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## ARTICLES

### RENDITION TO TORTURE: A CRITICAL LEGAL HISTORY

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#### I. INTRODUCTION

If any principle of international law seemed certain, it was that no nation could lawfully send people to places where they faced torture. Moreover, given President George W. Bush's long-standing rhetorical posture against torture,<sup>1</sup> and his attempts to outlaw torture worldwide,<sup>2</sup> the United States might have seemed a most unlikely candidate to abduct people and send them to third countries for interrogations applying torture.<sup>3</sup>

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1. For example, President George W. Bush told high school seniors designated "Presidential Scholars" (one from each state) that "the United States does not torture and that we value human rights." *The U.S. Government is not Jack Bauer*, BRATTLEBORO REFORMER, June 27, 2007, at Editorials; President Bush also said: "I want to be absolutely clear . . . The United States does not torture. It's against our laws, and it's against our values. I have not authorized it - and I will not authorize it." Issac A. Linnartz, *The Siren Song of Interrogational Torture: Evaluating the U.S. Implementation of the U.N. Convention Against Torture*, 57 DUKE L.J. 1485, 1493 (2008).

2. President George W. Bush said:

The United States is committed to the world-wide elimination of torture and we are leading this fight by example. I call on all governments to join with the United States and the community of law-abiding nations in prohibiting, investigating, and prosecuting all acts of torture and in undertaking to prevent other cruel and unusual punishment. I call on all nations to speak out against torture in all its forms and to make ending torture an essential part of their diplomacy.

Amnesty Int'l, USA: CIA 'Waterboarding': Admission of a Crime, Now There Must be a Criminal Investigation, Feb. 6, 2008, <http://www.amnesty.org/en/library/info/AMR51/011/2008> (last visited Nov. 13, 2009).

3. Of course, the United States history of actually using torture in the past might seem to some to be at significant variance from this rhetorical posture. See, e.g., ALFRED W. MCCOY, A QUESTION OF TORTURE: CIA INTERROGATION FROM THE COLD

The Convention Against Torture (CAT), which the United States ratified in 1994 (albeit with reservations, understandings and declarations) appears unambiguous: “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 subjected to torture.”<sup>4</sup> Moreover, the International Covenant on Civil and Political Rights<sup>5</sup> (ICCPR), also ratified by the United States,<sup>6</sup> contains a nonderogable<sup>7</sup> prohibition against torture as well as cruel, inhuman or degrading treatment.<sup>8</sup>

WAR TO THE WAR ON TERROR (2006).

4. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 39 U.N.GAOR Supp. (No. 51) at 197, 1465 U.N.T.S. 243, art. 3, section 1 [hereinafter CAT] (prohibiting torture and cruel, inhuman and degrading treatment; signed by the United States on April 18, 1988 and, subject to numerous reservations and understandings, ratified on Oct. 21, 1994).

5. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Mar. 23, 1976).

6. Signed 5 October 1977, ratified June 8, 1992. United Nations Treaty Collection: Status of Treaties, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg\\_no=IV-11&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-11&chapter=4&lang=en) (last visited Oct. 15, 2009).

7. The ICCPR does not, strictly speaking, apply to wars, but its provisions prohibiting torture under Article 7 are non-derogable and cannot be limited during times of emergency or even war. Thus, while much of the ICCPR’s formal application to the present situation depends on whether the “war on terror” is a “real” war as opposed to a metaphor, like the “war on drugs,” its proscription against torture remains applicable regardless of how the war on terror is formally classified. Moreover, there is substantial disagreement as to whether the “war on terror” constitutes a war at all. *See, e.g.,* Jordan J. Paust, *Post-9/11 Overreaction and Fallacies Regarding War and Defense, Guantanamo, the Status of Person, Treatment, Judicial Review of Detention, and Due Process in Military Commissions*, 79 NOTRE DAME L. REV. 1335, 1340-43 (2004). Others argue that it is perhaps a war *sui generis*. *See e.g.,* Ingrid Detter, *The Law of War and Illegal Combatants*, 75 GEO. WASH. L. REV. 1049, 1072-77 (2007) (arguing “the War on Terror is a ‘war *sui generis*’)” [hereinafter Detter, *War*]. However, the decision of the United States Supreme Court holding that the laws of war apply to detainees suggests that court agrees with the Bush Administration that it is in fact a war, albeit different from previous wars in that one of the combatants is not a nation state. *See Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

8. The U.S. ratification of the ICCPR contains an understanding “[t]hat the United States considers itself bound by Article 7 to the extent that ‘cruel, inhuman or degrading treatment or punishment’ means the cruel and unusual treatment or punishment prohibited by the Eighth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.” U.S. Reservations and Understandings, International Covenant on Civil and Political Rights, 138 Cong. Rec. S4781-01 (daily ed., Apr. 2, 1992). However, according to the Human Rights Committee’s authoritative comment the norm against torture is a peremptory norm and “[a]ccordingly, a State may not reserve the right to . . . torture, to subject persons to cruel, inhuman or degrading treatment or punishment.” Human Rights Committee, General Comment No. 24 (52), UN Doc. CCPR/C/21/Rev.6, app. C (1994). The prohibitions against refoulement contained in the ICCPR can only apply to torture and not to cruel, inhuman or degrading treatment or punishment. However, it cannot be seriously argued that the United States has not sent people to be tortured. Maher Arar, whose case is detailed below, provides but one example.

The laws of war, including the Geneva Conventions, also prohibit torture.<sup>9</sup> Thus, both international human rights law<sup>10</sup> and international humanitarian law<sup>11</sup> combine to provide what was thought to be a seamless<sup>12</sup> norm prohibiting torture under all circumstances, including the sending of anyone anywhere to face torture.<sup>13</sup> The rules seemed plain and appeared not to admit loopholes.<sup>14</sup> Moreover, the treaties prohibiting torture not only codified international customary law, but stated principles that are considered *jus cogens*,<sup>15</sup> permitting no derogation and constituting

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9. The Article 3 (Common Article 3) to the 1949 Geneva Conventions prohibits torture as well as “outrages upon personal dignity . . . humiliating and degrading treatment.” Detter, *War*, *supra* note 7, at 1080. Finally, even those who discount formal application of both the ICCPR and the Geneva Conventions to the present situation, think that the proscription of torture remains prohibited under natural law principles that provide an international standard irrespective of the Geneva Conventions or the ICCPR. *Id.* at 1086. According to this argument there would be no gap allowing torture even if neither applied. *Id.*

10. International human rights law is generally applicable during peacetime. To the extent that international human rights treaties are made non-derogable during times of crisis or war (or, where derogable, they have not been explicitly derogated) they also protect human rights during conflicts and other national security crises. *See id.* at 1191-92. Thus, international human rights doctrines are more broadly applicable than international humanitarian law, and in places the two overlap. Furthermore, the present conflict with terrorism has become conflated with the laws of war. This is both because of the unfortunate war metaphor (“war against terror”) and because of actual wars in Afghanistan and Iraq. Thus, it is necessary to consider both types of international law - those generally applicable during peacetime and the laws of war.

11. Applicable during wartime and certain types of internal conflicts. *See id.* at 1103-04.

12. A few scholars disagree and find gaps in the treaties. However, even then most concede that at a minimum, as argued below, international law absolutely prohibits torture. *See* Ingrid Detter Frankopan, *Extraordinary Rendition and the Law of War*, 33 N.C. J. INT’L L. & COM. REG. 657, 670-71 (2008) (arguing that the Geneva Conventions do not cover terrorists, and that the non refolement clauses of the Convention Against Torture do not apply to extraordinary renditions because “the United States is not ‘expelling’ or ‘returning’ persons under this scheme”). Detter, nonetheless, argues that the United States’ attempt to relieve itself of obligations under international law by overemphasizing territoriality fail because it “ignores the fact that the procedure might be illegal under international law.” *See generally id.* at 689.

13. *See, e.g.,* Leila Nadya Sadat, *Ghost Prisoners and Black Sites: Extraordinary Rendition Under International Law*, 37 CASE W. RES. J. INT’L L. 309, 320 (2006).

14. Even Ingrid Detter, who believes that terrorists, whom she analogizes to pirates as being outside of the law, including the Geneva Conventions, cannot quite bring herself to find these people completely outside of the law’s protection. She concludes: “[T]orture and degrading treatment are forbidden, that the detaining power must bring charges within a reasonable time, and that the suspected terrorists have the right to be present at their own trial. Detainees . . . have the right to hear all evidence except secret military evidence.” Detter, *War*, *supra* note 7, at 1103.

15. *Filártiga v. Peña-Irala*, 630 F.2d 876, 890 (2d Cir. 1980), colorfully states that “the torturer has become - like the pirate and the slave trader before him - *hostis*

the highest order of international norms, which nation states cannot (lawfully) modify either by state practice or as a matter of domestic law.<sup>16</sup> Finally, breaches of these norms are “punishable by international individual criminal responsibility,”<sup>17</sup> including, in the case of Augusto Pinochet of Chile, the loss of head of state immunity.<sup>18</sup> Like the earlier prohibitions on slavery and genocide, the prohibition against torture, or sending people to places that torture, trended towards becoming absolute.

The United States, during the George W. Bush Administration, swept this aside with formalistic, if not fallacious, reasoning.<sup>19</sup> Part Two of this Article outlines the international, legal roots of rendition, which the United States used by analogy to circumvent the rules proscribing torture and to knowingly send people to nations where they faced torture.<sup>20</sup> Part Three describes how simple rendition

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*humani generis*, an enemy of all mankind.” Filártiga also puts the rule more prosaically: “[A]n act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations.” *Id.* at 880; *see also* Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 717 (2d Cir. 1992) (holding that official torture violates *jus cogens*); *In re Agent Orange Prod. Liab. Litig.*, 373 F. Supp. 2d 7, 110 (E.D.N.Y. 2005) (stating that “[r]ules against torture, war crimes and genocide are, apart from treaties and statutes, arguably *jus cogens*”). Scholars have also found the prohibition against torture to be *jus cogens*. *See, e.g.*, Sadat, *supra* note 13, at 320; Detter, *War, supra* note 7, at 1055-56; and numerous British cases that likewise find the proscription to be *jus cogens*, including *R v. Sec’y of State for Foreign and Commonwealth Affairs*, [2008] EWHC 2048 (Admin); *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T Trial Judgment (Dec. 10, 1998); *R v. Bow Street Metro. Stipendiary Mag.* [1999] 1 A.C. 147 (H.L.); *A v. Sec’y of State for the Home Dep’t*, 2006 2 A.C. 221 (H.L.); *Jones v. Ministry of Interior of the Kingdom of Saudi Arabia* [2006] UKHL 26.

16. *In re Agent Orange Prod. Liab. Litig.*, 373 F. Supp. 2d at 131-36.

17. Leila Nadya Sadat, *Extraordinary Rendition, Torture, and Other Nightmares from the War on Terror*, 75 GEO. WASH. L. REV. 1200, 1212 (2007).

18. *R v. Bow Street Metro. Stipendiary Mag.*, [1999] 1 A.C. 147 (H.L.); *see also* Suresh v. Minister of Citizenship and Immigration, [2002] S.C.R. 3, 3-7 (Can.) (acknowledging the general rule that deportation to torture violates a peremptory norm of international law and concluding that deportation to torture would ordinarily violate section 7 of the Charter of Rights and Freedom, while recognizing that such a deportation to someone facing torture might nonetheless go ahead in undefined exceptional circumstances).

19. This paper will not discuss the broader general issue of torture in international or domestic law. For discussions of the issues presented by torture outside of the extraordinary rendition context see generally, Alan Clarke, *Creating a Torture Culture*, 32 SUFFOLK TRANSNAT’L L. REV. 1 (2008) [hereinafter Clarke, *Creating*] and Alan W. Clarke, *De-Cloaking Torture*, Boumediene and the Military Commissions Act, 11 SAN DIEGO INT’L L.J. 59 (2009) [hereinafter Clarke, *De-Cloaking*].

20. As we will demonstrate, the United States relied on empty assurances from the receiving nations that they would not use torture. The U.S. position, which this article later takes issue with, is set forth in paragraph 21 of the Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, Comments by the Government of the United States of America to the conclusions and recommendations from the Committee Against Torture, U.N. CAT/USA/CO/2/Add. 1 (Nov. 6, 2007). In

became “extraordinary” rendition; it tells the story of how this procedure, which began as a way to bring people to justice from places where extradition was problematic or impossible, became a system geared to torture. Part Four describes the further transformation of the program after September 11, 2001 under the administration of George W. Bush and provides studies of the more important and controversial rendition cases. It also undertakes analysis of the legal, geo-political and moral problems created by the expansion of rendition to the “war on terror” demonstrating how the program created international backlash that continues to constrain U.S. policymakers. The Article concludes that rendition to torture has created multiple overlapping problems for U.S. intelligence services and unnecessarily complex foreign policy issues. In summary, international human rights norms appear to be pushing the United States away from rendition, even as the new Obama administration claims the right to continue the practice in limited circumstances.<sup>21</sup>

The term “extraordinary rendition” arises out of earlier simpler notions of rendition, in which nations resorted to abduction to secure the presence of fugitives for trial. At least at first, it did not involve snatching a person abroad and then rendering that person to yet a third nation, not for trial, but for questioning, and, in many cases, to torture. Moreover, rendition usually meant snatching a fugitive found in a place where extradition was either difficult or even impossible – thus lending quasi-legitimacy to an otherwise legally murky process. This Article, then, traces the evolution of this process of abduction for arguably legitimate or “just” reasons to a process in the war on terror meant to evade any semblance of lawful process. This Article tells the story of how rendition became extraordinary, of how rendition and “harsh interrogations” became euphemisms for torture.

## II. RENDITION’S INTERNATIONAL ROOTS

Rendition has always been controversial. At least initially, it was an extra-legal way to bring people to justice – to an otherwise fair

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addition, in ratifying CAT, the United States narrowly construed Article 3’s “substantial grounds for believing that he would be subjected to torture” as only requiring nonrefoulement where “the United States determines whether it is more likely than not that a person would be tortured” thus rejecting the Committee Against Torture’s more restrictive view that it should not send anyone to a nation where “a person faces a ‘real risk’ of torture.” *Id.* at 3.

21. Leon E. Panetta, Director of the CIA in the Obama Administration, has said that the agency may continue its rendition program of capturing terrorism suspects and sending them “to other countries without extradition proceedings,” and would continue to seek diplomatic assurances against the use of torture or other cruel, degrading or inhuman treatment. Eric Schmitt & Mark Mazzetti, *U.S. Relies More on Aid of Allies in Terror Cases*, N.Y. TIMES, May 24, 2009, at A1.

trial where, if convicted, only lawful penal sanctions followed. Hence the original term, “rendition to justice.”<sup>22</sup> Frowned upon, while tolerated, it became “extraordinary” only after it came to be a way to outsource torture - a way to kidnap people for harsh interrogations in countries that did not inevitably observe the legal niceties found in international human rights instruments.<sup>23</sup>

Both renditions to justice and its metastasized successor, extraordinary rendition, begin with governmentally sanctioned abduction. Without resort to extradition, deportation or any internationally recognized process, a person, who is wanted by one country, is snatched from another, without its formal consent, often in violation of the aggrieved second nation’s domestic law. Sometimes, however, the nation seeking the “snatch” effects it with implicit or overt consent from local or national officials. Irregular rendition can be seen as a matter of degree, with some violations of international law being seen as more egregious than others, and some seemingly following the “no harm, no foul” rule of playground basketball.

Rendition can implicate prickly issues of national sovereignty and pride. One nation cannot normally (or at least openly) kidnap persons from within another nation without consequence. Even the most benign example of rendition – bringing a truly bad person to face relatively impartial justice – can cause wounded pride, protest, and retaliation by the offended nation.

#### A. *The Eichmann Precedent*

The twentieth century’s most famous rendition involved the notorious Nazi war criminal Adolf Eichmann, who was abducted from Argentina by Israeli agents<sup>24</sup> in 1960. Eichmann, who had been one of the architects of Hitler’s final solution, escaped Nuremberg by fleeing to Argentina where he and his wife “made no sustained effort to conceal their identity.”<sup>25</sup> In a mid-1950s recording Eichmann recalled, “If it has to be . . . I will gladly jump into my grave in the knowledge that five million enemies of the Reich have already died

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22. Margaret L. Satterthwaite, *The Story of El-Masri v. Tenet: Human Rights and Humanitarian Law in the “War on Terror,”* in NEW YORK UNIVERSITY PUBLIC LAW AND LEGAL THEORY WORKING PAPERS, 536, 538 (2008), <http://lsr.nellco.org/nyu/plltwp/papers/109/>.

23. *See id.* at 542.

24. Israel contended that Eichmann had been captured by volunteers. Argentina countered that “Israel’s express approval of the acts of the volunteers and intent to place Eichmann on trial resulted in the imputation of legal responsibility to the Jewish State.” Matthew Lippman, *Genocide: The Trial of Adolf Eichmann and the Quest for Global Justice*, 8 BUFF. HUM. RTS. L. REV. 45, 56 (2002).

25. *Id.* at 53.

like animals.”<sup>26</sup> There is little doubt that Eichmann qualified as a war criminal even if he was not “the central, demonic figure.”<sup>27</sup> As Professor Cesarani concludes:

That he committed atrocities before then is beyond doubt, and there is no disputing the fact that he became an accomplice to a widening circle of mass murder that he helped to sustain with all his might. What makes his crimes so chilling is that they were not preordained by any evident pathology or inbuilt racism. Eichmann learned to hate, and to hate in a controlled and impersonal way. He applied business methods to the handling of human beings who, once they had been dehumanised, could be treated no differently from cargoes of kerosene. In his mind there was little difference between setting up a petrol station or a death camp.<sup>28</sup>

Israel made no attempt to extradite Eichmann and then, ignoring Argentine protests, refused to return him, perhaps because they doubted that resort to formal extradition would be effective. They would not risk losing him.

Eichmann’s abduction was considered at the time to have violated international law. Israel apologized to Argentina, but nonetheless tried, convicted, and executed him.<sup>29</sup> In retrospect, many might feel that the violation of international law was, in this case, justified. Strong evidence directly linked Eichmann to some of the worst excesses of the Holocaust; few then, or now, regret that he faced the only measure of justice that the world had then to offer. Had Israel not kidnapped and tried Eichmann, he would likely have lived out his life without facing any consequence greater than emigration.

Had renditions remained limited to such extraordinary circumstances as bringing a genocidal murderer to justice, the process might not have fallen into disrepute. It, and later renditions to justice, laid the intellectual, political, and legal basis for the far more controversial and less justifiable post-9/11 extraordinary renditions. Eichmann, and the increasingly less compelling cases that followed, made the post-9/11 extraordinary renditions to torture seem less radical, and, at least arguably, justifiable extensions of precedent.

B. *Further International Precedents: Rhetorical Support for Later U.S. Practice*

In 1994, French intelligence agents of the *Direction de la*

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26. David Cesarani, *Adolf Eichmann: The Mind of a War Criminal*, BBC HISTORY, Jan. 20, 2009, [http://www.bbc.co.uk/history/worldwars/genocide/eichmann\\_01.shtml](http://www.bbc.co.uk/history/worldwars/genocide/eichmann_01.shtml).

27. *Id.*

28. *Id.*

29. Lippman, *supra* note 24, at 76-104.

*Surveillance du Territoire* (DST), with help from the Sudanese government,<sup>30</sup> abducted, handcuffed, and hooded the notorious terrorist, Illich Ramirez Sanchez, aka Carlos, “the Jackal,” from the Sudan and rendered him to France for trial.<sup>31</sup> Few besides Carlos himself protested this rendering to justice. Since Sanchez had been wanted by many nations<sup>32</sup> and had been implicated in the murder of eight Israeli athletes at the Munich Olympics in 1972, the kidnapping of OPEC ministers from a meeting in Vienna, and the explosion of a French express train that killed six people, many nations applauded his capture.<sup>33</sup> Moreover, “[t]he DST had a personal vendetta against . . . [Carlos] who killed two of its agents in 1975.”<sup>34</sup> At one time, before Osama bin Laden became synonymous with terrorism, Carlos, “the Jackal,” was considered the “world’s most wanted terror chief.”<sup>35</sup> He was convicted for the 1975 murder of two French intelligence officers and sentenced to life in prison.<sup>36</sup> Evidence of his many crimes continues to surface, however, and in 2007 he was ordered to stand trial for a series of other crimes committed during the early 1980s.<sup>37</sup>

Carlos contested the legality of his abduction, but the European Commission of Human Rights “ruled that the circumstances of his arrest and transfer to France did not violate the European Convention on Human Rights.”<sup>38</sup> He was tried, convicted, and is now serving a life sentence in France.<sup>39</sup>

U.S. Secretary of State Condoleezza Rice cited the Jackal’s case as precedent for extraordinary renditions during the George W. Bush Administration,<sup>40</sup> claiming that “[f]or decades, the United States and

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30. *Capture of Carlos: French Help for Islamic Junta’s War Won Arrest of Jackal*, THE GUARDIAN (London), Aug. 17, 1994, at 3; Sue Quinn, *Jackal Arrest a ‘Betrayal’ Shadowy Deal, Kidnap Alleged by His Lawyer*, THE ADVERTISER, Aug. 17, 1994. (“There was no procedure or extradition. It was a kidnapping. Mr Oussedik and flamboyant French lawyer Mr. Jacques Verges have agreed to defend Carlos against expected charges in connection with a 1982 bomb attack in Paris that killed one person . . . . He was betrayed by the Sudanese guards charged with his protection, bound, drugged and put on board a French plane where agents of the DST (French counterintelligence agency) were waiting for him.”).

