperate or give any assistance.³⁷⁶ Prosecutors in Germany received the list from Spanish judicial authorities, who put it together based on a flight manifest of the airplane that stopped in Palma, on the island of Majorca, before flying to Skopje to pick up El-Masri.³⁷⁷

El-Masri appealed his case to the Fourth Circuit.³⁷⁸ Writing for a unanimous panel on March 2, 2007, Judge Robert B. King noted two developments that occurred after the district court's decision: (1) a June 7, 2006 draft report by the Council of Europe substantially affirming El-Masri's account of his rendition and (2) the public admission by President Bush three months later that the CIA program existed.³⁷⁹ Nevertheless, the Fourth Circuit affirmed the decision by Judge Ellis.³⁸⁰ In so doing, it offered three arguments.

The first: "This inquiry is a difficult one, for it pits the judiciary's search for truth against the Executive's duty to maintain the nation's security."³⁸¹ The judiciary cannot search for truth if it accepts the assertion of state secrets and blocks access to disputed documents and eliminates the adversary process that is designed for truth-seeking. Abusive, illegal, and unconstitutional actions by the Executive Branch do not maintain national security. They undermine it. To allow the Executive Branch to engage in extraordinary rendition and torture serves to recruit terrorists and spread hate against the United States.

Second: the Fourth Circuit claimed that the judiciary does not abdicate its powers on state secrets cases.³⁸² In fact, it does. Consider this passage:

The *Reynolds* Court recognized this tension, observing that "[j]udicial control over the evidence in a case cannot be abdicated

375. For news reports on *El-Masri*, see Jerry Markon, *Lawsuit Against CIA Is Dismissed*, WASH. POST, May 19, 2006, at A13; Dana Priest, *Secrecy Privilege Invoked in Fighting Ex-Detainee's Lawsuit*, WASH. POST, May 13, 2006, at A3.

376. Craig Whitlock, *German Lawmakers Fault Abduction Probe*, WASH. POST, Oct. 4, 2006, at A18.

377. *Id.*; see Souad Mekhennet & Craig S. Smith, *German Spy Agency Admits Mishandling Abduction Case*, N.Y. TIMES, June 2, 2006, at A8 (describing El-Masri's abduction). For more details on El-Masri, see GREY, *supra* note 137, at 79–102.

378. *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007).

379. *Id.* at 302.

380. *Id.* at 313.

381. *Id.* at 304.

382. *Id.* (citing *United States v. Reynolds*, 345 U.S. 1, 9–10 (1953)).

to the caprice of executive officers”—no matter how great the interest in the national security—but the President’s ability to preserve state secrets likewise cannot be placed entirely at the mercy of the courts. . . . Moreover, a court evaluating a claim of privilege must “do so without forcing a disclosure of the very thing the privilege is designed to protect.”³⁸³

Evidence is not “disclosed” when a court insists that sensitive documents be given to the trial judge to be examined in camera. Accepting assertions by one side is abdication, which is what the Fourth Circuit did: “[I]n certain circumstances a court may conclude that an explanation by the Executive of why a question cannot be answered would itself create an unacceptable danger of injurious disclosure. In such a situation, a court is obliged to accept the [E]xecutive [B]ranch’s claim of privilege without further demand.”³⁸⁴

The Fourth Circuit rejected El-Masri’s argument that the state secrets privilege represents a surrender of judicial control over access to documents: “As we have explained, it is the court, not the Executive, that determines whether the state secrets privilege has been properly invoked.”³⁸⁵ It is indeed the court that makes that determination, but it cannot decide in an informed manner unless it asks for and examines Executive Branch documents. Deferring to Executive Branch declarations and statements (classified or unclassified) weakens judicial control. Both the district court and the Fourth Circuit depended on a “Classified Declaration” that summarized Executive Branch claims without allowing judges to read the underlying documents.³⁸⁶ Under those conditions, courts operate largely in the dark.

Third: the Fourth Circuit concluded that El-Masri “suffers this reversal not through any fault of his own, but because his personal interest in pursuing his civil claim is subordinated to the collective interest in national security.”³⁸⁷ There is no collective interest in what the government did to El-Masri. National interest is not advanced by apprehending and detaining the wrong people and letting the executive officials who committed the mistake remain unaccountable and at liberty to repeat the error. There is no collective interest in having the United States abuse innocent people while the world passes judgment on the health and vitality of the U.S. political and legal system. Nor is the legal dispute between one person and the

383. *Id.* (quoting *Reynolds*, 345 U.S. at 9–10).

384. *Id.* at 305–06 (internal citations omitted).

385. *Id.* at 312.