31. Terry Davis, *Unlawful Rendition*, WALL ST. J., June 27, 2006, at A14.

32. Paul Webster, *Pasqua Basks in Arrest of the Jackal*, THE GUARDIAN (London), Aug. 16, 1994, at 2 (noting that “the terrorist was hunted down in a joint effort by European and Middle East countries”).

33. Bruce Wilson, *Jackal, High Priest of Terror*, THE ADVERTISER, Aug. 17, 1994.

34. Webster, *supra* note 32, at 2.

35. *Id.*

36. *Carlos the Jackal Faces New Trial*, BBC NEWS, May 4, 2007, <http://news.bbc.co.uk/2/hi/europe/6623659.stm>.

37. *Id.*

38. Davis, *supra* note 31, at A14.

39. *Id.*

40. Glenn Kessler, *Rice Defends Tactics Used Against Suspects; Europe Aware of*

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.”<sup>41</sup> While there had long been use of renditions to justice, Rice’s suggestion by implication, that European nations had rendered people solely for interrogations, remained questionable (although, as we will see, there was precedent from the Clinton Administration for the practice). Moreover, despite accumulating evidence to the contrary, Rice continued to advance the administration’s line that the United States did not render people for torture.

Terry Davis, secretary general of the Council of Europe, vigorously disputed Rice’s characterization, calling it “obfuscation”<sup>42</sup> and distinguishing the case from post-9/11 U.S. extraordinary rendition by pointing out:

Carlos did not disappear, nor did he end up in some Caribbean gulag. He was taken to Paris and brought before a judge, with the right to a lawyer and a fair trial. This was because he was arrested on the basis of a valid arrest warrant, issued before his capture on the basis of his alleged involvement in a car-bomb attack which killed two people and injured 70 people in Paris. An arrest warrant is a piece of paper signed by a judge. This may not seem much, but it makes all the difference. This is the stuff our freedom is made of.<sup>43</sup>

Despite the Council of Europe’s protestations to the contrary, one can easily see how this type of rendition provided plausible, if plainly distinguishable, justification for the United States’ use of extraordinary rendition. The Administration did not need to persuade everyone; it also did not need an airtight legal defense. What it needed was legal and political cover, and Rice’s explanation provided that. Many European nations were quietly complicit in the CIA’s extraordinary rendition program and were in no position to vigorously protest.<sup>44</sup>

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*Operations, She Implies*, WASH. POST, Dec. 6, 2005, at A1.

41. Condoleezza Rice, U.S. Sec’y of State, Remarks Upon Her Departure for Europe (Dec. 5, 2005), *quoted in* Louis Fisher, *Extraordinary Rendition: The Price of Secrecy*, 57 AM. U. L. REV. 1405, 1426 (2008) (emphasis added).

42. Davis, *supra* note 31, at A14.

43. *Id.*

44. Louis Fisher analyzes Secretary Rice’s explanation to the European Union: “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.” 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.

Fisher, *supra* note 41, at 1428.

At least as to human rights matters, the United States does not submit to the jurisdiction of the World Court or any other international judicial or quasi-judicial body (such as the United Nations Human Rights Committee).<sup>45</sup> It thus arrogates to itself the determination of the legality of its compliance with international human rights treaties. This allows the United States to violate those same treaties “without effective redress, because of peculiar but dominant contemporary views of treaties held by domestic authorities responsible for their implementation.”<sup>46</sup> It only needed a plausible analogy to bolster its case, to provide surface plausibility to its assertions of legality, in order to make the larger political point. Rice, then, succeeded in the short run in deflecting European criticism.

### C. *Additional Historical Context*

Other renditions seem less controversial and provide less persuasive cover for U.S. expansion of the concept. Nonetheless, they remain important as part of the intellectual backdrop that the United States appeals to in justifying its use of rendition.

For example, the European Court of Human Rights has found no legal impediment under the European Convention for the Protection of Human Rights and Fundamental Freedoms for a country to omit formal extradition proceedings when the rendering state cooperates by making the arrest and turning a fugitive over to authorities of the prosecuting state.<sup>47</sup> Thus, in one early case, the European Human Rights Commission ruled that the Convention was not violated where Costa Rican police arrested a fugitive from Italy and then turned him over (without formal legal process) to Italian authorities for transport to Italy to face charges.<sup>48</sup> Similarly, Klaus Barbie’s<sup>49</sup> (somewhat irregular) return to France with Bolivia’s cooperation was deemed lawful.<sup>50</sup>

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45. ALAN W. CLARKE & LAURELYN WHITT, *THE BITTER FRUIT OF AMERICAN JUSTICE: INTERNATIONAL AND DOMESTIC RESISTANCE TO THE DEATH PENALTY* 53 (2007) [hereinafter *BITTER FRUIT*].

46. Joan Fitzpatrick, *The Unreality of International Law in the United States and the LaGrand Case*, 27 *YALE J. OF INT’L L.* 427, 428 (2002).

47. *See e.g.*, *Ocalan v. Turkey*, 37 *Eur. Ct. H.R. Rep.* 10 (2003).

48. *Freda v. Italy*, 21 *Eur. Comm’n H.R. Dec. & Rep.* 250 (1981).

49. Klaus Barbie, (also known as Altmann), known as “the Butcher of Lyon,” was thought to have been responsible for the deaths of over 7500 people (4000 of them Jews) when he was Gestapo chief in Lyon. *See 1983: ‘Butcher of Lyon’ Returns to Face Trial*, *BBC NEWS*, Feb. 6, 1983, [http://news.bbc.co.uk/onthisday/hi/dates/stories/february/6/newsid\\_4149000/4149443.stm](http://news.bbc.co.uk/onthisday/hi/dates/stories/february/6/newsid_4149000/4149443.stm). He was returned to France in 1983, tried, convicted of 341 separate crimes against humanity and sentenced to life in prison where he died in 1991. *See id.*

50. *Altmann (Barbie) v. France*, 37 *Eur. Comm’n H.R. Dec. & Rep.* 225, 233-34, <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc.en>. For a similar case, see

Europe's famously pro-human rights sensibilities are not offended by irregularities in a fugitive's rendition to justice, particularly where the crime is heinous and the fugitive otherwise difficult to capture relying solely on formal processes. One can readily see why courts would not wish to free someone merely because of minor irregularities attending the capture of a particularly wicked and elusive fugitive. One can also see how these barely lawful irregularities became precedents for more audacious and problematic renditions developed in response to post 9/11 terrorism.

### III. EARLY U.S. PRECEDENTS – FROM REAGAN TO CLINTON, FROM BRINGING TERRORISTS TO FACE JUSTICE TO RENDITIONS TO TORTURE AND DISAPPEARANCE

#### A. *Early 19th and 20th Century Roots*

Although sometimes attributed to policies beginning under the Clinton Administration,<sup>51</sup> extra-judicial kidnappings by the United States had earlier legal roots<sup>52</sup> – albeit limited to bringing people to U.S. justice rather than taking them to third countries for trial or questioning.<sup>53</sup> These trace to the nineteenth century case of *Ker v.*

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Reinette v. France, 63 Eur. Comm'n H.R. Dec. & Rep. 189 (1989).

51. See e.g., A. Barton Hinkle, Editorial, *Suddenly, Fascism Doesn't Look So Bad After All*, RICHMOND TIMES DISPATCH, Feb. 17, 2009, at A11 (asserting that extraordinary rendition began under Clinton); Marc A. Thiessen, *Tough Questions for Panetta; His Answers Will Shape CIA's War on Terror*, USA TODAY, Jan. 28, 2009, at A11 (asserting that Clinton instituted extraordinary renditions and Bush continued them); Nat Hentoff, *War Crimes*, THE VILLAGE VOICE, Feb. 15, 2005, at 26 (“As I shall document later in this series, the CIA's ‘extraordinary renditions’ began in the Clinton Administration, but have been greatly expanded under George W. Bush, who piously and repeatedly pledges that this country will never, ever condone or practice torture.”). The problem then is partly one of nomenclature. Some historians and others begin with the renditions of Eichmann and The Jackal, which were renditions to justice, while others, without always clearly making the distinction, look to Clinton Administration policies that were the first time that the United States grabbed people in one country and then sent them to a third country. Both views are in their own way correct, but distinctions in the methods are sometimes overlooked. Moreover, as we shall see, kidnappings to justice go back further than Eichmann and in the United States to *Ker v. Illinois*, 119 U.S. 436 (1886).

52. Ingrid Detter Frankopan finds rendition's roots tracing to the fugitive slave laws, *supra* note 7, at 658, citing U.S. CONST. art. IV, § 2, cl. 3 (“No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.”), *repealed by* U.S. CONST. amend. XIII.

53. Clinton did expand the notion by rendering people to *other nations* where, despite assurances that they would not be tortured, torture was apparently practiced. Before that, kidnappings were used to bring a fugitive in for trial, not to send them to a third country for interrogation. In that sense, the Clinton Administration was the first. Moreover, the Clinton Administration did press foreign governments to “respect

*Illinois*, where, despite an extradition treaty and the issuance of a formal extradition warrant, government agents, without higher-level authorization, kidnapped and then rendered the defendant to face American justice.<sup>54</sup> The Supreme Court held that “such forcible abduction is no sufficient reason why the party should not answer when brought within the jurisdiction of the court which has the right to try him for such an offense, and presents no valid objection to his trial in such court.”<sup>55</sup> The Court pointed out that there was “no language in this treaty . . . which says in terms that a party fleeing from the United States to escape punishment for crime becomes thereby entitled to an asylum in the country to which he has fled.”<sup>56</sup> It remained open for treaty language to expressly prohibit such abductions, but in the absence of such language it would not matter how the fugitive was brought to trial.<sup>57</sup>

In 1952, *Frisbie v. Collins* held that forcible abduction from one state to another within the United States also does not impair a court’s power to try a person.<sup>58</sup> The domestic legal basis for renditions to justice was laid in the nineteenth century and upheld long before the practice became common.

*B. Renditions Under Presidents Ronald Reagan and George Herbert Walker Bush*

The modern concept (at least as to the United States) begins with President Ronald Reagan who, approved renditions in 1986.<sup>59</sup> In 1987 the FBI lured Fawaz Yunis into international waters off the coast of Cyprus<sup>60</sup> with promises of a drug deal and brought him to face U.S. justice.<sup>61</sup> Yunis had been the leader of the terrorist group that hijacked a Royal Jordanian Airline Flight in which two hostages were United States citizens.<sup>62</sup> The Court of Appeals, citing *Frisbie v.*

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lawful boundaries in interrogations” and “cut off funding and cooperation with the directorate of Egypt’s general intelligence service,” because of its reputation for torturing suspects, which was not something that the Bush Administration did. Dana Priest & Barton Gelman, *U.S. Decries Abuse but Defends Interrogations; ‘Stress and Duress’ Tactics Used on Terrorism Suspects Held in Secret Overseas Facilities*, WASH. POST, Dec. 26, 2002, at A1. Officially sanctioned kidnappings, however, predated Clinton and in that sense Clinton was not the first. See Satterthwaite, *supra* note 22, at 538-40.

54. *Ker*, 119 U.S. at 438.

55. *Id.* at 444.

56. *Id.* at 442.

57. *Id.*

58. *Frisbie v. Collins*, 342 U.S. 519, 522-23 (1952).

59. Satterthwaite, *supra* note 22, at 538.

60. Daniel Benjamin, *5 Myths About Rendition (and that New Movie)*, WASH. POST, Oct. 21, 2007, at B3.

61. *United States v. Yunis*, 924 F.2d 1086, 1089 (D.C. Cir. 1991).

62. *Id.*

*Collins*<sup>63</sup> and *Ker v. Illinois*,<sup>64</sup> rejected Yunis' complaint that jurisdiction should have been declined because of the government's "allegedly outrageous conduct."<sup>65</sup> There seems to have been little question that Yunis was a dangerous terrorist, and deception rather than force animated and thereby partially justified this particular rendition. Moreover, unlike Eichmann or Carlos the Jackal, Yunis' capture in international waters did not aggrieve another nation, nor did it impinge on any nation's sovereignty.

In 1989 President George Herbert Walker Bush<sup>66</sup> ordered the invasion of Panama, initiating one of the more controversial early cases. In part, the goal was to bring cocaine-smuggling dictator Manuel Noriega to justice. Noriega vigorously protested, arguing that his arrest, capture and forcible removal to the United States was illegal<sup>67</sup> and "shocking to the conscience and in violation of the laws and norms of humanity,"<sup>68</sup> and that the invasion of Panama violated both the Constitution and international law. The Federal District Court for the Southern District of Florida responded that,

It is well settled that the manner by which a defendant is brought before the court normally does not affect the ability of the government to try him. The *Ker-Frisbie* doctrine, as this rule has come to be known, provides that a court is not deprived of jurisdiction to try a defendant on the ground that the defendant's presence before the court was procured by unlawful means.<sup>69</sup>

The important thing to notice is how the "ends justify the means" argument has changed. Eichmann's abduction for genocide seems more than justifiable; the crime was against humanity itself. The Jackal's capture seems only slightly less compelling; while it did not involve the staggering numbers of the Holocaust, his brand of

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63. 342 U.S. at 522.

64. 119 U.S. at 444.

65. Yunis, 924 F.2d at 1092.

66. President of the United States from 1989 to 1993 and father of George Walker Bush, President from 2001 to 2009.

67. Because Noriega was never the legitimate head of state, he was not able to successfully assert head of state immunity. The first case to directly confront (and reject) the defense of head of state immunity for crimes against humanity, was that of the extradition of Augusto Pinochet before the British House of Lords. Geoffrey Robertson, *The Case of General Pinochet*, in *THE PHENOMENON OF TORTURE* 314, 318-19 (William F. Schulz ed., 2007); *R v. Bow Street Metro. Stipendiary Magistrate*, [2000] 1 A.C. 147 (H.L.) (holding that head of state immunity does not apply to acts of torture and hostage taking which are not legitimately functions of the head of state). The decision, however, was limited to the period after the United Kingdom had ratified the Convention Against Torture, 29 September 1988. Since Chile had also ratified the Convention, this satisfied the double criminality rule of extradition law. Had Noriega been a legitimate and recognized head of state, his case would have been much closer, given the state of the law at the time of his capture.

68. *United States v. Noriega*, 746 F. Supp. 1506, 1529 (S.D. Fla. 1990).

69. *Id.* (emphasis added).

international terrorism likewise involved the killing of large numbers of innocent people. Yunis was also a terrorist and in any event his case does not appear to have violated international law in any meaningful respect.

Noriega's case, however, included starting a war with the foreseeable killing and displacement of large numbers of innocents. It also involved ending large-scale drug smuggling and stopping a criminal dictatorship. Nonetheless the loss of lives and disruption for others was horrific. As Human Rights Watch reported in 1991,

[W]e remain skeptical about larger numbers . . . They reveal that the "surgical operation" by American forces inflicted a toll in civilian lives that was at least four-and-a-half times higher than military casualties in the enemy, and twelve or thirteen times higher than the casualties suffered by U.S. troops. By themselves these ratios suggest that the rule of proportionality and the duty to minimize harm to civilians, where doing so would not compromise a legitimate military objective, were not faithfully observed by the invading U.S. forces. For us, the controversy over the number of civilian casualties should not obscure the important debate on the manner in which those people died.<sup>70</sup>

Note the shift and expansion of rendition's logic. From constituting the rare exception, renditions to justice were becoming accepted as an increasingly important if also murkily illicit tool. Powerful nations – particularly the United States – overlooked the illegality of kidnapping under international law; norms seemed (prematurely and erroneously as it has turned out) to be shifting in favor of an ambiguous – neither quite legal nor demonstrably illegal – status for renditions to justice. In any event, as demonstrated in the case of *Alvarez-Machain*,<sup>71</sup> discussed below, the United States seemed prepared to weather the criticism of illegality. The rules were changing, at least for an exceptionalist nation like the United States, both in the amount of force that could be brought to bear and in toleration of increasingly lesser purposes animating renditions.

In 1990, in a case that ultimately reached the U.S. Supreme Court, the United States government authorized the abduction of a medical doctor, Humberto Alvarez-Machain, who was accused of participating in the torture-murder of a DEA agent in Mexico.<sup>72</sup> The

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70. David Nachman, *Human Rights in Post-Invasion Panama: Justice Delayed Is Justice Denied*, HUMAN RIGHTS WATCH, Apr. 7, 1991, <http://www.hrw.org/legacy/reports/1991/panama/> (last visited June 30, 2009).

71. *United States v. Alvarez-Machain*, 504 U.S. 655, 670 (1992) (holding that petitioner's kidnapping from Mexico did not violate the express terms of the 1978 extradition treaty with Mexico and that his abduction did not prohibit his trial in the United States).

72. *Id.* at 657.

case differed from *Ker*<sup>73</sup> in two respects. First, Mexico protested the kidnapping after claiming that such abductions on Mexican soil violated the extradition treaty with the United States.<sup>74</sup> Second, unlike *Ker* the United States government explicitly authorized Alvarez-Machain's abduction.<sup>75</sup> This direct governmental involvement hurt Mexican sensitivities, informed as they were by a long history of U.S. meddling in Mexico's internal affairs. The diplomatic tensions stemming from that interference had, long before this case, directly and adversely affected extradition between the two countries.<sup>76</sup>

A six-vote majority on the U.S. Supreme Court held that, notwithstanding Mexico's protest and the violation of international law, the treaty did not explicitly prohibit abduction. As a result, the *Ker-Frisbie* doctrine was applicable. Thus the trial court was not divested of jurisdiction.<sup>77</sup> Alvarez-Machain was acquitted at trial,

73. *Ker v. Illinois*, 119 U.S. 436 (1886).

74. The Federal District Court observed that,

The Embassy of Mexico has presented a diplomatic note to the United States Department of State in Washington, D.C. concluding that U.S. agents violated the terms of the extradition treaty by unilaterally abducting Dr. Machain, and demanding Dr. Machain's return to Mexico. Mexico has adequately protested and raised any rights it has under the extradition treaty in force between the United States and Mexico. Accordingly, Dr. Machain has derivative standing to invoke those rights. The legality of Dr. Machain's abduction under the extradition treaty is therefore squarely before the Court.

*United States v. Caro-Quintero*, 745 F. Supp. 599, 608-09 (C.D. Cal. 1990).

75. *Alvarez-Machain*, 504 U.S. at 659.

76. Rodrigo Labardini noted:

Commentators have indicated that an impediment to successful extradition relations was the view by Mexicans that the United States tramples on its sovereignty and violates its law. Indeed, assertions were made that "[i]n the 1980s, Mexico was still so paranoid about foreign meddling that it protected even its criminals in the name of sovereignty."

Rodrigo Labardini, *Life Imprisonment and Extradition: Historical Development, International Context, and the Current Situation in Mexico and the United States*, 11 SW. J. L. & TRADE AM. 1, 9 (2005) (alteration in original).

77. Writing for the majority, Justice Rehnquist wrote,

Respondent and his *amici* may be correct that respondent's abduction was "shocking," and that it may be in violation of general international law principles. Mexico has protested the abduction of respondent through diplomatic notes, and the decision of whether respondent should be returned to Mexico, as a matter outside of the Treaty, is a matter for the Executive Branch. We conclude, however, that respondent's abduction was not in violation of the Extradition Treaty between the United States and Mexico, and therefore the rule of *Ker v. Illinois* is fully applicable to this case. The fact of respondent's forcible abduction does not therefore prohibit his trial in a court in the United States for violations of the criminal laws of the United States.

*Alvarez-Machain*, 504 U.S. at 669-70 (citation omitted).

and he then sued those responsible for his abduction.<sup>78</sup> The Supreme Court again heard his case, this time ruling, among other things, that his abduction, brief illegal detention and rendering to justice in the United States did not violate a well-defined norm of customary law, thus leaving him without civil remedy for his abduction from Mexico.<sup>79</sup>

By this point rendition to justice had expanded to include garden varieties of serious crime; however heinous Alvarez-Machain's alleged crime may have been, it was neither a war crime, nor terrorism, as those crimes are conventionally understood.<sup>80</sup> More importantly, although deemed lawful by the Supreme Court, some have argued these actions were plainly illegal under international law.<sup>81</sup>

They also, not incidentally, constituted a flagrant, prosecutable violation of Mexican law.<sup>82</sup> This violation of another nation's domestic law should not be overlooked. As we will see with the case of extraordinary rendition, the threat of international prosecution of U.S. agents remains substantial. Even if the United States refuses to extradite its officials to face kidnapping charges, those officials are then hampered by the mere fact of an international warrant for their arrest.

The *Alvarez-Machain* expansion of the rendition to justice concept was not without other more immediate consequence. First, it was inevitable that once renditions to justice became more common, wholly innocent persons, as well as those only marginally connected to terrorism, would be snatched and tortured.<sup>83</sup> This problem could

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78. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 698 (2004).

79. *Id.* at 699.

80. As Geoffrey Robertson points out in the slightly different context revolving around limiting the application of universal jurisdiction, "the drug dealer is a common criminal, heedless of the harm he puts in others' way, but it is an exaggeration to regard his offence as the equivalent of politically motivated mass murder." Robertson, *supra* note 67, at 312. Placing limits on universal jurisdiction is not in all respects analogous to the extraordinary rendition situation. Nonetheless, the analogy is sufficiently close to make the comparison, in that in each case one would be applying the principle to lesser and lesser crimes. Thus, the severity of the crime is surely a reasonable consideration in assessing the legitimacy of the practice of extraordinary rendition just as it is in assessing whether universal jurisdiction should extend to so-called common crimes as opposed to the more recognized use of the concept in genocide and other similar crimes against humanity.

81. Michael J. Glennon argues, "[T]he Court provided no support in *Sosa v. Alvarez-Machain* for its extraordinary conclusion . . . Its conclusion is mistaken . . . because it violates both core principles of customary law concerning sovereignty and derivative limits on enforcement jurisdiction that existed long before any treaty attempted to limit the use of force." Michael J. Glennon, *How International Rules Die*, 93 GEO. L.J. 939, 961 (2005).

82. In a similar case, an American bounty hunter was charged and ordered to stand trial under Mexican law. BITTER FRUIT, *supra* note 45, at 38.

83. Both the United States and Canada have had great difficulty with wrongful

only increase as more people were kidnapped on what would sometimes prove shaky intelligence. At least in Alvarez-Machain's case there was an arrest warrant preceding the kidnapping and a fair trial afterward. But one can easily see how the innocence problem might become much greater when those constraints were removed.

The fact that the trial court acquitted Alvarez-Machain should serve as an important reminder of the need for due process protections; a reminder of the fact that our law enforcement and intelligence agencies do not inevitably get it right; a reminder that we can only protect the innocent by providing a fair process to everyone, including the guilty.

This case also demonstrates that even before the extraordinary renditions of the George W. Bush Administration, the international community was becoming increasingly hostile to these "abductions to justice" violations of international law<sup>84</sup> and national sovereignty. Two years later the House of Lords in the United Kingdom came to a different view directly repudiating both *Alvarez-Machain's* reasoning and result.<sup>85</sup>

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convictions of persons even after fair trials. All of our procedural trial protections cannot suffice to prevent unsettling numbers or erroneous convictions. *See, e.g.*, Alan W. Clarke & Laurelyn Whitt, *Problem Without Borders: A Comment on Garrett's Judging Innocence*, 33 QUEEN'S L.J. 619 (2008). Thus, it is not surprising that people who have not been tried, whose only procedural protection has been the issuance of an arrest warrant, and who are abducted rather than extradited, will sometimes be not guilty.

84. BITTER FRUIT, *supra* note 45, at 38-39. In his dissent in *United States v. Alvarez-Machain*, Justice Stevens argues:

A critical flaw pervades the Court's entire opinion. It fails to differentiate between the conduct of private citizens, which does not violate any treaty obligation, and conduct expressly authorized by the Executive Branch of the Government, which unquestionably constitutes a flagrant violation of international law, and in my opinion, also constitutes a breach of our treaty obligations.

504 U.S. 655, 682 (1992).

85. *R v. Horseferry Road Magistrates' Court*, [1994] 1 A.C. 42 (H.L.) (holding that the High Court had the responsibility to inquire into the circumstances by which a person was brought within the court's jurisdiction and order the release of the defendant if there has been a disregard of the extradition process and a violation of international law and the laws of the place where the defendant had been found). During the course of the decision in *Horseferry*, Lord Bridge, after citing *Alvarez-Machain* (with specific reference to Justice Stevens' dissent characterizing the majority opinion as "monstrous" and a violation of international law), observed:

Whatever differences there may be between the legal systems of South Africa, the United States, New Zealand and this country, many of the basic principles to which they seek to give effect stem from common roots. There is, I think, no principle more basic to any proper system of law than the maintenance of the rule of law itself. When it is shown that the law enforcement agency responsible for bringing a prosecution has only been

Alvarez-Machain's rendition to justice provoked Mexican outrage,<sup>86</sup> a flurry of scholarly criticism,<sup>87</sup> and a "storm of international protest."<sup>88</sup> In the end, the U.S. was forced to negotiate a new extradition treaty with Mexico prohibiting such conduct.<sup>89</sup> Moreover, the Council of Europe, which legally binds 46 nation states in Europe, now unequivocally prohibit such abductions to render someone to justice.<sup>90</sup>

The *Alvarez-Machain* case thus illustrates and continues the point about the way in which the precedent for forcible abductions to justice expanded both in number and kind. More importantly, with this case, we begin to see the world community react forcibly and

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enabled to do so by participating in violations of international law and of the laws of another state in order to secure the presence of the accused within the territorial jurisdiction of the court, I think that respect for the rule of law demands that the court take cognisance of that circumstance. To hold that the court may turn a blind eye to executive lawlessness beyond the frontiers of its own jurisdiction is, to my mind, an insular and unacceptable view. Having then taken cognisance of the lawlessness it would again appear to me to be a wholly inadequate response for the court to hold that the only remedy lies in civil proceedings at the suit of the defendant or in disciplinary or criminal.

*Id.* at 67(F)-(H).

86. Chris McGreal, *America Accused of Riding Roughshod in Drugo Case*, THE INDEPENDENT (London), Apr. 29, 1990, at 11.

87. Neil A. Lewis, *U.S. Tries to Quiet Storm Abroad Over High Court's Right-to-Kidnap Ruling*, N.Y. TIMES, June 17, 1992, at A8.

88. BITTER FRUIT, *supra* note 45, at 38; *see also* Labardini, *supra* note 76, at 13 ("[*Alvarez-Machain*] sparked intense media criticism and official protests from political leaders, legislators, judges, legal professional associations and academics in Mexico, Canada, Europe, Asia and the Caribbean.") (citations omitted).

89. Labardini, *supra* note 76, at 15.

90. European Commission for Democracy Through Law, *Opinion on the International Legal Obligations of Europe Member States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoners*, adopted by the Venice Commission at its 66<sup>th</sup> Plenary Session (Venice March 17-18, 2006), [http://www.venice.coe.int/docs/2006/CDL-AD\(2006\)009-e.asp](http://www.venice.coe.int/docs/2006/CDL-AD(2006)009-e.asp), states in pertinent part:

Para. 24. A transfer is unlawful or irregular when the government of State B transfers a person from State B to the custody of State A, against his or her consent, in a procedure not set out in law (i.e. not extradition, deportation, transit or transfer with a view to sentence-serving).

Para. 25. The kidnapping of a person by agents of State A on the territory of State B and his or her removal to State A or to a third State is a violation of State B's territorial sovereignty and therefore an internationally wrongful act which engages the international responsibility of State A.

Para. 26. Under general international law ... in such a case State A has to make full reparation for the injury caused by the internationally wrongful act at the request of the injured State, which, in this case, would include the return of the person in question. The rights of the person in question vis-à-vis State A depend upon the latter's law, on the applicable human rights obligations.

effectively against renditions to justice. In this sense then, *Alvarez-Machain* provided both the legal, political and moral arguments for<sup>91</sup> and against<sup>92</sup> the yet-to-come expansion into extraordinary rendition. Proponents cite the precedent for declaring rendition lawful and a salutary step in dealing with the intractable problem of putting fugitive international terrorists out of action. Opponents emphasize the almost universal nation-by-nation backlash, the violation of evolving international norms, and transnational case law undercutting this precedent. In this way, the *Alvarez-Machain* cases (criminal and civil) were the most important international rendition precedents since *Eichmann*.

### C. Clinton and the First Renditions to Torture

Renditions continued to move towards the modifier “extraordinary.” Two things facilitated this change: first, Congress passed new laws giving extraterritorial reach to certain terrorist crimes,<sup>93</sup> and second, President Bill Clinton signed an executive

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91. Daniel Benjamin of the Brookings Institution argues in favor of the rendition program and points out that there have been numerous supporting precedents, including *Alvarez-Machain*.

President George H.W. Bush approved the kidnapping in 1990 of Mexican physician Humberto Alvarez Machain, who was believed to be involved in the torture and killing of a Drug Enforcement Administration official. Nothing says that renditions can involve only suspected terrorists; Israel's abduction of Nazi war criminal Adolf Eichmann in Argentina in 1960 could be called a rendition, though the term was not yet in use . . . . According to former CIA director George J. Tenet, about 70 renditions were carried out before Sept. 11, 2001, most of them during the Clinton years.

Benjamin, *supra* note 69, at B3.

92. Alan W. Clarke and Laurelyn Whitt point out some of the problems with such abductions to render a person to justice:

Obviously, abduction is not always practicable, and in any event its use has caused so many foreign policy difficulties that it is not likely to become a common way to circumvent extradition. As a result of the "storm of international protest" provoked by the decision, the government's ability to abduct fugitives without extradition has been greatly limited.

Department of Justice guidelines now prohibit federal officers from kidnapping suspects in other countries without advance approval. Moreover, after the Supreme Court's decision, the Mexican government suspended U.S. Drug Enforcement Administration activities in Mexico, and later negotiated a treaty with Washington (not yet ratified) that prohibits transborder abductions. Finally, an American bounty hunter and his brother, who abducted and returned a fugitive, were charged and ordered to stand trial by a Mexican judge.

BITTER FRUIT, *supra* note 45, at 38.

93. 18 U.S.C. § 2331 (1993). Frederick Hitz testified:

This practice [rendition] arose out of the Congress's decision to pass statutes in the 1980's with extraterritorial reach, making it a federal crime to commit terrorist acts against U.S. citizens abroad.

order which expanded the CIA's ability to render terrorists from abroad.<sup>94</sup> Although much of this order remains classified, it was a part of the basis for greater flexibility in carrying out renditions and particularly in renditions from one country to another outside of the United States.<sup>95</sup>

At first, the administration followed the familiar path of simply snatching a suspected terrorist for trial. For example, in 1993 the United States captured Ramzi Yousef for his role in the 1993 World Trade Center bombing, and rendered him to the United States for trial where he was convicted for his role in the first World Trade Center bombing and sentenced to life imprisonment.<sup>96</sup>

These programs arguably could be justified by the need to bring international terrorists to justice from countries that could not or would not extradite.<sup>97</sup> Even after the Clinton Administration began to render persons to third countries such as Egypt, it required a legal process before rendition – there had to be a warrant, indictment, or

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*Rendition to Torture: the Case of Maher Arar: Hearing Before Subcommittee on International Organizations, Human Rights and Oversight of the Committee on Foreign Affairs and the Subcommittee on the Constitution, Civil Rights and Civil Liberties of the Committee on the Judiciary House of Representatives*, 110th Cong. 110-118 (2007) (statement of Frederick P. Hitz, Esq., Lecturer and Senior Fellow, Center for National Security Law, University of Virginia School of Law) [hereinafter *Hearings*].

94. Presidential Decision Directives, Memorandum from President Clinton to the Vice President and Others (Nov. 13, 2009), <http://www.fas.org/irp/offdocs/pdd39.htm> (last visited June 30, 2009). This memorandum stated in part: "If we do not receive adequate cooperation from a state that harbors a terrorist whose extradition we are seeking, we shall take appropriate measures to induce cooperation. Return of suspects by force may be effected without the cooperation of the host government." *Id.*

95. For an account of how the Clinton Administration developed its practice of rendering alleged terrorists from safe havens to third countries willing and able to prosecute and detain them, see Jane Mayer, *Outsourcing Torture: The Secret History of America's "Extraordinary Rendition" Program*, THE NEW YORKER, Feb. 14, 2005, at 106 (quoting former CIA counter-terrorism expert Michael Scheuer explaining that the program "was begun in desperation" in order to capture terrorists and take them to a third party such as Egypt). Apparently, the CIA was "wary of granting terrorism suspects the due process afforded by American law" because of fear of divulging "secrets about its intelligence sources and methods." *Id.*

96. See *Extraordinary Rendition, Extraterritorial Detention, and Treatment of Detainees Restoring Our Moral Credibility and Strengthening Our Diplomatic Standing: Hearing Before the Senate Foreign Relations Comm.*, 110th Cong. 33 (2007) (prepared statement of Dr. Daniel Byman, Director, Center for Peace and Security Studies, Georgetown University).

97. Margaret Satterthwaite points out that "when it was first approved, rendition to justice involved the apprehension of suspected terrorists by U.S. agents in (1) countries in which no government exercised effective control (i.e., 'failed states' or states in chaos because of civil war or other massive unrest); (2) countries known to plan and support international terrorism; or (3) international waters or airspace." Satterthwaite, *supra* note 22, at 538.

other lawful process directed towards the person to be rendered.<sup>98</sup> However, once the United States began renditions to third countries (and at least in part for the purpose of interrogation)<sup>99</sup> such as Egypt, Jordan or Syria, the person so rendered lost the protections that would have been present in a U.S. federal district court. Plainly, the original safeguards of trial in the United States were being relaxed.<sup>100</sup> Despite precautions, it was this step that more than any other opened the process to torture.

Under Clinton, the person being rendered, even if sent to a third country, was not supposed to be sent to a country where there was a likelihood of torture.<sup>101</sup> Nonetheless, the Clinton Administration was the first to render people to countries, like Egypt, where torture of prisoners remains common.<sup>102</sup> The CIA agent tasked with implementing Clinton's rendition policy was quoted publicly and inconsistently on whether the government received assurances that the person being rendered would not be tortured.<sup>103</sup> According to press reports, some were tortured and have disappeared:

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98. Benjamin, *supra* note 69, at B3.

99. CIA agent Michael Scheuer, who was tasked with implementing Clinton's rendition program, says that the program of rendering people to Egypt for interrogation purposes began in 1995. Mayer, *supra* note 95, at 106. "What was clever was that some of the senior people in Al Qaeda were Egyptian," Scheuer said. "It served American purposes to get these people arrested, and Egyptian purposes to get these people back, where they could be interrogated." *Id.*

100. The Clinton Administration, however, did maintain at least some legal control over the process in that the suspects to be rendered had been tried in absentia in the country to which they were to be transferred and the agency prepared the equivalent of a rap sheet, thus reducing the possibility of rendering an innocent person. *Id.*

101. *See id.*

102. The U.S. Department of State points out that the country has been in a state of emergency "almost continuously since 1967." The country's "respect for human rights remained poor" and recounted many instances of torture. U.S. Dept. of State, 2006 Country Reports on Human Rights – Egypt, <http://www.state.gov/g/drl/rls/hrrpt/2006/78851.htm>. (last visited Nov. 13, 2009). According to Human Rights Watch, "Torture in Egypt is a widespread and persistent phenomenon" that has "become epidemic." *Egypt's Torture Epidemic: A Human Rights Watch Briefing Paper*, HUMAN RIGHTS WATCH (Feb. 2004) (citing sources going back to the 1990's), [http://www.hrw.org/legacy/english/docs/2004/02/25/egypt7658.htm#\\_ftn1](http://www.hrw.org/legacy/english/docs/2004/02/25/egypt7658.htm#_ftn1) (last visited Nov. 13, 2009) [hereinafter HUMAN RIGHTS WATCH]. "Egypt has a consistent history of mistreating political prisoners, often in the name of fighting terrorism." Amy Zalman, *Egypt Human Rights Violations: History of Torture in Egypt*, Aug. 28, 2009, <http://terrorism.about.com/od/humanrights/a/EgyptTorture.htm> (last visited Nov. 13, 2009).

103. Mayer, *supra* note 95, quotes Michael Scheuer, who stated that the Clinton Administration required assurances that the person rendered would not be tortured. However, Michael Scheuer has also been quoted as saying that, "before 9/11 we never asked for some guarantee that prisoners would not be tortured or coerced." Peter Bergen, *Exclusive: I Was Kidnapped By the CIA*, MOTHER JONES, Mar. 3, 2008, <http://motherjones.com/politics/2008/03/exclusive-i-was-kidnapped-cia>.

The first known rendition by the [U.S.] government to a third country with a record of torture occurred in 1995 when an Egyptian Islamist, Talaat Fouad Qassem, went missing while visiting Croatia. Mr Qassem, the leader of a banned Islamic group in Egypt, had been sentenced to death in absentia three years earlier by a military tribunal. The Croatian authorities had originally apprehended Mr Qassem on an immigration charge, but his transport to Egypt was arranged by the [U.S.] and he was interrogated by Americans on board a ship in the Adriatic before sending him to Cairo's torturers.

Three years later, following reports that an Egyptian terrorist cell based in Albania were planning to attack [U.S.] embassies in the region, a CIA paramilitary team arranged the arrest and rendition of a further six Islamic militants to Egypt. Many of them, including Mr Qassem, have not been heard of since. Those who have say they were tortured horrendously.

But it was after the terror attacks on New York and Washington on 11 September 2001, when "the gloves came off," that the phenomenon exploded. As Cofer Black, onetime director of the CIA's counterterrorist unit, put it: "There was a before-9/11 and an after-9/11."<sup>104</sup>

Although the publicly disclosed details appear somewhat murky, the Clinton Administration apparently rendered five Egyptian al-Qaeda suspects from Albania to Egypt in 1998; all were tortured and two hanged.<sup>105</sup> Given Egypt's well-known, long-standing and widespread use of torture,<sup>106</sup> U.S. officials at the time almost surely knew they were sending people to be tortured. To be fair, the Clinton Administration eventually ceased cooperation with Egypt's

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104. Peter Popham & Jerome Taylor, *The War on Terror: Inside the Dark World of Rendition*, THE INDEPENDENT (London), June 8, 2007, [www.independent.co.uk/news/world/politics/the-war-on-terror-inside-the-dark-world-of-rendition-452261.html](http://www.independent.co.uk/news/world/politics/the-war-on-terror-inside-the-dark-world-of-rendition-452261.html); see also BLACK HOLE, HUMAN RIGHTS WATCH § VI (May 9, 2005), <http://www.hrw.org/en/node/11757/section/6> (discussing the disappearance of Muhammed al-Zawahiri after his Fall 2001 capture in Afghanistan).

105. Henry Porter, *Into Harm's Way: By "Rendering" Suspects to Torturers, America Sinks to The Moral Level of Saddam*, THE OBSERVER (London), Dec. 11, 2005, [www.guardian.co.uk/world/2005/dec/11/usa/print](http://www.guardian.co.uk/world/2005/dec/11/usa/print); Satterthwaite, *supra* note 22, at 542.

106. According to a 2004 Human Rights Watch Briefing Paper that summarized findings going back to 1999:

Torture in Egypt is a widespread and persistent phenomenon. Security forces and the police routinely torture or ill-treat detainees, particularly during interrogation. In most cases, officials torture detainees to obtain information and coerce confessions, occasionally leading to death in custody. In some cases, officials use torture detainees to punish, intimidate, or humiliate. Police also detain and torture family members to obtain information or confessions from a relative, or to force a wanted relative to surrender.

HUMAN RIGHTS WATCH, *supra* note 102, at 7.

intelligence services on account of its use of torture.<sup>107</sup> But the concept had again expanded, now allowing renditions to third countries.<sup>108</sup> All that remained for this metastasizing concept was to use the practice while turning a blind eye to violations of the assurances; that is, to wink and nod while sending people to torture.<sup>109</sup> Finally, the program had expanded from a handful of cases to hundreds, or perhaps thousands, of cases.<sup>110</sup>

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107. Priest & Gellman, *supra* note 53, at A1 (“Clinton cut off funding and cooperation with the directorate of Egypt’s general intelligence service, whose torture of suspects has been a perennial theme in State Department rights reports.”).

108. *See id.*

109. At a September 2002 joint hearing of the House and Senate Intelligence Committees, the then-head of the CIA Counterterrorism Center said “after 9/11 the gloves come off.” *Id.* Another official has said “[w]e don’t kick the [expletive] out of them. We send them to other countries so they can kick the [expletive] out of them.” *Id.* It is clear that from early on the Bush Administration knew that it was sending people to countries where the interrogations would be brutal and that people were being tortured notwithstanding assurances to the contrary.

110. *See* Satterthwaite, *supra* note 22, at 544; *see also* Alan Brinkley, *Black Sites*, N.Y. TIMES, Aug. 3, 2008, at 1 (book review). Similarly, the back cover to Stephen Grey’s book *Ghost Plane* claims “[s]ince 1997, thousands of people have been abducted from foreign airports and subjected to the . . . torture program known by the euphemism ‘extraordinary rendition.’” STEPHEN GREY, *GHOST PLANE: THE TRUE STORY OF THE CIA RENDITION AND TORTURE PROGRAM* (2007). However, Dick Marty, a Swiss lawyer who investigated the matter for the Council of Europe said that “[i]t would be exaggerated to talk of thousands of flights, let alone hundreds of renditions concerning Europe” in his report on “the secret abduction of suspects by CIA operatives and their allies in foreign intelligence services.” Craig Whitlock, *European Probe Finds Signs of CIA-Run Secret Prisons*, WASH. POST, June 8, 2006, at A16. Investigative reporter Jane Mayer, who has done more careful reporting on the program than anyone else, says that there are hundreds of people who have been transferred under the United States’ extraordinary rendition program “to countries that routinely use torture.” *Fresh Air: Interview with Jane Mayer by Terry Gross* (National Public Radio broadcast Oct. 24, 2008). By 2002, it was reported that “the number of such ‘extraordinary renditions’ to third countries in the anti-terrorist campaign numbered less than 100, although several thousand other al-Qaeda suspects of interest to U.S. intelligence have been arrested in or deported to their home countries for interrogation.” Jim Lobe, *Rights: U.S. Backslides on Torture in Pursuit of War on Terror*, IPS-INTER PRESS SERVICE, Dec. 28, 2002. By 2005 the number was estimated to be perhaps 150. *See* Mayer, *supra* note 95, at 106.