386. *Id.*

387. *Id.* at 313.

collective interest. No litigant could ever prevail with that test. The conflict is between the interests raised by El-Masri for all potential victims who may be flown to another country for interrogation and torture. He represents a collective interest in prohibiting abusive and illegal programs by executive officials. There is a collective interest in assuring that constitutional values prevail over political and partisan shortcuts.³⁸⁸ Justice Hugo Black used to inveigh against artificial “balancing tests” that put an individual on one side of the scale and the government on the other.³⁸⁹ Often an individual speaks for the interests of society and the rule of law, and those interests must be protected against claims and assertions by government, especially claims of state secrets.

V. CIA INTERROGATIONS

After President Bush, in September 2006, confirmed the existence and operation of CIA prisons abroad and the transfer of fourteen suspects to Guantánamo, the Administration and Congress drafted legislation to comply with *Hamdan*.³⁹⁰ The White House and Republican Senators insisted on language that “would provide for continued tough interrogations of terrorism suspects by the CIA at secret detention sites.”³⁹¹ The White House clearly intended to maintain two standards: one for interrogations conducted by the Defense Department, subject to the rules set forth in the Army Field Manual, and a separate procedure for the CIA. That distinction was openly discussed during debate on the military commissions bill.³⁹²

The Supreme Court’s decision in *Hamdan* required military commissions to meet the standards contained in Common Article 3 of the Geneva Conventions.³⁹³ It has that name because it appears in all four Geneva Conventions, prohibiting “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture,” and “outrages upon personal dignity, in particular,

388. For an article on the Fourth Circuit decision, see Adam Liptak, *U.S. Appeals Court Upholds Dismissal of Abuse Suit Against C.I.A., Saying Secrets Are at Risk*, N.Y. TIMES, Mar. 3, 2007, at A6.

389. See, e.g., *Barenblatt v. United States*, 360 U.S. 109, 144 (1959) (Black, J., dissenting) (criticizing the majority for adopting a balancing test to analyze fundamental First Amendment rights).

390. 126 S. Ct. 2749 (2006).

391. R. Jeffrey Smith & Charles Babington, *White House, Senators Near Pact on Interrogation Rules*, WASH. POST, Sept. 22, 2006, at A1.

392. Peter Baker, *GOP Infighting on Detainees Intensifies: Bush Threatens to Halt CIA Program if Congress Passes Rival Proposal*, WASH. POST, Sept. 15, 2006, at A1.

393. See *Hamdan*, 126 S. Ct. at 2798 (holding that the military commissions scheduled to be used in *Hamdan*’s trial did not meet the requirements of Common Article 3 of the Geneva Conventions).

humiliating and degrading treatment.”³⁹⁴ Section 6 of the Military Commissions Act, enacted in October 2006 in response to *Hamdan*, required President Bush to issue an executive order to implement treaty obligations, including Common Article 3.³⁹⁵ In signing the bill, President Bush said it would allow the CIA “to continue its program for questioning key terrorist leaders and operatives.”³⁹⁶ The legislation, according to Bush, provided “clarity our intelligence professionals need to continue questioning terrorists and saving lives. This bill provides legal protections that ensure our military and intelligence professionals will not have to fear lawsuits filed by terrorists simply for doing their jobs.”³⁹⁷

The Bush Administration did not seek “clarity.” It sought statutory authority to protect CIA employees who engage in aggressive and abusive interrogations and who transfer suspects to locations where torture is likely. As noted by Frederick Schwarz and Aziz Huq, clarity “was never the Administration’s goal. After all, this was the Administration that for four years had used a standard of ‘humane treatment’ that lacked any definition whatsoever. Rather than clarity, the Administration sought license to torture.”³⁹⁸ Whatever clarity the statute might provide, the procedures followed by CIA interrogators would remain secret. It was widely believed—for good reason—that the methods would be prohibited by military interrogators. Otherwise, there would be no reason for the Administration to repeatedly insist on a different standard for the CIA. Also, the provision for legal protections against lawsuits underscored that the CIA techniques would be aggressive, harsh, and of questionable legality. Bush claimed that the bill “complies with both the spirit and the letter of our international obligations.”³⁹⁹ Unless the CIA methods were made public and neutral observers would be in the room during interrogations, the extent of compliance could never be known.

394. Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3320, 75 U.N.T.S. 138.

395. See Military Commissions Act of 2006, Pub. L. No. 109-366, § 6(a)(3), 120 Stat. 2600, 2632 (2006) (to be codified at 18 U.S.C. § 2441) (recognizing that the President has the authority to interpret treaty obligations and directing the President to issue an executive order interpreting the applicability of the Geneva Conventions).

396. Remarks on Signing the Military Commissions Act of 2006, 42 WEEKLY COMP. PRES. DOC. 1832 (Oct. 17, 2006).

397. *Id.*

398. FREDERICK A. O. SCHWARZ, JR. & AZIZ Z. HUQ, UNCHECKED AND UNBALANCED: PRESIDENTIAL POWER IN A TIME OF TERROR 92 (New Press 2007).