Scott Horton, an expert on international law who helped prepare a report on renditions issued by N.Y.U. Law School and the New York City Bar Association, estimates that a hundred and fifty people have been rendered since 2001. Representative Ed Markey, a Democrat from Massachusetts and a member of the Select Committee on Homeland Security, said that a more precise number was impossible to obtain. “I’ve asked people at the CIA for numbers,” he said. “They refuse to answer. All they will say is that they’re in compliance with the law.”

*Id.* From this information we can only conclude that the actual number can be reasonably estimated to have been somewhere in the hundreds to perhaps a few thousand.

Since assurances that torture would not be employed had failed during, and were abandoned by, the Clinton Administration, the George W. Bush Administration knew, or should have known, that similar assurances given to it would likewise be unsuccessful. Some of our most important allies have since recognized that assurances from nations that regularly torture can be meaningless.<sup>111</sup> Moreover, this skepticism about assurances, combined with legal liability issues, may lead to close allies not being able to trust assurances by the United States.<sup>112</sup> Thus, rendition to torture, albeit with fig leaf assurances that torture would not be used, began with President Clinton. His administration set the precedent for the abusive renditions of the Bush Administration.

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111. For example, the All Party Parliamentary Group on Extraordinary Rendition issued a joint opinion from solicitors Michael Fordham, Q.C., Tom Hickman, Michael Davison, and Emma Colquhan, July 28, 2008, which noted in paragraph 11 that:

(1) The correct approach, as prescribed by the ECtHR, is that such assurances do not absolve the State of "*the obligation to examine whether such assurances provide, in their practical application, a sufficient guarantee that the applicant would be protected against the risk of treatment prohibited by the Convention.*" The weight to be given to assurances from the receiving State depends, in each case, on the circumstances obtaining at the material time.

(2) Unless the assurance "eliminates" any real risk of inhuman and degrading treatment or torture the UK will be liable as a matter of Convention law.

(3) An assurance may not be effective for a number of reasons: for example, because the terms of the assurance do not exclude the possibility of torture or ill treatment, because there remains a foreseeable chance that the assurance might be breached, or because there is an ambiguity as to whether it applies in a particular case.

APPG ON EXTRAORDINARY RENDITION, IN THE MATTER OF THE HUMAN RIGHT, RESPONSIBILITY ARISING FROM MILITARY DETAINEE HANDOVERS IN IRAQ (July 28, 2008) (citation omitted) [hereinafter APPG].

112. The All Party Parliamentary Group on Extraordinary Rendition, House of Commons in the UK concluded that "[a] human rights violation would arise 'if an individual in British detention . . . in Iraq is handed over to U.S. military personnel despite substantial grounds for considering that there is a real risk of that person being subjected to torture.'" *Id.* at ¶ 15. Thus, parliamentarians in the U.K. worry that cooperation with the United States in prisoner transfers may lead to legal liability if U.S. assurances that the prisoner will not be mistreated turn out to be untrue. This is potentially one more cost of the fall-out from the extraordinary rendition program, and it has the potential to hamper our intelligence gathering.

IV. MUTATION: SEPTEMBER 11, 2001<sup>113</sup>A. *Background*

It is easy for those not directly or immediately affected to forget the fear and anger<sup>114</sup> following the terrible events of September 11, 2001 and to fail to appreciate both the pressure put on the Bush Administration, the public's approval<sup>115</sup> of that administration's robust response,<sup>116</sup> and the general trust in the government's

113. Professor Frederick Hitz testified that:

The concept of renditions *mutated* after 9/11 when "the gloves were taken off" law enforcement and intelligence to refer to the situation where instead of snatching the suspected terrorist for trial in the U.S., we delivered them to allied nations for interrogation under rules and circumstances that resulted in the use of interrogation methods beyond what would have been permitted to U.S. authorities.

*Hearings, supra* note 93, at 80 (emphasis added).

114. Peter Grier, *The New Normal*, CHRISTIAN SCI. MONITOR, Oct. 11, 2001, at 1 ("There's a new patriotism, and there's a new American anger, too. Gun-buying is up. Brick-throwing is up - at the Pakistanis and other Muslim-Americans who have been the targets of a scattered but real rise in discriminatory violence.").

115. See POLLINGREPORT.COM, *President Bush: Job Ratings*, <http://www.pollingreport.com/BushJob1.htm> (last visited Nov. 13, 2009). George W. Bush's popularity as reflected by opinion polls was below 50 percent for a time in early 2001, but soared to 88 percent approval by mid-November 2001, just two months after the attacks of September 11, 2001. *Id.* They remained above 70% for nearly a year and only began to drop below 50 percent in early 2004, bouncing above and below the 50 percent point until 2005 when they began to slide such that by the end of his presidency his approval ratings barely reached 30 percent in many polls. *Id.* Moreover, even as late as May 2009, while a majority found certain enhanced interrogation techniques, such as waterboarding, to be torture, half continued to approve their use, and 57 percent of Americans did not want to see former Bush Administration officials prosecuted. Paul Steinhauer, *Poll Finds Lack of Support for Torture Investigations*, CNN, May 6, 2009, <http://www.cnn.com/2009/POLITICS/05/06/bush.torture/>. Thus, it is clear that even as Bush's personal popularity plummeted, support for policies including so-called enhanced interrogation techniques did not fall nearly as much.

116. As Betsy McCaughey, adjunct senior fellow at the Hudson Institute and former lieutenant governor of New York, put it at the time:

The Bush Administration is right to make plans for sustained bombing and ground operations against Afghanistan. What is needed now is the single-minded tenacity with which Churchill led Britain against Nazi Germany. "What is our aim?" said Churchill. "It is victory, victory at all costs, victory in spite of all terror, victory no matter how long and hard the road may be, for without victory there is no survival." Counterintelligence and law enforcement alone cannot protect us from terrorism. Our best defense is to make it clear to all nations that there is a high price to pay for harboring an anti-American terrorist such as bin Laden. That was what we failed to do in the past, by sending aid to Afghanistan.

Betsy McCaughey, *Despite Afghanistan's Terror Role, U.S. Continues to Give Foreign Aid*, INVESTOR'S BUS. DAILY, Sept. 24, 2001, at A20.

approach to the war on terror.<sup>117</sup> Plainly, the Bush Administration had a broad mandate from a frightened American public to “bring [the] terrorists to justice,”<sup>118</sup> and it did so by, among other things, promulgating a secret order allowing the CIA to establish “secret detention facilities outside the United States, and to question those held in them with unprecedented harshness.”<sup>119</sup>

This, along with other policy decisions, opened the door to expanding and transforming the country’s rendition program. It allowed the creation of a massive, worldwide, torture culture<sup>120</sup> that included, among other things, kidnapping large numbers of people and then sending them to places where they would face torture and cruel, inhuman and degrading interrogations. This section explores one manifestation of that culture – extraordinary rendition.

The Bush Administration’s new and aggressive policy expanded the rendition process sending hundreds, or by some estimates, thousands of people<sup>121</sup> into a legal no-man’s land to face torture and disappearance. What we know, despite the many books<sup>122</sup> and articles by investigative journalists<sup>123</sup> written on the subject, remains

117. See Grier, *supra* note 114, at 1. (“According to polls, trust in government ‘is at a level that hasn’t been seen since before the Vietnam War,’ says Robert Higgs, author of *Crisis and Leviathan: Critical Episodes in the Growth of American Government*.”).

118. George W. Bush, U.S. President, State of the Union Address (Jan. 30, 2002). He also said in that speech: “Even seven thousand miles away, across oceans and continents, on mountain tops and in caves, you will not escape the justice of this nation.” *Id.*

119. John Barry et al., *The Roots of Torture*, NEWSWEEK, May 24, 2004, at 26, 30.

120. David Luban coined the term torture culture and argues that administration lawyers sought to “construct a judicially-endorsed practice of permissible torture.” David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 VA. L. REV. 1425 (2005), *quoted in* THE TORTURE DEBATE IN AMERICA 35, 71 (Karen J. Greenberg ed., 2006); *see also* Clarke, *Creating*, *supra* note 19, at 24.

121. See Satterthwaite, *supra* note 22, at 544.

122. See, e.g., GREY, *supra* note 110; JANE MAYER, THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS (2008); TREVOR PAGLEN & A.C. THOMPSON, TORTURE TAXI: ON THE TRAIL OF THE CIA’S RENDITION FLIGHTS (2006); BARBARA OLSHANSKY ET AL., AMERICA’S DISAPPEARED: SECRET IMPRISONMENT, DETAINEES, AND THE “WAR ON TERROR” (2005).

123. See e.g., Priest & Gellman, *supra* note 53, at A1; DeNeen L. Brown & Dana Priest, *Canadian’s Case Called Typical of CIA*, WASH. POST, Nov. 5, 2003, at A1; Dana Priest, *Italy Knew About Plan to Grab Suspect; CIA Officials Cite Briefing in 2003*, WASH. POST, June 30, 2005, at A1; Dana Priest, *Help From France Key in Covert Operations; Paris’s “Alliance Base” Targets Terrorists*, WASH. POST, July 3, 2005, at A1; Mayer, *supra* note 95, at 106; Jane Mayer, *Outsourcing*, THE NEW YORKER, Oct. 30, 2006, at 34; *‘Rendition Flights’ Landed in UK*, BBC NEWS, Mar. 17, 2006, [http://news.bbc.co.uk/2/hi/uk\\_news/politics/4817374.stm](http://news.bbc.co.uk/2/hi/uk_news/politics/4817374.stm); Michael Bilton, *Post-9/11 Renditions: An Extraordinary Violation of International Law*, Int’l Consortium of Investigative Journalists, May 22, 2007, <http://projects.publicmintegrity.org/militaryaid/report.aspx?aid=855>; Paul Reynolds, *Rendition and the Rights of the Individual*, BBC NEWS, June 7, 2006, <http://news.bbc.co.uk/2/hi/europe/5055872.stm>.

fragmentary and incomplete as much remains secret.<sup>124</sup> However, the program has resulted in intense scrutiny from the European Union,<sup>125</sup> the Council of Europe,<sup>126</sup> numerous European states,<sup>127</sup> and

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124. There can be little doubt that the U.S. extraordinary rendition program remains shrouded in secrecy. It is not simply the number of persons rendered or what happened to them that remains unknown. The United States has gone to great lengths to keep the details of its extraordinary rendition program secret, even to the point of pressuring allies to muzzle their court systems inquiry into U.S. practices. For example, a British High Court ruled in the case of Binyam Mohamed that it could not release evidence of his torture at Guantanamo Bay because the United States had threatened that if such information were released it would then curtail the sharing of intelligence with British Intelligence. *Ministers Face Torture Pressure*, BBC NEWS, Feb. 4, 2009, [http://news.bbc.co.uk/2/hi/uk\\_news/politics/7870049.stm](http://news.bbc.co.uk/2/hi/uk_news/politics/7870049.stm). Binyam Mohamed remained at Guantanamo Bay until February 23, 2009, and is one of five plaintiffs in a civil lawsuit against Jeppesen Dataplan, a subsidiary of Boeing, alleging that it had acted as the CIA's travel agent in extraordinary renditions to torture, including their own. Bob Egelko, *Hearing in Rendition Case Could Reveal Obama's Policy*, S.F. CHRONICLE, Feb. 9, 2009, at A1. This lawsuit was dismissed by the Federal District Court sitting in San Francisco, and was appealed to the Ninth Circuit Court of Appeals. *Id.* The Bush Administration had argued that the trial court's decision should be upheld on grounds of the state secrets privilege. *See id.* Many speculated on whether the Obama Administration would continue to urge that claim. *Id.* Eventually, the Obama Administration did. John Schwartz, *Obama Backs Off A Reversal On Secrets*, N.Y. TIMES, Feb. 10, 2009, at A12. Ultimately the Ninth Circuit Court of Appeals overruled the District Court, holding that the state secrets privilege does not bar the lawsuit against Jeppesen. *Mohamed v. Jeppesen Dataplan, Inc.*, 563 F.3d 992, 1009 (9th Cir. 2009). The case was remanded to the district court to determine what evidence was privileged and whether any such evidence was indispensable. *Id.* The U.S. government has also vigorously asserted the state secrets privilege in reply to the civil lawsuits flowing out of the government's extraordinary rendition program, thus suggesting that much about this program remains secret. *See, e.g.,* *El-Masri v. Tenet*, 437 F.Supp. 2d 530 (E.D. Va. 2006), *aff'd*, 479 F.3d 296 (4th Cir. 2007), *cert. den.*, 2007 U.S. LEXIS 11351 (Oct. 9, 2007). In that case, the district court granted the government's motion to dismiss finding that the state secrets privileged material was "central" to claims and defenses raised and that special procedures were not appropriate. *Id.* at 539-41. The court of appeals agreed and the Supreme Court denied certiorari. *Id.* Similarly, the state secrets privilege was raised in *Arar v. Ashcroft*, but the case was decided against Arar on other grounds, thus obviating the need to address the state secrets privilege. 414 F. Supp. 2d 250 (E.D.N.Y. 2006), *aff'd* 532 F.3d. 157 (2d Cir. 2008). This assertion of secrecy and the need to maintain it has generated considerable scholarly attention. *See, e.g.,* Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 GEO. WASH. L. REV. 1249 (2007); *see also* Daniel J. Huyck, *Comment: Fade to Black: El-Masri v. United States Validates the Use of the State Secrets Privilege to Dismiss "Extraordinary Rendition" Claims*, 17 MINN. J. INT'L L. 435 (2008); Holly Wells, *The State Secrets Privilege: Overuse Causing Unintended Consequences*, 50 ARIZ. L. REV. 967 (2008).

125. *See* Bruce Zagaris, *European Prosecutors, Legislators Seek Accountability for U.S.*, 23 INT'L ENFORCEMENT L. REP. 41 (Apr. 2007); Gordon Corera, *CIA Renditions Strain Europe Goodwill*, BBC NEWS (Mar. 20, 2006), <http://news.bbc.co.uk/2/hi/europe/4822374.stm>.

126. *See* sources cited *infra* note 293.

Canada<sup>128</sup> as well as the attention of investigative reporters.<sup>129</sup> Thus, despite the secrecy, it is possible to piece together the process, at least in broad outline.

*B. Key Cases: The Human Side of Extraordinary Rendition*

Given the numbers of cases of extraordinary rendition, and the secrecy that continues to shroud the process, it will not be possible to provide even a short summary of all such cases. However, some renditions have created immense legal difficulties, while others have seemingly disappeared from view, leaving fewer consequential legal issues. It is also helpful to put a human face on the issue, to remember always that it is real, flesh and blood people who are part of, and play a role within, these legal concepts and conflicts.<sup>130</sup> In this

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127. See, e.g., Jake Oresick, *Spain Judge to Review US Rendition Memo as Investigation Continues*, JURIST, Dec. 11, 2008, <http://jurist.law.pitt.edu/paperchase/2008/12/spain-judge-to-review-us-rendition-memo.php> (noting that a Spanish judge seeks to investigate U.S. rendition practices); Benjamin Klein, *Italy Court Again Suspends CIA Rendition Trial to Consider State Secrets Testimony*, JURIST, Dec. 4, 2003, <http://jurist.law.pitt.edu/paperchase/2008/12/italy-court-again-suspends-cia.php> (involving an extraordinary Italian case involving the rendition of Hassan Mustafa Osama Nasr (also known as Abu Omar) whose case is detailed below—from the streets of Milan by the CIA has been on and off again for several years as Italian courts try to resolve issues surrounding that country’s state secrets doctrine); Devin Montgomery, *UK Attorney General to Investigate Guantanamo Detainee Torture Claims*, JURIST, Oct. 31, 2008, <http://jurist.law.pitt.edu/paperchase/2008/10/uk-attorney-general-to-investigate.php> (stating that the United Kingdom has faced continuing problems with its own complicity in aiding CIA renditions); John Goetz, Marcel Rosenbach, & Holger Stark, *German CIA Arrest Warrants Strain Ties with US*, BBC MONITORING EUROPE – POLITICAL, June 27, 2007 (explaining that Germany has wrestled with the implications surrounding the rendition of its national, Khalid El-Masri); Bilton, *supra* note 123 (noting that Sweden has been criticized for its role in renditions from Sweden).

128. Canada’s most famous case of complicity with U.S. extraordinary rendition involved the rendition of Maher Arar (detailed below), whose case is summarized in the Maher Arar Website, which also has useful links to much relevant supporting documentation including the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar. See *We All Have a Right to the Truth*, MaherArar.ca, <http://www.maherarar.ca/index.php> (last visited July 3, 2009).

129. See, e.g., MAYER, *supra* note 122; PAGLEN & THOMPSON, *supra* note 122; GREY, *supra* note 110; Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005, at A1; Dana Priest, *Covert CIA Program Withstands New Furor: Anti-Terror Effect Continues to Grow*, WASH. POST, Dec. 30, 2005, at A1; Dana Priest, *Help from France Key in Covert Operations; Paris’s “Alliance Base” Targets Terrorists*, WASH. POST, July 3, 2005, at A1; Tony Paterson, *Germans Investigate CIA Kidnap of Innocent Citizen*, BELFAST TELEGRAPH, Feb. 22, 2006.

130. Felix Cohen puckishly lampooned “jurists” who “drank the Lethean draught which induced forgetfulness of terrestrial human affairs,” which leads to the “divorce of legal reasoning from questions of social fact and ethical value.” Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 809, 814 (1935). According to Stanley Fish, this means “[i]n short, a responsible judge will

section we will outline the better-known and significant cases, those that are likely to drive legal and policy debates.

C. *Beginnings: Jamil Qasim Saeed Mohammed*

Within weeks after the September 11 attacks, the CIA ramped up its attempts to take suspected terrorists out of action.<sup>131</sup> On October 24, 2001, Pakistani intelligence operatives, at U.S. request, arrested in Karachi, a Yemeni microbiology student named Jamil Qasim Saeed Mohammed who was suspected of being a member of al-Qaeda and of involvement in the 1998 bombing of the USS Cole off the coast of Aden.<sup>132</sup> Bypassing formal extradition or deportation procedures, he was handed over to CIA agents, who blindfolded and shackled him and put him on a Gulfstream V jet owned by a CIA front company.<sup>133</sup> The plane dropped off Mohammed in Jordan where he disappeared.<sup>134</sup> Amnesty International has asked the Jordanian government for information on his whereabouts but has received no answer.<sup>135</sup> This appears to have been the first case reported in the press of extraordinary rendition<sup>136</sup> but, of course, we have no way of knowing whether it was in fact the first rendition to a country where torture is practiced.

The story received very little notice at the time. Americans, like most of the world, remained unaware that the United States was using rendition to make people disappear in violation of its

have empathy.” Stanley Fish, *Think Again: Empathy and the Law*, N.Y. TIMES, May 24, 2009, <http://fish.blogs.nytimes.com/2009/05/24/empathy-and-the-law/>. Perhaps, it is not only judges who need empathy, but all who think about the law at any level. If this is so, then the stories of those rendered to torture should be important.

131. Jason Lewis, *Mystery of the “Ghost Flights” Believed to Carry Terror Suspects to Secret Bases*, MAIL ON SUNDAY, Dec. 4, 2005, at 13; Peter Beinart, *Outsourcing*, NEW REPUBLIC, May 31, 2004, <http://www.tnr.com/article/outsourcing>.

132. See, e.g., Tom Engelhardt, *Tomgram: How Bush Took Us to the Dark Side*, ATLANTIC FREE PRESS, Jan. 3, 2008, <http://www.atlanticfreepress.com/news/1/3175-tomgram-how-bush-took-us-to-the-dark-side.html>; Craig Whitlock, *Jordan’s Spy Agency: Holding Cell for the CIA; Foreign Terror Suspects Tell of Torture*, WASH. POST, Dec. 1, 2007, at A1; Daniel McGrory, *US Torture Jets “Were Refueled in Britain.”* THE TIMES (London), Dec. 16, 2005, at 16.

133. Whitlock, *supra* note 132.

134. *Id.*

135. AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA THE THREAT OF A BAD EXAMPLE: UNDERMINING INTERNATIONAL STANDARDS AS “WAR ON TERROR” DETENTIONS CONTINUE 30-31 (2003).