399. Remarks on Signing the Military Commissions Act of 2006, *supra* note 396.

In late July 2007, the White House agreed on procedures to allow the CIA to resume its interrogation of terrorism suspects overseas.⁴⁰⁰ News reports indicated that the methods would allow techniques “more severe” than those used by military personnel.⁴⁰¹ Several executive officials said that the techniques excluded “waterboarding.”⁴⁰² The Justice Department concluded that the procedures did not violate the Geneva Conventions.⁴⁰³ Human rights groups objected that the authorization of “indefinite, incommunicado detention” and interrogation violated international law.⁴⁰⁴ Apparently, the International Committee of the Red Cross would be prohibited from visiting detainees held by the CIA.⁴⁰⁵ The only person at that time that the agency acknowledged holding was Abd al-Hadi al-Iraqi, an Iraqi Kurd said to be “one of Osama bin Laden’s closest advisers.”⁴⁰⁶ CIA officials said that he had “produced valuable intelligence” even though CIA interrogators, at that time, had followed the techniques approved in the Army Field Manual.⁴⁰⁷

The executive order issued by President Bush on July 20, 2007, interprets and applies Common Article 3 to the CIA.⁴⁰⁸ Prohibited interrogation practices include: (1) torture (as defined by 18 U.S.C. § 2340); (2) acts prohibited by 18 U.S.C. § 2441(d) (including murder, torture, cruel or inhuman treatment, mutilation or maiming, intentionally causing bodily injury, rape, sexual assault or abuse, taking of hostages, or performing biological experiments); and (3) acts of cruel, inhuman, or degrading treatment prohibited by the Military Commissions Act and the Detainee Treatment Act.⁴⁰⁹ Also prohibited: (4) “willful and outrageous acts of personal abuse *done for the purpose of* humiliating or degrading the individual” (including “sexual or sexually indecent acts” and “forcing the individual to perform sexual acts or to pose sexually”); (5) “threatening the individual with sexual mutilation, or using the individual as a human shield;” and (6) “acts *intended to* denigrate the

400. See Exec. Order No. 13,440, 72 Fed. Reg. 40,707 (July 24, 2007) (issuing instructions to the C.I.A. regarding the proper interrogation procedures under Common Article 3); Mark Mazzetti, *Rules Lay Out C.I.A.’s Tactics in Questioning*, N.Y. TIMES, July 21, 2007, at A1 (characterizing the President’s Executive Order as approval for methods used in prisons overseas).

401. Mazzetti, *supra* note 400.

402. *Id.*

403. *Id.*

404. *Id.*

405. *Id.*

406. *Id.*

407. *Id.*

408. Exec. Order No. 13,440, 72 Fed. Reg. 40,707 (July 24, 2007).

409. *Id.* at 40,708.

religion, religious practices, or religious objects of the individual.”⁴¹⁰ “[D]etainees [are to] . . . receive the basic necessities of life, including adequate food and water, shelter from the elements, necessary clothing, protection from extremes of heat and cold, and essential medical care.”⁴¹¹

The words “done for the purpose of” and “intended to” seem a backdoor way to condone torture or violations of Geneva. Nothing in Common Law 3 speaks of purpose or intent. The prohibitions are not qualified. The Bush Administration could argue that if the intent or purpose of CIA interrogation is to gather intelligence or prevent future terrorist attacks, CIA employees may commit outrageous acts to humiliate or degrade the individual or denigrate Islam. If interpreted or administered in that manner, the executive order cannot be reconciled with Common Article 3.⁴¹²

VI. CONCLUSION

For most of U.S. history, presidents had no independent authority to transfer someone from the United States to a receiving country for trial. They depended on extradition procedures set forth in treaties and statutes. Renditions occurred under the *Ker-Frisbie* doctrine and other precedents for forcible abduction, but the purpose (as it was for extradition) was to bring someone to court for trial, not for interrogation and abuse.

The Bush Administration and the United States paid a price, legally and politically, for sending suspects to other countries for interrogation and torture. On numerous occasions the Administration decided to deceive the American public and the international community until studies conducted by the Council of Europe, independent analyses by private parties, and the Supreme Court’s decision in *Hamdan* forced it to admit what was widely known. An effective national security policy requires an administration to build trust with the public and to work jointly with Congress. The policy of extraordinary rendition violates both needs.

410. *Id.* (emphasis added).

411. *Id.*

412. P. X. Kelley & Robert F. Turner, *War Crimes and the White House: The Dishonor in a Tortured New “Interpretation” of the Geneva Conventions*, WASH. POST, July 26, 2007, at A21.