136. The first press reports of Mohammed’s (also sometimes spelled Mohammad) abduction, transfer to U.S. agents, and rendition apparently appeared in a Karachi paper, *The News International*, on Oct. 26, 2001. *Mystery Man Handed Over to U.S. Troops in Karachi*, THE NEWS INT’L, Oct. 26, 2001; see also GREY, *supra* note 110, at 110. This news was repeated the next day in an article in the *Washington Post*. Rajiv Chandrasekaran, *Pakistan Questioning Two Nuclear Scientists*, WASH. POST, Oct. 27, 2001, at A20.

obligations under international human rights law.<sup>137</sup> Shortly thereafter, another rendition received slightly more attention in a first page article in the *Washington Post*.<sup>138</sup> Yet, despite allegations that there had by then been dozens of such renditions to countries that practiced torture,<sup>139</sup> the issue remained largely quiescent.<sup>140</sup>

The case raises several questions. Most obviously, what happened to Mohammed in Jordanian hands? Was he tortured? If so, did the Bush Administration know or have reason to know that he would likely be tortured? There are tantalizing hints that even at that early stage, the U.S. was planning renditions in order to subject persons to torture.<sup>141</sup> In the *Washington Post* article cited above, an

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137. Forced disappearances violate the International Covenant on Civil and Political Rights' ("ICCPR"), guarantees of the right to a fair and public trial, and the right to security of the person. They also implicate the right to life, the right to be free from torture, and, the right to recognition as a person before the law. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N.GAOR Supp. (No 16) at 52, U.N. Doc. A/6316 (1966). The United States ratified the ICCPR in 1992 with a number of reservations and understandings that dilute its effect. Kenneth Roth, THE CHARADE OF US RATIFICATION OF INTERNATIONAL HUMAN RIGHTS TREATIES, 2 CHI. H. INT'L L. 347 (2000). There is also an International Convention for the Protection of All Persons from Enforced Disappearance which has not yet entered into force. See *Seven More Ratification Needed for Enforced Disappearance Convention to Enter into Force*, Amnesty International, Aug. 28, 2009, <http://amnesty.org/en/appeals-for-action/seven-more-ratifications-needed-enforced-disappearance-convention-to-enter-into-force>.

138. Rajiv Chandrasekaran & Peter Finn, *U.S. Behind Secret Transfer of Terror Suspects*, WASH. POST, Mar. 11, 2002, at A1 (telling the story of Muhammad Saad Iqbal Madni who was picked up in Indonesia and transferred by U.S. agents to Egypt). The article went on to say:

Since Sept. 11, the U.S. government has secretly transported dozens of people suspected of links to terrorists to countries other than the United States, bypassing extradition procedures and legal formalities, according to Western diplomats and intelligence sources. The suspects have been taken to countries, including Egypt and Jordan, whose intelligence services have close ties to the CIA and where they can be subjected to interrogation tactics – including torture and threats to families – that are illegal in the United States, the sources said. In some cases, U.S. intelligence agents remain closely involved in the interrogation, the sources said.

*Id.*

139. *Id.*

140. Stephen argues that "[l]ess than half a year since 9/11, America's mood was still raw and angry, and there was little interest in what the consequences of a policy of rendition might be." GREY, *supra* note 110, at 111-12.

141. On September 16, 2001, just five days after the attacks on the World Trade Center and the Pentagon, Vice President Dick Cheney said on NBC's *Meet the Press*, "We also have to work, though, sort of the dark side, if you will. We've got to spend time in the shadows in the intelligence world," and "If you're going to deal only with sort of officially approved, certified good guys, you're not going to find out what the bad guys are doing. You need to be able to penetrate these organizations." Ken Herman, *Bush Urges Americans to Return to Work as Nation Waits Market Reaction*, COX NEWS SERV., Sept. 16, 2001.

anonymous U.S. diplomat is quoted as saying: “After September 11, these sorts of movements have been occurring all the time,” and “It allows us to get information from terrorists in a way we can’t do on U.S. soil.”<sup>142</sup> What, one might ask, could the Jordanians do in conducting an interrogation that the Americans could not, unless it included torture?

But perhaps just as important, what evidence has been lost as a result of his disappearance? If Jamil Qasim Saeed Mohammed was involved in the conspiracy to bomb the Cole (17 sailors were killed in that incident), one would think that it would have been important to have brought him to trial so that the survivors and their families could see that justice was done. Did we sacrifice closure on the Cole incident in our hurry to remove a suspected terrorist?

D. *Did a Torture-Induced, False Confession Help Start a War?  
Ibn al-Shaykh al-Libi*<sup>143</sup>

Depending on how one looks at it, Ibn al-Sheikh al-Libi’s suicide in a Libyan prison in early May 2009<sup>144</sup> was either extraordinary good luck, or another dead-end in the effort to uncover the facts surrounding America’s extraordinary rendition program.<sup>145</sup> Many in the former Bush Administration were undoubtedly relieved at his death;<sup>146</sup> detainees who have sought his testimony were undoubtedly

142. Chandrasekaran, *supra* note 132, at A1.

143. Ibn al-Shaykh al-Libi is the *nom de guerre* of Ali Mohammed Abdel-Azziz al-Fakeri. Maamoun Youssef, *Report: Al-Qaida Militant Who Once Gave False Confessions of Iraq Link Dies in Libya Prison*, ASSOCIATED PRESS, May 12, 2009. Most publications refer to him as al-Libi or Libi and this Article will follow this convention. *Id.*

144. *Id.*

145. Sarah Leah Whitson, Human Rights Watch Mideast and North Africa director said of al-Libi’s death that “the world will never hear his account of the brutal torture he experienced” and “Now it is up to Libya and the United States to reveal the full story of what they know.” *Id.*

146. Even before his death it was thought that the Bush Administration was trying to hide al-Libi. Dan Froomkin, in an online blog called “Torture Watch” in the *Washington Post*, quotes Michael Isikoff and David Corn in their book, *Hubris*, as suggesting that al-Libi was sent to Libya precisely because he was such an embarrassment and needed to be kept away from the press and anyone else who might report on what he knew. Dan Froomkin, *Torture Watch*, WASH. POST, May 13, 2009, <http://voices.washingtonpost.com/white-house-watch/torture/torture-watch-6.html> (reporting that al-Lubi was named as a potential witness for the defense in UC-J terrorism trials).

When President George W. Bush ordered the 2006 transfer to Guantanamo Bay, Cuba, of high-value detainees previously held in CIA custody, Libi was pointedly missing. Human rights groups had long suspected that Libi was instead transferred to Libya, but the CIA had never confirmed where he was sent. “I would speculate that he was missing because he was such an embarrassment to the Bush Administration,” said Tom Malinowski, the head

less happy.<sup>147</sup> Within a day after his death (reportedly by hanging himself with bed sheets)<sup>148</sup> suggestions surfaced that al-Libi knew too much.<sup>149</sup> Insinuations percolated that his death may not have been suicide;<sup>150</sup> others speculated outright that he was murdered.<sup>151</sup>

These suspicions are rooted in al-Libi's capture, rendition, the tale he told under Egyptian torture, and the use U.S. officials made of that tale in the run up to war in Iraq. Pakistani agents scored a major intelligence coup in late 2001 when they captured al-Libi, a high-ranking al Qaeda figure, who had, among other things, run a terrorist training camp in Afghanistan.<sup>152</sup> Newspapers speculated from the day the news broke that his capture carried potentially enormous intelligence value.<sup>153</sup>

In early January 2002, the Pakistanis handed al-Libi over to the United States,<sup>154</sup> which transferred him to Kandahar, Afghanistan.<sup>155</sup> The FBI was particularly interested in al-Libi because Richard Reid,

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of the Washington office of Human Rights Watch. "He was Exhibit A in the narrative that tortured confessions contributed to the massive intelligence failure that preceded the Iraq war."

*Id.*

147. *Mystery Surrounds Prison Death of Terrorist Whose Testimony was Key to Iraq Invasion*, HERALD SCOTLAND, May 16, 2009, <http://www.heraldscotland.com/mystery-surrounds-prison-death-of-terrorist-whose-testimony-was-key-to-iraq-invasion>.

148. Youssef, *supra* note 143 (reporting that the Libyan newspaper *OEA* had in turn reported that al-Libi took his own life by "hanging himself with bedsheets").

149. Benjamin Davis, *The Man Who Knew Too Much? A Convenient Suicide in a Libyan Prison*, JURIST, May 13, 2009, <http://jurist.law.pitt.edu/forumy/2009/05/man-who-knew-too-much-convenient.php> (arguing that al-Libi's death was "too convenient for too many people" and pointing out that Human Rights Watch has called for an investigation into his suicide).

150. Youssef, *supra* note 143 (reporting that Yasser Al-Sirri, "an Egyptian who runs the Islamic Observation Center in London . . . expressed doubts that al-Libi killed himself saying, [that] al-Libi was a 'true Muslim and Islam prohibits committing suicides'").

151. Andy Worthington, *Death in Libya, Betrayal in the West*, GUARDIAN UNLIMITED, May 15, 2009 ("News of the death, in a Libyan jail, of Ibn al-Shaikh al-Libi . . . has, understandably, raised questions about whether . . . he was murdered.").

152. Elizabeth Neuffer & Colin Nickerson, *Fighting Terror the Military Campaign*, BOSTON GLOBE, Jan. 6, 2002, at A22; Adrienne Lester, *Former High-Value CIA Detainee Dies in Libya Prison*, JURIST, May 13, 2009, <http://jurist.law.pitt.edu/paperchase/2009/05/former-high-value-cia-detainee-dies-in.php>.

153. The first news reports that show up on Lexis-Nexis are dated Jan. 6, 2002. Neuffer & Nickerson, *supra* note 152, at A22; *Latest Captured Prisoners Could Have Vital Information; The Key is for American Interrogators to Get Them to Talk*, GRAND RAPIDS PRESS (Mich.), Jan. 6, 2002, at A3; Eric Schmitt & Erik Eckholm, *A Nation Challenged: The Hunted; U.S. Takes Custody of a Qaeda Trainer Seized in Pakistan*, N.Y. TIMES, Jan. 6, 2002, at A1.

154. Schmitt & Eckholm, *supra* note 143, at A1.

155. Neuffer & Nickerson, *supra* note 152, at A22.

the shoe bomber, and Zacarias Moussaoui (thought at one time to have been the 21<sup>st</sup> hijacker in the 9/11 conspiracy), had both trained at the training camp run by al-Libi. Thus, the FBI stood to gain evidence in two of its most important and difficult cases and, understandably, wanted to elicit information that would later be usable in federal district court.<sup>156</sup> This meant following U.S. constitutional and evidentiary rules designed to give defendants a fair trial.<sup>157</sup>

FBI and CIA agents took turns using conventional interrogation techniques, and the FBI interrogators thought that they were making good progress.<sup>158</sup> The CIA, however, disagreed and rendered al-Libi to Egypt.<sup>159</sup> Here the story took a dark turn, leading to the widespread skepticism about his later suicide.

Al-Libi began to talk, and the information he gave pleased the Bush Administration so much that both the President and Secretary of State Colin Powell repeated it to the world. Among other things, al-Libi claimed that Saddam Hussein's regime in Iraq was giving training in the use of chemical and biological weapons of mass destruction to al Qaeda terrorists.<sup>160</sup> President Bush trumpeted this "intelligence" in a speech "in his push to get Congressional approval of the resolution authorizing . . . war in Iraq."<sup>161</sup> Most famously, however, Secretary of State Colin Powell used al-Libi's Egyptian "confession" in his address to the United Nations to make the argument to justify the coming invasion of Iraq.<sup>162</sup> It turns out that

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156. Mayer, *supra* note 95.

157. FBI agent Jack Cloonan

felt that neither the Moussaoui case nor the Reid case was a slam dunk. But if they could turn al-Libi into a state's witness, he thought it could make all the difference. Cloonan became intent on securing al-Libi's testimony as a future witness. He advised his FBI colleagues in Afghanistan to question Libi respectfully, "and handle this like it was being done right here, in my office in New York."

*Id.*

158. *Id.*

159. Douglas Jehl, *Qaeda-Iraq Link U.S. Cited Is Tied to Coercion Claim*, N.Y. TIMES, Dec. 9, 2005, at A1.

160. See, e.g., *id.*; Mayer, *supra* note 95; *CIA Questioned Credibility of Intel Behind Claims of Saddam-Al Qaeda Links*, FRONTRUNNER, June 12, 2008; Adrienne Lester, *Former High-Value CIA Detainee Dies in Libya Prison*, JURIST, May 13, 2009, <http://jurist.law.pitt.edu/paperchase/2009/05/former-high-value-cia-detainee-dies-in.php>; Benjamin Davis, *The Man Who Knew Too Much? A Convenient Suicide in a Libyan Prison*, JURIST, May 12, 2009, <http://jurist.law.pitt.edu/forumy/2009/05/man-who-knew-too-much-convenient.php> [hereinafter Davis, *Convenient Suicide*]; Youssef, *supra* note 143; Tom Malinowski, *Restoring Moral Authority: Ending Torture, Secret Detention, and the Prison at Guantanamo Bay*, 618 THE ANNALS OF THE AM. ACAD. OF POL. AND SOC. SCI. 148, 152 (July 2008).

161. Davis, *Convenient Suicide*, *supra* note 160.

162. See, e.g., Youssef, *supra* note 143.

al-Libi's torture-induced confession was nearly the whole of the government's evidence that the Saddam Hussein regime in Iraq was training al Qaeda terrorists in the use of weapons of mass destruction.<sup>163</sup> Thus, one of the major predicates for the war in Iraq – that the Iraqis' were training al Qaeda agents in the use of chemical and biological weapons – was primarily based on the statement of one man without significant corroboration. As we know in retrospect,<sup>164</sup> al-Libi later recanted<sup>165</sup> and the statement linking Saddam Hussein to training al Qaeda agents in the use of weapons of mass destruction turned out to have been false<sup>166</sup> and made under torture.<sup>167</sup>

Al-Libi's case and suicide raise a host of questions. First, and

163. A number of news services reported at the time that “[m]ost of Powell's case on Iraq's links to terrorism is based on interrogation of captured terrorists such as al-Libi and accounts from foreign intelligence services. It did not contain the telephone intercepts and extensive spy satellite images he deployed to show how Iraq is deceiving U.N. weapons inspectors.” See, e.g., Warren P. Strobel, *Powell Says Iraq is Harboring a Terrorist Network Headed by Al Qaida Associate*, KNIGHT-RIDDER TRIB. BUS. NEWS, Feb. 6, 2003.

164. There was ample reason at the time to doubt the veracity of al-Libi's claims. A classified Defense Intelligence Agency (D.I.A.) report at the time expressed skepticism about al-Libi's credibility. Jehl, *supra* note 159, at A1. Also, Dan Coleman, a retired FBI agent said,

It was ridiculous for interrogators to think Libi would have known anything about Iraq . . . I could have told them that. He ran a training camp. He wouldn't have had anything to do with Iraq. Administration officials were always pushing us to come up with links, but there weren't any. The reason they got bad information is that they beat it out of him. You never get good information from someone that way.

Mayer, *supra* note 95.

165. Al-Libi recanted saying that he had just wanted to stop the pain. *Coercive Interrogation Techniques: Hearing Before the S. Judiciary Comm.*, 110<sup>th</sup> Cong. (2008) (statement of John E. Cloonan, Retired FBI Special Agent); Matt Smith, *Powell Aide Says Torture Helped Build Iraq War Case*, CNN, May 14, 2009, <http://editions.cnn.com/2009/POLITICS/05/14/iraq.torture/>; Evan Thomas, *Flying in the Shadows*, WASH. POST, Nov. 14, 2006, C3 (discussing *Ghost Plane* by Stephen Grey).

166. Youssef, *supra* note 143.

The president used this tortured evidence to defend the war, alongside the confession of Ibn al-Shaykh al-Libi, who was cited by Colin Powell at the United Nations as a first-person source of the Saddam- Al-Qaeda connection. But al-Libi was also tortured. And we know that such an operational connection did not exist. And we also now know that what Zubaydah and al-Libi provided were false confessions, procured through torture techniques designed by the communist Chinese to produce false confessions. In other words, the first act of torture authorised by Bush gave the United States part of the false evidence that it used to go to war against Saddam.

Andrew Sullivan, *One Tortured Lie: That's All It Took for War; Bush Needed "Evidence" and Used Techniques Designed to Produce Lies to Get It*, SUNDAY TIMES (UK), Apr. 26, 2009, at 4.

167. See *id.*

foremost, did the Bush Administration push the use of harsh interrogation (and even outright torture) to obtain otherwise unavailable evidence linking al Qaeda and the regime of Saddam Hussein?<sup>168</sup> Did the desire for a reason to invade Iraq overwhelm the available (and contrary) evidence?<sup>169</sup> Did it lead to groupthink combined with strong confirmatory bias?<sup>170</sup> Despite some suggestions to the contrary, it is not likely that it could ever be proven that the administration intentionally sought to manufacture evidence that it knew to be false.<sup>171</sup> But increasingly there have been charges that the administration recklessly used uncorroborated evidence obtained through the use of torture that it ought to have treated more skeptically.<sup>172</sup>

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168. Frank Rich argues that the “key revelation in last month’s Senate Armed Services Committee report on detainees – that torture was used to try to coerce prisoners into ‘confirming’ a bogus Al Qaeda-Saddam Hussein link to sell that war – is finally attracting attention.” Frank Rich, *Obama Can’t Turn the Page on Bush*, N.Y. TIMES, May 16, 2009, at 12.

169. Ron Suskind reports that before the war British intelligence provided the United States with access to the head of Iraqi intelligence who advised that if the Americans invaded they would not find any weapons of mass destruction, which was ignored. RON SUSKIND, *THE WAY OF THE WORLD* 362-64 (2008). Suskind also reports that the administration had other lesser sources from inside the Hussein government, which corroborated the claim that Iraq did not possess weapons of mass destruction. *Id.* at 383. Suskind goes on to quote a prominent British intelligence officer as saying that if “the British had known everything that *both* men were saying . . . . ‘We never would have gone to war.’” *Id.* at 385.

170. “Confirmatory bias occurs when, unlike rational Bayesian actors, people misinterpret newly presented information as supporting previously held beliefs, even when there is no clear evidence for such an interpretation.” Lea-Rachel D. Kosnik, *Refusing to Budge: A Confirmatory Bias in Decision Making?* (Oct. 2007), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=585663](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=585663). It can “also refer, more broadly, to control strategies where people *seek* (and not just interpret) biased information when forming initial hypotheses.” *Id.*

171. Some are beginning to suggest that “enhanced interrogation” techniques were used in order to “invent evidence linking Saddam Hussein to al-Qaeda.” Joe Conason, Salon.com, *We Tortured to Justify War*, May 14, 2009, <http://www.salon.com/opinion/conason/2009/05/14/cheney/index.html>. Joe Conason points to evidence that the former Vice President ordered additional use of harsh interrogation techniques after al-Libi had become compliant in order to establish a link between Iraq and al-Qaeda. *Id.* From this he argues that “[w]hether Bush, Cheney and their associates were seeking real or fabricated intelligence, they knowingly employed methods that were certain to produce the latter.” *Id.*

172. Jonathan S. Landay reports that the “Bush Administration applied relentless pressure on interrogators to use harsh methods on detainees in part to find evidence of cooperation between al Qaida . . . and the late Iraqi dictator Saddam Hussein’s regime.” Jonathan S. Candy, *Report: Abusive Tactics Used to Seek Iraq-al Qaida Link*, MCCLATCHY NEWSPAPERS, Apr. 21, 2009, <http://www.mcclatchydc.com/2271story/66622.html>. The article goes on to point out the administration’s desire to make such a link, notwithstanding evidence to the contrary, in order to bolster the case for invading Iraq and overthrowing the Hussein regime.

Would the United States have gone to war had it not had “evidence” of a link between Saddam Hussein’s Iraq and weapons of mass destruction training for al Qaeda? The argument for war admittedly turned on more than simply the allegation that Iraq was training al Qaeda agents. There was also the argument, now thoroughly debunked,<sup>173</sup> that Iraq possessed weapons of mass destruction - weapons that Iraq might use against the United States, or that it might provide to terrorists.<sup>174</sup> There is evidence, however, that had the British known that the United States had two highly placed sources from within Saddam Hussein’s government, both denying possession of weapons of mass destruction, that the British would not have accompanied America to war.<sup>175</sup> Both prongs of the argument were defective in that they relied on cherry-picked data; would the unraveling of one have unraveled the other?

In retrospect, the invasion of Iraq hung on what appears to have been deception, or at the least a positive refusal to consider, and an effort to obscure, all inconveniently contrary evidence on both counts. Full disclosure on either count might well have derailed the war effort. Seen in this light al-Libi’s death, and the evidence that went to the grave with him, seems fortuitous indeed.

Was al-Libi’s death a suicide? If not, how did he die? If murdered, then who ordered his death and why? What would his evidence have been had he lived and been willing to testify? Finally, al-Libi was sent by the United States to Libya. Why was he not held and tried for his crimes against the United States?

Of all of the post-9/11 renditions, Ibn al-Shaykh al-Libi’s may safely be said to have been the most disastrous. As embarrassing as other more highly publicized renditions were (such as that of Binyam Mohamed, Maher Arar, El-Masri or Abu Omar (all detailed below)),

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173. See, e.g., Christopher Marquis, *The Struggle for Iraq: Intelligence – Ex-Arms Inspector Finds Himself in a New Place: The Center of a Political Maelstrom*, N.Y. TIMES, Feb. 2, 2004, at 10; William J. Broad and David E. Sanger, *Vienna Meeting on Arms Data Reignites Iran Nuclear Debate*, N.Y. TIMES, Mar. 3, 2008, at 1; Walter Pincus, *Inspector is Known as Tough, Thorough; Weapons Hunter Had Lost Faith that He Would Find Banned Arms in Iraq*, WASH. POST, Oct. 7, 2004, at A35.

174. In a speech given on October 7, 2002, President Bush made the case for invading Iraq:

When I spoke to Congress more than a year ago, I said that those who harbor terrorists are as guilty as the terrorists themselves. Saddam Hussein is harboring terrorists and the instruments of terror, the instruments of mass death and destruction, and he cannot be trusted. The risk is simply too great that he will use them, or provide them to a terror network. Terrorist cells and outlaw regimes building weapons of mass destruction are different faces of the same evil. Our security requires that we confront both, and the United States military is capable of confronting both.

Liz Cho, *World News Now Introduction*, ABC NEWS TRANSCRIPTS, Oct. 8, 2002.

175. Suskind, *supra* note 169.

at least no other rendition can fairly be said to have been a contributing factor in starting a war.

Al-Libi's case also provides one of the strongest arguments against the effectiveness of using torture in order to gain information that might save lives.<sup>176</sup> In at least this case,<sup>177</sup> the use of torture led to false information that contributed to starting a war in which thousands of lives have been lost.<sup>178</sup> It provides empirical evidence that information acquired through the use of torture can misfire badly.

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176. The al-Libi case has been repeatedly used to rebut former Vice President Dick Cheney's claim that harsh interrogation methods have saved lives. See Andy Worthington, *Death in Libya, Betrayal in the West*, GUARDIAN UNLIMITED, May 15, 2009. Moreover, Ben Macintyre argues that:

Torture is morally repugnant and illegal, but also frequently useless. It certainly extracts confessions, but the resulting intelligence is usually flawed, and often dangerously inaccurate. Instead of undermining insurgency, routine abuse of captives has precisely the opposite effect. The key example is Ibn Shaykh al-Libi, a Libyan al-Qaeda trainer captured in Pakistan in 2002. He denied knowing of any links between Saddam Hussein and al-Qaeda, but, under torture, "remembered" that Iraq had trained Islamic terrorists in the use of weapons of mass destruction. His evidence formed the centrepiece of George W. Bush's pre-invasion speech: "We've learnt that Iraq has trained al-Qaeda members in bomb-making and poisons and gases." Al-Libi's "confession" was entirely false, but by the time the CIA retracted the claim, the war was under way.

"24" is Fictional. So Is the Idea that Torture Works; Suspects Subjected to Extreme Pain Will Say Anything to End Their Agony. So How Can We Trust the "Secrets" They Reveal?, TIMES (London), Apr. 23, 2009, at 19.

177. It is well established that false and misleading statements can be elicited under coercion or torture. In one of the most famous cases, thirty-six captured U.S. airmen were coerced into giving the North Koreans a bizarre confession of a scheme to use biological warfare against civilians. See Alan Clarke, *Creating a Torture Culture*, 32 SUFFOLK TRANSNAT'L L. REV. 1, 24 (2008) [hereinafter Clarke, *Torture Culture*].

178. U.S. military casualties alone were 4296 (3441 in hostile actions) as of May 15, 2009. *Iraq War Casualties*, WASH. POST, May 15, 2009, at A6. Estimates on civilian deaths arising out of the Iraq war range from 100,000 to 300,000 plus. *Aid for Civilian Casualties of War: Hearing before the Subcom. on State, Foreign Operations, and Related Programs of the Sen. Comm. on Appropriations*, 111th Cong. (2009) (statement of John Crome, Board Member, Campaign for Innocent Victims In Conflict (CIVIC)).

E. *Torture's Truth*:<sup>179</sup> Binyam Mohamed

Binyam Mohamed's rendition to torture has tied the legal systems of two countries, courts in the United Kingdom<sup>180</sup> and the United States,<sup>181</sup> in knots and caused friction between both nations' intelligence services. Moreover, both President Obama<sup>182</sup> and Prime

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179. One sense in which one might view the phrase "torture's truth" is to translate it to something like, "does torture work," which is the title of an essay by Darius Rejali. Darius Rejali, *Does Torture Work?*, in *THE PHENOMENON OF TORTURE* 255 (William F. Schultz, ed., 2007). Rejali's extensive historical research provides empirical evidence that torture does not work. *Id.* Failure to elicit timely and useful information leading to long-term gain can mean many things, and Al-Libi's case is only one example of the way in which "torture's truth" might be viewed; of the false evidence given to stop the pain. Another sense might be to parse Aristotelian logic to differentiate the "slave's truth" from that of his reasoning master. See Page Dubois, *Torture and Truth*, in *THE PHENOMENON OF TORTURE*, *supra*, at 13. "Torture's truth" in that context then distinguishes the real, underlying truth supposedly gotten when torturing the master's unable-to-reason slave, from the dissembling truth of the reasoning master. In this Article, in contradistinction from those two senses of the phrase, I am viewing it as a case that evidences the truth of the allegation that the U.S. sends people to places where its relevant officials know or should know that the person rendered will likely be tortured. In this sense, "torture's truth" refers to the evidence pointing to the fact of torture, and the attendant knowledge of relevant, responsible officials.

180. *R v. Sec'y of State for Foreign and Commonwealth Affairs*, [2008] EWHC 2048 (Admin) (ordering the Foreign Office to release evidence in the possession of the U.K. and essential to Binyam Mohamed's defense before a U.S. Military Commission in Guantanamo Bay, Cuba).

181. *Mohamed v. Jeppesen Dataplan*, 563 F.3d 992, 1009 (9th Cir. 2009) (holding that the state secrets doctrine does not mandate dismissal of extraordinary rendition lawsuit against the contractor transporting the persons being rendered for the CIA; case remanded for determination of what evidence merits protection from disclosure, and whether the case can nonetheless proceed without the protected evidence).

182. The Federal District Court in *Mohamed v. Jeppesen Dataplan, Inc.*, 539 F. Supp. 2d 1128 (N.D. Cal. 2008), *rev'd*, 563 F.3d 992 (9th Cir. 2009), dismissed the case ruling that the government's interposition of the state secrets doctrine precluded the case from going forward. The plaintiffs appealed and there had been some speculation that the Obama Administration might take a different and less expansive view of the state secrets doctrine than had the Bush Administration. Bob Egelko, *Hearing In Rendition Case Could Reveal Obama's Policy*, S.F. CHRON., Feb. 9, 2009, at A1 (reporting that the ACLU hoped for a change of course from that of the Bush Administration which had argued that the Court of Appeals should uphold the federal district court's holding because, if the case were to go to court, it could result in revealing ultra-sensitive information. The Obama Administration, however, disappointed the plaintiffs and other civil libertarians, by maintaining the Bush argument that the case should be dismissed *in toto*). Dahlia Lithwick argued that,

The principle once again is that Obama is for prosecuting Bush Administration lawbreaking only when proof of such lawbreaking bonks him on the head. All the more reason to keep it out of sight, then.

It's a depressing hypothesis, and one about which I hope to be proved wrong. Blocking the *Jeppesen* suit from going forward serves no legitimate legal principle, although the political advantages of doing so may turn out to be overwhelming.

Minister Brown<sup>183</sup> have scrambled to argue (despite defeats in the courts) that court-ordered disclosure of the facts surrounding Binyam Mohamed's rendition and subsequent torture would irreparably harm both countries' national security.<sup>184</sup>

The United States, it is alleged, threatened to curb intelligence cooperation between the two nations if the classified details were to be publicly disclosed.<sup>185</sup> Any case that captures the attention of both the United States and the United Kingdom's legal systems, their

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Dahlia Lithwick, *See No Evil*, SLATE MAG., Feb. 10, 2009, <http://www.slate.com/id/2210915>; see also Brian Beutler, *Obama's State Secrets Mistake*, GUARDIAN UNLIMITED, Feb. 13, 2009. The Ninth Circuit rejected the Bush and Obama position and ruled that the state secrets doctrine could only be used to protect specific pieces of evidence and could not be used to dismiss the entire lawsuit unless it could be shown that the case could not fairly go forward without such evidence. *Mohamed v. Jeppesen Dataplan, Inc.*, 563 F.3d 992 (9th Cir. 2009).

183. The British High Court ruling in *R v. Sec'y of State for Foreign and Commonwealth Affairs*, [2008] EWHC 2048 (Admin), originally redacted 7 paragraphs which allegedly discussed Binyam Mohamed's treatment in detention in Morocco and at Guantanamo Bay, Cuba. The High Court later agreed, as of February 4, 2009, to continue to keep those details secret. This ruling, however, was based upon Bush Administration threats concerning intelligence cooperation between the two countries. That was challenged, and in response the Obama Administration maintained the Bush Administration's position, saying in a letter (parts of which have been leaked to the public) that,

If it is determined that [her majesty's government] is unable to protect information we provide to it, even if that inability is caused by your judicial system, we will necessarily have to review with the greatest care the sensitivity of information we can provide in the future."

.....

Neither in [those four] memoranda, nor in any statements of the administration accompanying their release, was reference made to the identity of any foreign government that might have assisted the United States.

.....

Given the declassification of the highly sensitive information contained in the memoranda, the fact that the president refrained from providing any information about foreign governments is indicative that the United States continues to preserve the secrecy of such information as critical to our national security.

Eli Lake, *U.S. Hushes Britain on Gitmo Detainee; Justice Letter Filed in Court*, WASH. TIMES, May 12, 2009, at A1; see also John F. Burns, *U.S. Again Warns Britain on Detainee Memo*, N.Y. TIMES, May 15, 2009, at 10; Duncan Gardham & Alex Spillius, *Release "Torture" Files and We Won't Share Secrets, Says US; At Your Peril, Warns America*, DAILY TELEGRAPH, May 14, 2009, at 12. As a result, UK Foreign Secretary David Miliband has renewed his effort to keep the seven paragraphs secret, arguing that disclosure would cause "real harm to the national security and international relations of the United Kingdom." Richard Norton Taylor, *Miliband Presses for Gag on CIA Memo: Disclosure Would Harm Security, Judges Told Binyam Mohamed Lawyers Query US Letter of Support*, THE GUARDIAN, May 16, 2009, at 12.

184. *Supra* notes 182-83.

185. *Id.*

respective executive branches, and both nations' intelligence services, merits close attention.

Ethiopian born U.K. resident, Binyam Mohamed traveled to Afghanistan in June 2001 to rid himself of a drug habit, and as he put it, "to take the journey to Afghanistan as any 21-year-old would do, just go and see part of the world and learn about what's happening over there."<sup>186</sup> He had converted to Islam and said, "I was trying to understand Islam and I was told that Afghanistan was where the real Islam was."<sup>187</sup> The United States, however, alleged a far more sinister motive. At least until its case fell apart, the U.S. argued that while in Afghanistan Mohamed received terrorist training from Al Qaeda; went to the frontline to participate in combat against the Northern Alliance; and conspired with Jose Padilla<sup>188</sup> and the infamous Khalid Sheikh Mohammed<sup>189</sup> on the construction and detonation of a radioactive dirty bomb in the United States.<sup>190</sup> The conflict between the United States and United Kingdom arose out of the tortuous path leading through these conflicting stories.

The United States, along with coalition allies, responded to the attacks of September 11 by launching Operation Enduring Freedom,<sup>191</sup> the war in Afghanistan to dislodge the Taliban and Al Qaeda. Binyam Mohamed left Afghanistan shortly after the war began, travelling to Karachi, Pakistan. On April 10, 2002 he made his second attempt to board an airplane, intending to return to the United Kingdom.<sup>192</sup> Using the false passport of a British national,<sup>193</sup>

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186. Steve Swan, *Binyam Gives Details of Captivity*, BBC NEWS, Mar. 13, 2009, [http://news.bbc.co.uk/2/hi/uk\\_news/7941285.stm](http://news.bbc.co.uk/2/hi/uk_news/7941285.stm).

187. *Binyam Mohamed, Key Quotes*, BBC NEWS, Mar. 13 2009, [http://news.bbc.co.uk/2/hi/uk\\_news/7941745.stm](http://news.bbc.co.uk/2/hi/uk_news/7941745.stm).

188. Jose Padilla's story, and how the case against him unraveled, is discussed in Clarke, *De-Cloaking*, *supra* note 19, at 44-48 in the draft text; the case against Binyam Mohammed and the way in which it fell apart is discussed below.

189. Khalid Sheikh Mohammed is the high value Guantanamo detainee, allegedly a top al-Qaeda operative, who planned the 9/11 attacks. His arrest was a major setback for al-Qaeda. He is thought to have been the architect of both the 1993 attempt on the World Trade Center, the attacks on the U.S. embassies in Kenya and Tanzania in 1998, and the Cole bombing in Yemen in 2000 as well as the 9/11 attacks.

190. Binyam Mohamed was charged with crimes carrying a potential death penalty on May 28, 2008 under the Military Commissions Act of 2006 (109 P.L. 366; 120 Stat. 2600), enacting Chapter 47A of title 10 United States Code (codified at 10 U.S.C. §§ 948a-950w and other sections of titles 10, 18, 28, and 42). These charges are summarized in *R v. Sec'y of State for Foreign and Commonwealth Affairs*, [2008] EWHC 2048 (Admin). Charges were later dropped and he was released and returned to the United Kingdom.

191. [2008] EWHC 2048 (Admin), ¶ 9(v).

192. *Id.*

193. *Id.*; *No Repeat Over CIA Flights Urged*, BBC NEWS, June 27, 2006, <http://news.bbc.co.uk/2/hi/europe/5119650.stm>.

he was arrested by Pakistani agents<sup>194</sup> on immigration charges,<sup>195</sup> held incommunicado without legal representation, and turned over to American agents without judicial process.<sup>196</sup> The Americans questioned him and allowed British intelligence agents to question him as well,<sup>197</sup> and it is here that the case becomes hotly contested. Mohamed claims that he was tortured both by Pakistani and American agents, that the torture temporarily stopped when visited by a British agent,<sup>198</sup> and that his subsequent confessions were false and nothing more than the product of years of torture and brutal treatment by Pakistani, American and Moroccan agents.<sup>199</sup>

What is not seriously contested (but not quite admitted either)<sup>200</sup> is that he was secretly<sup>201</sup> sent to Morocco, a nation with a checkered human rights record, and in which there have been “credible reports of torture and mistreatment of [terrorist] suspects.”<sup>202</sup> There, Mohamed alleges that he was repeatedly and brutally tortured, including having his penis sliced with a scalpel, and being threatened with having it severed.<sup>203</sup> He says he was “beaten . . . given mind-altering drugs and subjected to extremely loud rock music.”<sup>204</sup> He also claims that after his rendition to Morocco, an agent known only as Informant A told him that the torture would stop if he cooperated

194. *Profile: Binyam Mohamed*, BBC NEWS, Feb. 23, 2009, [http://news.bbc.co.uk/2/hi/uk\\_news/7906381.stm](http://news.bbc.co.uk/2/hi/uk_news/7906381.stm).

195. *Mohamed v. Jeppessen Dataplan, Inc.*, 563 F.3d 992, 998 (9th Cir. 2009).

196. [2008] EWHC 2048 (Admin).

197. *Id.* at ¶¶ 11-22.

198. *Id.* at ¶ 26. Mohamed claims he was beaten by Pakistani agents who threatened him with a gun. American agents allegedly hung him by his wrists so he could barely stand, was allowed to go to the toilet only twice a day and was given food only once every second day, and was told “we can’t do what we want here, the Pakistanis can’t do exactly what we want them to do. The Arabs will deal with you.”

199. *Id.* at ¶ 2.

200. Circuit Court of Appeals Judge Michael Daly Hawkins summarizes the allegations in *Mohamed*: “[Binyam] Mohamed . . . was flown to Morocco” and subjected to “severe physical and psychological torture, including routinely beating him and breaking his bones. Authorities also cut him with a scalpel all over his body, including on his penis, and poured ‘hot stinging liquid’ into the open wounds.” *Mohamed*, 563 F.3d at 998.

201. The British lost track of him at this time and did not learn of his whereabouts for approximately two years. However, British intelligence did realize that “it was apparent that he was in the custody of a third country and not yet in United States custody.” [2008] EWHC 2048 (Admin).

202. Jamil Dakwar & Eric Goldstein, *Morocco: Human Rights at a Crossroads*, HUMAN RIGHTS WATCH, Oct. 20, 2004, <http://www.hrw.org/en/node/11932/section/2>.

203. Andrew O. Selsky, *Gitmo Inmate’s Lawyer Urges US on Photos*, A.P. NEWS, Dec. 11, 2007, <http://www.thefreelibrary.com/Gitmo+inmate’s+lawyer+urges+US+on+photos-a01611426261>.

204. Dakwar, *supra* note 202; Selsky, *supra* note 203.

with British intelligence.<sup>205</sup> The British strongly deny this last allegation,<sup>206</sup> which, if true, would make them complicit in the Moroccan torture.

Did this medieval<sup>207</sup> slicing of the body, bone-breaking torture happen? More importantly, is there evidence tending to corroborate these claims, or are we left with one more contested claim of torture that cannot be fully resolved? That is where Mohamed's case gets interesting and where chronology<sup>208</sup> becomes the best evidence we

205. Vanessa Allen, *The Muslim 007 Who 'Proves MI5 Knew of Torture'*, DAILY MAIL (London), May 18, 2009, at 28.

206. See *supra* notes 182-83.

207. Henry Chu, *Guantanamo Inmate Returns to Britain; Terror Charges Against Binyam Mohamed, Held For Seven Years, Were Dropped in 2008; He Has Alleged Torture*, L.A. TIMES, Feb. 24, 2009, at A3 (describing the ordeal of Binyam Mohamed who returned to Britain a free man after what he described as "darkest nightmares" abducted and tortured in "medieval ways" all orchestrated by [US]).

208. The following is a partial chronology of important events re: Binyam Mohamed (BM):

24 July 1978	BM born
9 March 1994	BM comes to UK
-- June 2001	BM goes to Afghanistan
10 April 2002	Arrested in Karachi, Pakistan (BM is incommunicado 4.10.02 to May 2004)
22 April 2002	UK intelligence notified by US of BM's arrest
17 May 2002	UK agent interviews BM
21 July 2002	BM rendered from Pakistan to Morocco
22 July 2002	Jeppesen plane refuels at Shannon Airport
-- September 2002	After ER is in Morocco, allegedly visited by UK agent
16 January 2004	N313P stopped at Shannon, BM - Rabat to "Dark Prison"
21 or 22 Jan 2004	Transferred to US Custody at airport in Morocco
-- May/Sept 2004	Bagram, Afghanistan – made confessions
20 September 2004	Transferred to Gitmo
-- November 2005	Original military commission charges (dismissed)
-- August 2007	UK seeks BM and other's return
28 May 2008	Charged under MCA 2006 with offenses carrying DP
22 July 2008	Letter re: U.S. found BM's allegations "not credible"
21 August 2008	High Court to release information to BM's lawyers
21 October 2008	Charges dropped
23 February 2009	Released from Gitmo
23 March 2009	High Court releases details - proposed plea w/BM
22 April 2009	High Court orders UK, request info in 7 days
29 April 2009	9 <sup>th</sup> Cir. rules states secrets rule does not bar BM's suit
12 May 2009	Report of letter to UK warning if secrets released
15 May 2009	Miliband makes fresh attempt to muzzle High Court

See *R v. Sec'y of State for Foreign and Commonwealth Affairs*, [2008] EWHC 2048 (Admin); All ER (D) 123 (Q.B.D.) (21 Aug. 2008); *Profile: Binyam Mohamed*, BBC NEWS, Feb. 23, 2009, [http://news.bbc.co.uk/2/hi/uk\\_news/7906381.stm](http://news.bbc.co.uk/2/hi/uk_news/7906381.stm) [hereinafter *Mohamed*].

have (barring release of classified information). Because so much remains classified and shrouded in secrecy, we must look to inferences requiring attention to detail and timing. However, as we will see, the facts as they ultimately played out suggest that Mohamed's account is more likely to be near the truth than are U.S. denials.

We know that he was transferred back from Morocco to U.S. custody – first to a CIA black site, secret prison in Afghanistan (where he alleges further torture),<sup>209</sup> then to the prison at Bagram and finally to Guantanamo Bay, Cuba.<sup>210</sup> He is supposed to have confessed to the dirty bomb conspiracy in statements made both in Afghanistan and again at Guantanamo Bay.<sup>211</sup> It is these confessions that become important. Were they the unreliable product of years of torture, beginning with Pakistan and moving to Morocco and finally Afghanistan? Or, were they the true story of a sinister plot?

As to the torture, his lawyer, Clive Stafford Smith alleges that, “[t]hrough diligent investigation we know when the CIA took pictures . . . we know the identity of the CIA agents who were present including the person who took the pictures (we know both their false identities and their true names), and we know what those pictures show.”<sup>212</sup> Smith, of course, has been trying to obtain those pictures along with other evidence in the hands of the CIA and British intelligence. Evidence that he believes will show both the fact of Binyam Mohamed's torture and British complicity therein.<sup>213</sup> Evidence that, it is alleged, is in the possession of both governments and which neither will give up, each claiming the overriding necessity of protecting national security.<sup>214</sup> One might wonder how pictures of Binyam Mohamed's body, including his genitalia<sup>215</sup> harms

209. *Mohamed*, *supra* note 208.

210. [2008] EWHC 2048 (Admin)

211. *Id.* at ¶ 2.

212. Selsky, *supra* note 203. This quotation in the press is consistent with and supported by ¶ 36 of R. [2008] EWHC 2048 (Admin) (“BM then alleges that on 21 or 22 January 2004, he was transferred back in to the custody of the United States . . . before the flight photographs were taken of his penis. BM's lawyers have provided materials that they contend suggest that there was a flight on 22 January 2004 by a gulfstream V aircraft operated by the CIA from Rabat to Kabul.”).

213. Selsky, *supra* note 203; Lucas Tanglen, *Guantanamo Ex-detainee Claims Memos Show UK Involved in Alleged Torture*, JURIST, Mar. 8, 2009, <http://jurist.law.pitt.edu/paperchase/2009/03/guantanamo-ex-detainee-claims-memos.php>.

214. *See* Taylor, *supra* note 183, at 12.

215. Binyam Mohamed has said that U.S. military personnel in Guantanamo, Cuba, took pictures of him after a beating and pictures were also taken in Morocco and Afghanistan, which included pictures of his genitals. He further said, “Although the U.S. authorities still apparently deny it and refuse even to admit that I was rendered to Morocco, I was horribly tortured there and had a razor blade taken to my genitals.”

the national security of either the United Kingdom or the United States. What sources, methods or other valuable intelligence, are protected by this state secret?

The legal effort to secure evidence of Binyam Mohamed's rendition and torture took two legal paths, one in the United States and one in the United Kingdom. Of the two, the case in the United States is the easier to understand and the less probative on the issue of whether Mohamed was tortured. The U.S. case<sup>216</sup> involved five men all of whom had been the subject of extraordinary renditions, which they alleged had been facilitated by a private contractor, Jeppesen Dataplan, Inc.<sup>217</sup> The contractor allegedly flew Binyam Mohamed and the other plaintiffs to countries where they would be interrogated and tortured.<sup>218</sup> Apparently, management officials at Jeppesen Dataplan knew that these were "torture flights."<sup>219</sup>

Plaintiffs filed suit against Jeppesen under the Alien Tort Statute.<sup>220</sup> The U.S. intervened both in the Federal District Court<sup>221</sup> and on appeal, seeking dismissal on the grounds of the state secrets doctrine. The District Court dismissed the complaint, citing the state secrets doctrine, but the Court of Appeals reversed, holding that dismissal was unwarranted and remanding to the lower court to determine what evidence might be privileged, and whether any such privileged evidence might be indispensable to either party.<sup>222</sup> Thus, the case may or may not ultimately be tried, depending on whether it can fairly proceed without the use of any evidence found privileged under the state secrets doctrine.

This case, by itself, does not prove that anyone was in fact tortured, or that it was done with the knowledge of U.S. officials. It does, however, point in that direction; rendition to torture is certainly one possible secret that the government would likely wish to protect. As such, it supports the allegations of torture that Binyam Mohamed and the other plaintiffs make. This evidence becomes much stronger when considered along with the British High Court case, *R v. Sec'y of*

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Richard Norton-Taylor, *Front: Fight to Stop US Destroying Torture Images: British Resident Says Photographs Are Evidence of Abuse at Guantanamo*, GUARDIAN (London), July 6, 2009, at 1.

216. *Mohamed v. Jeppesen Dataplan, Inc.*, 563 F.3d 992 (9th Cir. 2009).

217. *Id.* at 997.

218. *Id.*

219. *Id.* at 999 n.1 ("[A] former Jeppesen employee . . . stated that the director of Jeppesen International Trip Planning Services . . . had told him, 'We do all the extraordinary rendition flights,' which he also referred to as 'the torture flights' or 'specific flights.'"); *see also* Mayer, *supra* note 95.

220. 28 U.S.C. § 1350 (2006); *Mohammed*, 539 F.2d at 1129-30.

221. *Mohamed*, 539 F.3d at 1136.

222. *Id.* at 1008-09.

*State for Foreign and Commonwealth Affairs.*<sup>223</sup>

In the United Kingdom, the case took the form of a race against U.S. threats to charge and try Mohamed before a military commission with a crime potentially carrying the death penalty. In August 2007, Britain asked the United States to return five of its residents, including Binyam Mohamed, from detention at Guantanamo Bay.<sup>224</sup> Three had been released and another slated for release by May 2008 when Mohamed, the remaining detainee, filed suit in the United Kingdom seeking evidence in the government's hands that allegedly showed that he had been the victim of an extraordinary rendition and that he had been tortured.<sup>225</sup>

It is here that timing becomes part of the reason for concluding that not only was Mohamed tortured but also that U.S. officials likely knew or should have known that they were rendering him to torture. The relevant events, stripped to the essentials,<sup>226</sup> are:

1. 28 May 2008 – Binyam Mohamed was charged under MCA 2006 with serious crimes *carrying a potential death penalty* (and involving an alleged conspiracy to detonate a radioactive dirty bomb in the United States).
2. Summer 2008 – the United States sent a letter to the United Kingdom stating that Binyam Mohamed's allegations that he was tortured and that his confessions were the product of that torture were "not credible."<sup>227</sup>
3. 21 August 2008 – British High Court, citing classified as well as open evidence, ruled the U.K. government must produce evidence in its hands essential to Mohamed's defense and

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223. [2008] EWHC 2048.

224. Duncan Gardham, *Britain Asks US to Free Five from Guantanamo*, DAILY TELEGRAPH (London), Aug. 8, 2007 (stating that "Shaker Aamer from Saudi Arabia, Jamil el-Banna from Jordan, Omar Deghayes from Libya, Binyam Mohamed from Ethiopia, and Abdennour Sameur from Algeria - had all been granted refugee status, indefinite leave or exceptional leave to remain in Britain before they were detained").

225. Mike Rosen-Molina, *Guantanamo Detainee Sues UK for Withholding "Torture" Evidence*, JURIST, May 6, 2008, <http://jurist.law.pitt.edu/paperchase/2008/05/guantanamo-detainee-sues-uk-for.php> (reporting that three detainees had been released to the United Kingdom and that a 4th, Shaker Abdur-Raheem Aamer, was to be returned, but that his status remained unclear). Later reports list him as having been released, but state "[r]elease being negotiated by Saudi Arabia." Robert Verkaik, *The Last Briton in Guantanamo Faces Death Penalty; After Being Held Prisoner by the U.S. for Six Years, Inmate to be Charged with Terrorism Offences Despite Protesting His Innocence*, BELFAST TELEGRAPH, May 30, 2008. Thus, his status remains unclear.

226. For a more complete chronology of events, see *supra* note 208.

227. In addition, according to a document filed with the High Court, a U.S. prosecutor told Mohamed's lawyers that his claims about torture "could be disproved and that BM knew his claims were demonstrably false." Jon Manel, *U.S. "Offered Binyam Plea Bargain"*, BBC NEWS, Mar. 24, 2009, [http://news.bbc.co.uk/2/hi/uk\\_news/7960357.stm](http://news.bbc.co.uk/2/hi/uk_news/7960357.stm).

tending to support his account.<sup>228</sup>

4. Fall 2008 – Prosecutors offer Binyam Mohamed a highly restrictive plea agreement, requiring him to serve one more year, not to take any kind of legal action, and to sign a document saying that he had not been tortured. He rejects the offer.
5. 10 October 2008 – Charges against Binyam Mohamed are dropped.
6. 23 February 2009 – Binyam Mohamed was released from Guantanamo Bay and returned to Great Britain a free man. No charges of any kind were brought in either nation.
7. May 2009 – The Obama administration reiterates the position of the former Bush Administration admonishing the British government that release of its secret evidence by the High Court could jeopardize intelligence sharing between the two countries.

One might reasonably ask how it is that a man who has allegedly confessed to conspiring to detonate a radioactive bomb in the United States is simply let go without trial and without any further consequence in either the United States or Great Britain. One might also ask how it is that the official position of the United States could move from saying that Mohamed's allegations that his confession to these things was the product of torture were "not credible" to being sufficiently credible to release him unconditionally. We can be reasonably certain that the evidence in the hands of the United States and the United Kingdom and its High Court did not radically change in this short period of time. What seems to have changed is the calculation by U.S. officials about the likelihood that evidence of torture might be made available to the defense and ultimately the military commission.

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228. The High Court said,

We are satisfied that the information held by the Foreign Secretary is not merely necessary but essential if BM is to have his case fairly considered by the Convening Authority and a fair trial before the Military Commission (if his case is referred). That is because without the information he will not be able to put forward a defence to the very serious charges he faces, given the confessions made by him at Bagram and Guantanamo Bay in 2004. Our reasons for that conclusion are set out in the closed judgment. Part of one of those reasons, but only part of one, can be seen from the summary of our findings set out at paragraph 87, as the information also provides the only support independent of BM in some material particulars for his general account of events which led to the confessions; this support in fact goes very significantly beyond the matters put forward by Ms Rose QC in paragraph 104. That is, however, only one of the reasons put forward in the closed judgment.

R v. Sec'y of State for Foreign and Commonwealth Affairs, [2008] EWHC 2048 (Admin), ¶ 105.

Seen from this perspective, the prosecution's end-of-game attempt to secure a plea agreement appears more likely to have been a last ditch effort at saving face rather than a serious attempt to do justice; that the point was to obscure evidence of torture rather than to protect the American public. Mohamed's radioactive bomb conspiracy, if even plausibly true, surely made him exceptionally dangerous. Prosecutors do deal away weaker cases, but not generally if it means allowing someone who is monumentally dangerous back into society. Good prosecutors ordinarily take their chances at trial before doing that. And prosecutors do not usually do multiple back-flips quite so quickly. Here, within a matter of months, Binyam Mohamed went from being "not credible" and enormously dangerous, to meriting a plea agreement combining a statement denying torture, with a little more prison time, to going completely and unequivocally free. This particular series of flip-flops is unusual. While too much should not be made from this, it at least suggests that Mohamed's situation was not as originally presented by the prosecution.

It is important to point out that this does not mean that whatever secret evidence there was against Binyam Mohamed would have been made publically available – the Military Commissions Act of 2006, and the rules of evidence thereunder, allows for the use of classified evidence without public disclosure.<sup>229</sup> So, the most reasonable conclusion from this is that the evidence (which the public has not seen) would have led to an embarrassing exoneration before the military commission. In short, this evidence suggests, but does not prove, that Binyam Mohamed's confession was in fact the product of torture and a false confession. It also suggests, but does not prove, that the United States covered its mistake up until it became impossible to continue to do so.<sup>230</sup>

Notice that the United States has neither tried nor released

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229. Rule 505 of the *Military Commission Rules of Evidence* provides for the protection of classified evidence and provides for *ex parte* and *in camera* proceedings. U.S. MILITARY COMM'N RULES OF EVID. R. 506(a). Moreover, as the High Court wrote:

We can think of no good reason why the materials have not now been made available by the United States Government to BM's lawyers in confidence and subject to the strict conditions of secrecy in which part of the proceedings before the Military Commissions operate.

[2008] EWHC 2048 (Admin), at ¶ 147.

230. Binyam Mohamed's lawyer, Clive Stafford Smith is quoted as responding to the release of the offered plea bargain that:

The facts revealed today reflect the way the US Government has consistently tried to cover up the truth of Binyam Mohamed's torture. Gradually, the truth is leaking out, and the governments on both sides of the Atlantic should pause to consider whether they should continue to fight to keep this torture evidence secret.

Manel, *supra* note 227.

other dangerous persons such as Khalid Sheikh Mohammed.<sup>231</sup> Plainly, the United States is prepared to keep at least some dangerous people even if it cannot effectively try them without evidence untainted by torture. But Binyam Mohamed – who supposedly confessed to a dangerous plot in conspiracy with Khalid Sheikh Mohammed – goes free. Surely the United States would not have released such a man if it had any doubts that he was dangerous or that he had ever conspired to detonate a radioactive dirty bomb. Nor can it be that Great Britain would willingly have accepted him into its country had it any substantial evidence that he was a danger to them.

It follows that Binyam Mohamed was not likely released on a mere technicality; that the lack of evidence free from torture was not the prosecution's only impediment. Had he been truly dangerous the United States would not have released him notwithstanding British protestations; indeed, it seems unlikely that Britain would have protested so strongly if classified evidence pointed towards any real danger. Thus, it appears from the publically available evidence that the United States tortured an innocent man and then rendered him to even more extreme forms of torture.

A bit more detail about the British High Court decision is needed in order to appreciate the force of this argument. We noted that, based partly on classified evidence available to the court but not made public, the court felt that the evidence acquired from the CIA was essential to Binyam Mohamed's defense, should a military commission have been convened for him. It was essential precisely because it undermined his confessions and tended to support his account that they were procured by torture. Based on this same confidential evidence the High Court also concluded that "[t]he unreasoned dismissal by the United States Government of BM's allegations as 'not credible' as recorded in the letter of 22 July 2008 is, in our view, untenable, as it was made after consideration of almost all the material provided to us."<sup>232</sup>

These are strong words and it cannot be supposed that the judges of the Queen's Bench are any less circumspect than American judges of similar rank. Finally, even the UK's Foreign Secretary conceded to the court, that BM had established an arguable case that:

- i) After being subject to torture and cruel, inhuman or degrading treatment in Pakistan, he was unlawfully rendered from Pakistan to Morocco by the United States authorities
- ii) Whilst in Morocco he was subject to unlawful incommunicado

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231. *Mohamed*, *supra* note 208.

232. [2008] EWHC 2048 (Admin), at ¶ 147.

detention and torture during his interrogation there by or on behalf of the United States authorities

iii) He was unlawfully rendered by the United States authorities from Morocco to Afghanistan on 21 or 22 January 2004

iv) He was detained unlawfully and incommunicado at the “Dark Prison” near Kabul and thereafter at the United States Air Force base at Bagram

v) He was tortured or subject to cruel, inhuman or degrading treatment by or on behalf of the United States authorities in the “Dark Prison”<sup>233</sup>

Thus, U.K. Foreign Secretary David Miliband, who was charged with defending these U.S.-provided secrets before the High Court, has conceded that, if publicly disclosed, they would show an arguable case that the United States both tortured Mohamed and rendered him to further, and more brutal, torture.<sup>234</sup> If the agency charged with defending the secrecy of this evidence felt forced to concede “an arguable case” of torture and rendition, then it should not surprise that the neutral judges described this same evidence as “essential” to a fair trial and described the U.S. attack on Mohamed’s credibility as “unreasoned.”<sup>235</sup> This concession is strong evidence that the court made no rush to judgment, and that the assessment that this secret evidence is strongly exculpatory is sober and thoughtful.

Moreover, the judges must have thought it at least plausible that a U.S. military commission, acting under the Military Commissions Act of 2006, would not, on its own, provide this material to the defense even though “essential” to a fair trial in a case carrying a potential death penalty. The British Foreign Secretary had originally taken the position before the court that the United States would provide the evidence to the defense to be used under the rules of that body for the use of such classified materials.<sup>236</sup> However, the court had a basis for questioning whether that was so.<sup>237</sup> The thought that the defendant in a serious capital case might not be allowed access to serious exculpatory evidence must have added urgency to the court’s

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233. *Id.* at ¶ 67.

234. *See id.*

235. *See id.* at ¶ 147(vii) and (x)(4).

236. MILITARY COMMISSION RULES OF EVID. R. 505.

237. *See* [2008] EWHC 2048 (Admin), at ¶ 47 (v):

On 25 July 2008 the Treasury Solicitor on behalf of the Foreign Secretary wrote to BM’s lawyers to state that the Foreign Secretary would no longer rely upon the fact that the prosecuting authority would necessarily disclose of its own motion the material requested by BM’s lawyers when BM was tried before the Military Commissions. The contention was maintained before us, however, that the material would be disclosed in the trial before the Military Commissions as we set out at paragraphs 109 and following.

opinion.

The evidence outlined does not conclusively prove the point. Release of the secret evidence alluded to would likely prove it, but we do not have that. What we do have is a set of circumstances pointing to deliberate and intentional torture and knowing rendition to an even worse fate in Morocco. It also suggests that at least some U.S. officials would have allowed Mohamed to face a capital trial without strong, readily available, exculpatory evidence. Reasonable people can disagree with these conclusions, but the burden, then, should be on them to offer a more plausible explanation.

It appears that the Obama administration by its letter to the British government continues to keep this matter secret. There may be legitimate reasons for that. But it makes one even more curious about what it is that both exculpates Binyam Mohamed and is so secret that intelligence cooperation between two strong allies would be compromised if it were to be disclosed.

Finally, most significant from the United States' perspective is the fact that this case is not alone among major international court rulings forcing disclosure of sensitive materials affecting U.S. intelligence. The Supreme Court of Canada ordered the release of classified information compiled by its officials following interviews with one of its citizens detained by the United States as an alleged terrorist at Guantanamo Bay.<sup>238</sup> The Federal Court of Canada, in implementing the Supreme Court order, wrote:

Canada cannot now object to the disclosure of this information. The information is relevant to the applicant's complaints of mistreatment while in detention. While it may cause some harm to Canada-U.S. relations, that effect will be minimized by the fact that the use of such interrogation techniques by the U.S. military at Guantánamo is now a matter of public record and debate. In any event, I am satisfied that the public interest in disclosure of this information outweighs the public interest in non-disclosure.<sup>239</sup>

Plainly, like the U.K. High Court, the Federal Court of Canada considered the arguments concerning the potential harm to Canada's relationship to the United States and decided that the evidence of mistreatment outweighed that risk.

The Canadian *Khadr* case and Binyam Mohamed's U.K. case are distinguishable. *Khadr* was a Canadian citizen, and Canada has not extended the right to such confidential information to noncitizen permanent residents or landed immigrants, as was Mohamed in the United Kingdom.<sup>240</sup> In that respect, the U.K. High Court ruling is

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238. *Canada (Justice) v. Khadr*, [2008] 2 SCR 125 (Can.).

239. *Khadr v. Canada (Attorney General)*, [2008] FCJ. 972 (Can.), ¶ 89.

240. Applicant, Mohamedou Ould Slahi was a landed immigrant of Canada. *Slahi v. Canada (Minister of Justice)*, [2009] FCJ 141 (Can.), ¶ 8. Ahcene Zemiri had attained

broader.<sup>241</sup>

Unlike *Khadr*, Binyam Mohamed's case did not reach the nation's court of last resort (the House of Lords) and so cannot be said to be the final word on the subject. Nonetheless, it is rare for a court of any nation to resist its own executive branch on a sensitive matter of national security; particularly when that security matter adversely affects its relationship with a close ally. Such court ordered disclosures are rarer yet when the complaining ally remains the world's sole superpower. It may seem like a small thing, but these cases present another constraint on the U.S. war on terror. Some human rights violations invite resistance, and that resistance can sometimes come from unlikely places.

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permanent resident status. *Id.* at ¶ 13. The court concluded:

The Applicants here have failed to establish a nexus to Canada that would engage their section 7 Charter rights as they relate to the Guantanamo Bay interviews. It must be remembered that the Charter, an integral part of Canada's supreme law, is a Canadian instrument enacted to enshrine and protect the fundamental rights of Canadians and those finding themselves within Canada's territory. Its extraterritorial reach is exceptional and limited, as is mandated by respect for the principles of sovereignty and judicial comity. This Court is not prepared to extend the Charter's reach beyond that which has already been decided. The Applicants are not Canadian citizens. They have failed to establish the required connection to Canada. Consequently, their circumstances cannot engage a section 7 Charter right.

*Id.* at ¶ 48.

241. Furthermore, Canadian complicity in the human rights violations may have been somewhat greater, thus giving the court more latitude in ordering disclosure. In *Khadr*, Canadian officials interviewed Khadr while he was in prison at Guantanamo Bay and passed "the fruits of the interviews on to U.S. officials" in a way that violated "Canada's international [human rights] obligations." [2008] 2 S.C.R. 125, at ¶ 27. The High Court's decision in Binyam Mohamed's case also disclosed a substantial amount of complicity in the wrongdoing, but a fair reading of that court's opinion suggests that it concluded that while the British intelligence services facilitated the wrongdoing, such facilitation was innocent and not causative. *R v Sec'y of State for Foreign and Commonwealth Affairs*, [2008] EWHC 2048 (Admin), ¶¶ 75-88. Because so much of the court's opinion relied on closed evidence, not placed in the opinion, it is impossible to determine the full extent of governmental complicity, but there is enough to suggest the possibility of a distinction on this ground.

F. *Is the Bureaucratic Outsourcing of Torture<sup>242</sup> Legal? Maher Arar*

“So the minute the executive raises the specter of foreign policy, national security, it is the government’s position that that is a license to torture anyone?”

– Judge Sonia Sotomayor, Court of Appeals for the Second Circuit<sup>243</sup>

Maher Arar’s rendition from New York’s J.F.K. airport to Syria undoubtedly remains the best known,<sup>244</sup> some might say infamous, post 9/11 rendition. It was also arguably not even a rendition, but rather a complex matter of immigration law.<sup>245</sup> In any event, it

242. The phrase “outsourcing torture” as a synonym for extraordinary rendition has become quite common. Judge Saks argued in dissent in *Arar v. Ashcroft*:

The defendants did not themselves torture Arar; they “outsourced” it. But I do not think that whether the defendants violated Arar’s Fifth Amendment rights turns on whom they selected to do the torturing: themselves, a Syrian Intelligence officer, a warlord in Somalia, a drug cartel in Colombia, a military contractor in Baghdad or Boston, a Mafia family in New Jersey, or a Crip set in South Los Angeles.

532 F.3d 157, 204-05 (2d Cir. 2008) (Sack, J., concurring in part and dissenting in part) (emphasis added). Similarly, Representative Jerrold Nadler has said, “the administration, by sending Mr. Arar to Syria, was *outsourcing torture*. They wanted him tortured, quite obviously . . . . We knew perfectly well that any assurances from the Syrian government that they would not engage in torture were worthless.” *Hearings, supra* note 93, at 1 (emphasis added). Perhaps the most famous reference to extraordinary rendition as outsourcing torture came from Jane Mayer’s well-known article in the *New Yorker*. See Mayer, *supra* note 95. A Lexis search of the phrase “outsourcing torture” in the All English News file discloses the first reference found in that database to outsourcing torture in the *Capital Hill Hearing Testimony of Timothy Edgar*. See *Security v. Freedom in Intelligence Gathering: Hearing Before the H. Comm. on Intelligence*, 108th Cong. 12 (2003) (statement of Timothy Edgar, Legislative Counsel) (“The United States risks, in essence, *outsourcing torture* through intelligence sharing while washing its hands of such criminal activity.”) (emphasis added).

243. Jo Becker & Adam Liptak, *Sotomayor’s Blunt Style Raises Issue of Temperment*, N.Y. TIMES, May 29, 2009, at A14.

244. A Lexis Nexis search of “Maher Arar” on May 17, 2009 in the Major U.S. and World Publications got more than 3000 hits. Restricting the search to the Globe and Mail alone resulted in 1068 hits. Contrast this with a search of El-Masri in Major U.S. and World Publications, which yielded only 1000 hits.

245. The majority in *Arar v. Ashcroft* treated the matter as primarily an immigration matter, holding that “a Bivens remedy is unavailable for claims ‘arising from any action taken or proceeding brought to remove an alien from the United States under’” the authority of the Immigration and Nationality Act, 8 U.S.C. §1252(b)(9). 532 F.3d at 184. Judge Sack dissented, saying that “[t]his is not an immigration case . . . . This lawsuit is thus about the propriety and constitutionality of the manner in which United States law enforcement agents sought to obtain “desired information.” *Id.* at 202. John Bellinger, Legal Advisor to the State Department during the Bush Administration, told the House Subcommittee on International

differed from other well-known renditions in that it began on U.S., not foreign, soil and not by CIA agents, but rather domestic law enforcement officials. The basic issue, at least for the United States, turns on whether rendering someone to another country against his will, to face interrogation-by-torture violates U.S. law.<sup>246</sup> Or is there, as Judge (now Justice) Sotomayor vividly put it, a “license to torture”?<sup>247</sup> And if there is such license, is it embedded in bureaucracies’ ability to deflect blame onto the victim? These are two important questions raised by Maher Arar’s rendition to torture by the United States to Syria.

Maher Arar, a dual citizen of Canada and Syria, had lived in Canada since he was a teenager. He obtained a bachelor’s degree from McGill University and a master’s degree in telecommunications from the University of Quebec, and in 2002 was working as a telecommunications engineer.<sup>248</sup> In June of that year he went on a family vacation in Tunisia<sup>249</sup> but returned alone in September for a business meeting in Montreal.<sup>250</sup> It is at this point that both Canadian and U.S. bureaucracies turned Arar’s transitory stop at J.F.K. airport into a juridical nightmare that “would beggar the imagination of Franz Kafka.”<sup>251</sup>

The Royal Canadian Mounted Police (RCMP) turned its

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Organizations that Arar was not the victim of an extraordinary rendition; that it was an “immigration matter,” which, because Syria gave assurances that he would not be tortured, did not violate the Convention Against Torture. Deirdre Jurand, *State Department Official Defends US Rendition Practices Before House Committee*, JURIST, June 12, 2008, <http://jurist.law.pitt.edu/paperchase/2008/06/state-department-official-defends-us.php>; see generally Erin Craddock, *Torturous Consequences and the Case of Maher Arar: Can Canadian Solutions “Cure” the Due Process Deficiencies in U.S. Removal Proceedings?*, 93 CORNELL L. REV. 621 (2008).

246. As Representative Jerrold Nadler put it in a question to former Attorney General Alberto Gonzales, “Does our government claim the legal authority to snatch someone off the street and lock them up without a trial or to turn them over – to turn someone over to another government for the purpose of being tortured?” *Hearings*, *supra* note 93, at 19.

247. Becker & Liptak, *supra* note 243, at 14.

248. *Hearings*, *supra* note 93, at 25.

249. Omar El Akkad and Colin Freeze, *Testimony Puts Arar, Khadr at al-Qaeda Safehouse*, GLOBE AND MAIL, Jan. 20, 2009, at A1.

250. *Arar*, 532 F.3d at 194 (Sack, J., dissenting).

251. *Id.* Judge Sacks, said in dissent in *Arar v. Ashcroft* that what happened to Arar “would beggar the imagination of Franz Kafka.” 532 F.3d at 194. One is indeed reminded of Kafka’s Joseph K., who was arrested for an unspecified crime for which he was prosecuted and ultimately executed. FRANZ KAFKA, *THE TRIAL* (Willa & Edwin Muir trans., 1964) (1937). Franz Joseph Kafka, a lawyer by training, was anti-bureaucratic and obsessed with the interaction between the then emerging, large and thoroughly modern, bureaucratic legal systems with the citizen, but even he might have been startled by the byzantine legal maze that ensnared Arar. His ordeal seems more the stuff of fiction than real. See *id.*

attention to Arar as a “person of interest” when he was seen having coffee with Abulla Al Malki, “the primary target of a national security investigation.”<sup>252</sup> He also attended the same mosque with Al Malki and had co-signed as guarantor on a residential lease with him.<sup>253</sup> Based on nothing more than thin guilt by association with someone suspected of having terrorist links, the RCMP then exaggerated his role to U.S. authorities “indicating that he was probably connected to Al Qaeda when, in fact, they had no information to that effect.”<sup>254</sup>

The RCMP exaggerations continued to magnify. When Arar arrived at J.F.K. he had become to U.S. immigration authorities, “the subject of a . . . lookout as being a member of a known terrorist organization,”<sup>255</sup> and by the time he was handed over to Syria via Jordan, he had become “‘clearly and unequivocally’ a member of al Qaeda and, therefore, ‘clearly and unequivocally inadmissible to the United States.’”<sup>256</sup>

Did the U.S. have powerful evidence to add to the RCMP’s exaggerations? While the U.S. continues to claim Arar is or was a terrorist, maintaining him on its “no-fly” list,<sup>257</sup> the publicly available

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252. Lorne Waldman, *No One Above the Law: Reflections of an Immigration Lawyer on the Importance of the Rule of Law*, 72 SASK. L. REV. 143, 150 (2009). Lorne Waldman was one of Maher Arar’s lawyers before the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, and is considered to be one of Canada’s best immigration, refugee and human rights lawyers. *See id.* at 150-52.

253. Ronald-Frans Melchers, *The Maher Arar Case: Implications for Canada-U.S. Law Enforcement Cooperation*, 6 J. INST. JUST. AND INT’L STUD. 37, 41 (2006).

254. Waldman, *supra* note 252, at 150 (citing OTTAWA: PUBLIC WORKS AND GOVERNMENT SERVICES, VOL. 1 COMMISSION OF INQUIRY INTO THE ACTIONS OF CANADIAN OFFICIALS IN RELATION TO MAHER ARAR, REPORT OF THE EVENTS RELATING TO MAHER ARAR: FACTUAL BACKGROUND 53-54 (2006) [hereinafter COMMISSION OF INQUIRY] (noting the *Report of the Events Relating to Maher Arar*).

255. *Arar v. Ashcroft*, 414 F. Supp. 2d 250, 253 (2006).

256. *Id.* at 254.

257. Arar continues to be on the United States’ “no-fly” list. Tonda MacCharles, *9/11 Gaffe is Old News, U.S. Security Czar Says; Ottawa, Washington to Assess Border Risks*, TORONTO STAR, May 28, 2009, at A20 (“Arar continues to be on a U.S. no-fly list, despite an inquiry’s conclusion he was wrongly labelled a terror suspect.”). Because he was on the U.S. “no-fly” list he was unable to personally attend the Joint Hearing before the Subcommittee on International Organizations and Human Rights and had to testify by video-link. *Hearings, supra* note 93 (statement of Jerrod Nadler, Chairm, Subcomm. on the Constitution, Civil Rights, and Civil Liberties). In apologizing for not appearing personally, he said, “forgive me for not being with you in person. I am forced to appear by video-link because the U.S. government prevents me from coming there, even though five years have passed since my original detention and I have never been charged with any crime in any country.” *Id.* at 26. Nonetheless, the U.S. continues to include Arar on the “no-fly” list claiming that doing so is supported by independently gathered information. *See* Jed Borod, *Canada Protests U.S. Refusal to Remove Arar from Terror Watch List*, 23 INT’L ENFORCEMENT L. REP. 3 (Mar. 2007). It is difficult to know what that “independently gathered information” might be.

evidence suggests instead that the U.S. is simply saving face with those claims, while lacking evidential support.

Two sources into Canadian and U.S. secret evidence allow such inference:

1. First, the Canadian government (unlike the United States) conducted an exhaustive formal inquiry into the matter,<sup>258</sup> which assessed the information in the hands of the Canadian government. The Commissioner, Justice Dennis O'Connor, Associate Chief Justice of Ontario, who has been described as "highly respected,"<sup>259</sup> concluded there "is no evidence to indicate that Mr. Arar has committed any offence or that his activities constitute a threat to the security of Canada."<sup>260</sup>
2. Second, several U.S. congressmen and senators with access to

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However, one possibility is that the United States views the claim by another Canadian, Omar Khadr, as evidence of Arar's terrorist connections. Khadr, who has been detained at Guantanamo Bay Cuba, initially as an "enemy combatant," apparently confessed (allegedly under torture or coercive and harsh interrogations) that he saw Arar living with terrorists in Afghanistan. Kayleigh Shebs, *Arar Decries Alleged Linkage to Khadr Case*, JURIST, January 30, 2009. Arar, however, has never been to Afghanistan, and accuses the media of not paying attention to the facts and thereby promoting false allegations by U.S. sources. *Id.*

258. See generally COMMISSION OF INQUIRY, *supra* note 254.

259. Melchers, *supra* note 253, at 39.

260. In the *Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar: Report of the Events Relating to Maher Arar: Analysis and Recommendations*, Justice O'Connor concluded:

I have heard evidence concerning all of the information gathered by Canadian investigators in relation to Mr. Arar. This includes information obtained in Canada, as well as any information received from American, Syrian or other foreign authorities. I am able to say categorically that there is no evidence to indicate that Mr. Arar has committed any offence or that his activities constitute a threat to the security of Canada.

The public can be confident that Canadian investigators have thoroughly and exhaustively followed all information leads available to them in connection with Mr. Arar's activities and associations. This was not a case where investigators were unable to effectively pursue their investigative goals because of a lack of resources or time constraints. On the contrary, Canadian investigators made extensive efforts to find any information that could implicate Mr. Arar in terrorist activities. They did so over a lengthy period of time, even after Mr. Arar's case became a *cause célèbre*. The results speak for themselves: they found none.

Of course, it is virtually impossible to establish a negative, that is, to establish that Mr. Arar has never been involved in any illegal activities connected with national security. The same would hold true for any individual. However, my conclusion, coupled with the RCMP's position that Mr. Arar was never even a suspect in its investigation — that, at most, he was a person of interest — should remove any taint or suspicion about Mr. Arar that has resulted from the publicity surrounding his case.

COMMISSION OF INQUIRY, *supra* note 254.

classified U.S. information came to the same conclusion.<sup>261</sup>

Moreover, Arar has never been charged with any crime and, finally, the person he had briefly associated with also continues to reside in Canada and has likewise not been charged.<sup>262</sup> The public cannot view the classified evidence for itself, nor can journalists and scholars do it for them. But given the integrity and competency of the people in both countries who have carefully reviewed these documents, it is reasonable to conclude that the U.S. sent Arar to Syria without more than the exaggerated RCMP information as further magnified by later U.S. immigration authorities,<sup>263</sup> and that the information was “inaccurate or false.”<sup>264</sup>

It is also reasonable to assume that the U.S. sent Arar to Syria, rather than Canada, precisely because they knew that he would be tortured. Arar has testified that:

I clearly and repeatedly told them that I was afraid I would be tortured there. I told them [American officials questioning him] I would be tortured because I was being wrongly accused of being a member of al Qaeda. I also conveyed to them my fear of returning to Syria, given that I had not fulfilled my compulsory military service.<sup>265</sup>

Moreover, “Syria is renowned for using torture.”<sup>266</sup> U.S. State Department reports repeatedly confirm continuing abuses.<sup>267</sup> In fact,

261. Representative Jerrold Nadler said:

I saw all the classified information yesterday. And I am not at liberty to reveal all the classified information, but I am at liberty to say that I fully concur with Justice O'Connor, with Senator Leahy, with Senator Specter, in saying that there is nothing there. There is nothing there that justifies this campaign of vilification against your name, sir, or that justifies, in my mind, denying you entry to this country or characterizing you as a terrorist in any way.

*Hearings*, *supra* note 93 (statement of Rep. Jerrod Nadler, Chairman, Subcomm. on the Constitution, Civil Rights and Civil Liberties).

262. *Id.* at 30-31, 50 (statement of Maher Arar).

263. University of Ottawa criminologist, Ronald-Frans Melchers, in describing the intelligence failures of both the U.S. and Canada observes that “[i]ntelligence intoxication is a well-documented phenomenon to guard against.” Melchers, *supra* note 253, at 41.

264. *Hearings*, *supra* note 93, at 49 (statement of Maher Arar).

265. *Id.* at 27.

266. Jules Lobel, *Extraordinary Rendition and the Constitution: The Case of Maher Arar*, 28 REV. LITIG. 479, 485 (2008).

267. Federal District Judge Trager wrote in *Arar v. Ashcroft*:

Arar’s claim that he faced a likelihood of torture in Syria is supported by U.S. State Department reports on Syria’s human rights practices. According to the State Department, Syria’s “human rights record remained poor, and the Government continued to commit numerous, serious abuses . . . including the use of torture in detention, which at times resulted in death.”

Canadian intelligence officials apparently were aware that the U.S. sent Arar to Syria so that he would face interrogation by torture.<sup>268</sup> Finally, the assurances against torture sought and received by the United States were at a low level, ambiguous<sup>269</sup> and worthless.<sup>270</sup> As Jules Lobel asks, “What other purpose could the U.S. government possibly have for sending Arar to Syria, and not Canada, except its interest in obtaining information through tactics such as detention without charges and coercive interrogation?”<sup>271</sup>

Thus, the United States, accepting uncritically exaggerated intelligence from Canada, and then magnifying it for its own reasons or incompetence, sent Arar to face torture<sup>272</sup> in Syria. There he

414 F. Supp. 250, 257 (E.D.N.Y. 2006); *see also* Lobel, *supra* note 266, at 485 (citations omitted).

268. The Deputy Director of the Canadian Security Intelligence Service (CSIS) said in an email that the U.S. was sending Arar to the Syrians so that they “could have their way with him.” COMMISSION OF INQUIRY, *supra* note 254, at 180; *see also* Lee Carter, *Canada-Syria Case Papers Released*, BBC NEWS, Aug. 10, 2007, <http://news.bbc.co.uk/2/hi/americas/6939866.stm> (pointing out that declassified documents show that in 2002 Canadian officials suspected that the U.S. had sent Arar to Syria to be tortured).

269. John R. Crook, *Second Circuit Panel Dismisses Canadian Citizen’s Claims Involving Removal to Syria; Court to Rehear en Banc; U.S. Agencies Investigate Handling of the Case*, 102 A.J.I.L. 880, 882 (2008) (“[A] March report by the inspector general states that ‘the assurances upon which Arar’s removal was based were ambiguous regarding the source of authority purporting to bind the Syrian Government to protect Arar.’”) (citing Inspector General, Dep’t of Homeland Security, *The Removal of a Canadian Citizen to Syria*, 3 (Mar. 2008)).

270. The Commission of Inquiry Report recounted the testimony of Julia Hall of Human Rights Watch, “who testified that diplomatic assurances from totalitarian regimes that they will not torture detainees are of no value and should not be relied upon for the purposes of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.” COMMISSION OF INQUIRY, *supra* note 254, at 176 n.19.

271. Lobel, *supra* note 266, at 488.

272. What happened is best told in Arar’s own words:

My pleas fell on deaf ears. On October 8th at 3:00 in the morning I was awakened and told that they had decided to remove me to Syria. When I told them again about my fears of being tortured, they told me they were not the office; that this was the torture convention.

By then it was becoming more and more clear to me that I was being sent to Syria for the purpose of being tortured. I was put on a private jet and flown to Jordan, then driven to Syria, and eventually ended up at the Palestine branch of the Syria military intelligence October 9th.

There I was put in a dark underground cell that was more like a grave. It was three feet wide, six feet deep, and seven feet high. Life in that cell was hell. I spent 10 months and 10 days in that grave.

During the early days of my detention, I was interrogated and physically tortured. I was beaten with an electrical cable and threatened with a metal chair, a tire and electric shocks. I was forced to falsely confess that I had been to Afghanistan.

When I was not being beaten, I was put in a waiting room so that I could

remained for nearly a year until Canadian consular services secured his freedom and returned him to Canada. Unfortunately, neither nation's bureaucracies were through. Even while Arar languished in Syria, Canadian intelligence officials lobbied to prevent his return, and after his return "the same officials engaged in a smear campaign to undermine public support for him and his demands for a public inquiry."<sup>273</sup>

American officials continue to claim that "their actions were based on reliable intelligence."<sup>274</sup> Moreover, neither Syria nor the United States cooperated with the Canadian Commission of Inquiry. Neither has ever offered any credible evidence that Arar was implicated in any wrongdoing.

Arar's case, first and foremost, demonstrates that the bureaucracies of even stable democracies are self-protective and defensive in the face of even their most egregious mistakes. Law enforcement agencies, intelligence agencies and the courts are

hear the screams of other prisoners. The cries of the women still haunt me the most.

Over the next 10 months, the only time I left my cell was to be interrogated or for meetings with the Canadian consul. I was allowed to meet with the consul seven times, but only in the controlled presence of Syrian officials. I was warned prior to those meetings not to say how I was being treated.

During the last visit, however, I burst out yelling about the beatings and the horrible conditions I had been living in. After 374 days of torture and wrongful detention, I was finally released to Canadian embassy.

COMMISSION OF INQUIRY, *supra* note 254, at 27-28.

273. Waldman, *supra* note 252, at 151. Criminologist Ronald-Frans Melchers, points out:

Commencing while Mr. Arar was still being held in Syria, a number of leaks to media from unnamed government officials began to mark a campaign of disinformation regarding Mr. Arar. In July 2003, a CanWest journalist was told that Mr. Arar was "a very bad guy who apparently received military training at an al-Qaeda base. Upon Mr. Arar's return to Canada, further unidentified leaks from 'an official closely involved in the case' speaking 'on condition he not be quoted by name' claimed Mr. Arar had "been to Afghanistan several times" and that he had not been tortured . . . Ottawa Citizen journalist Juliet O'Neill received a package of materials, including from Syrian Military Intelligence, that caused O'Neill to write "it was in defence of their investigative work – against suggestions that the RCMP and Canadian Security Intelligence Service, had either bungled Mr. Arar's case or, worse, purposefully sent an innocent man to be tortured in Syria – that security officials leaked allegations against him in the weeks leading to his return to Canada." Leaks continued even as the Commission was hearing *in camera* evidence. All of this information was ultimately shown to be unfounded and much of it derived under torture. In the end, the air of desperation evidenced by the leaks contributed to the sense that there was much yet to be uncovered in this matter.

Melchers, *supra* note 253, at 39-40 (citations omitted).

274. Carter, *supra* note 268.

susceptible of extreme indifference and outright resistance when confronted with their own errors, even when they result in the torture or death of a citizen. In this respect Kafka's Joseph K., who was arrested without apparent cause, wound through an unhearing and impenetrable judicial system, to be "killed like a dog,"<sup>275</sup> provides a literary example of a much larger truth about power and innocence.

Bureaucracies resist, in part because they can get away with it. It is not just that they have power. They also have great credibility with the citizenry that can be manipulated to their advantage. Many citizens (and certainly most of the students I teach) seem to think that there is some sort of self-correcting mechanism that works to fix extreme abuses, and that if law enforcement and courts really go after someone with a vengeance there must be something there. The person must "have done something wrong." They are surprised at those who are completely innocent yet convicted of capital crimes and sentenced to death. Often one hears that claims of innocence must surely be some sort of technicality, and not true innocence, that despite the evidence the person must have some guilt somewhere. Yet both in Canada and in the United States surprising numbers of wholly innocent people turn up.<sup>276</sup> In many of these cases, those innocent people (sometimes on death row, in the U.S. at least) find that law enforcement agencies and even the courts resist to the utmost, claiming against all reason that the innocent person was somehow complicit in the original crime or otherwise should not be released.<sup>277</sup> *Arar* provides a nearly unique example of how a wholly innocent person can find himself in the crosshairs of the bureaucracies of two nations, traduced, sentenced without trial, and tortured with both bureaucracies' combined force arrayed against him and maintaining that stance even in the face of overwhelming evidence of innocence.

Given the history of law enforcement agencies in both nations resisting efforts to expose those who are innocent yet nonetheless convicted and incarcerated (and in the United States, executed<sup>278</sup>) we

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275. KAFKA, *supra* note 251, at 286.

276. Clarke & Whitt, *supra* note 83, at 8.

277. *See id.*; BITTER FRUIT, *supra* note 45, at 113-33 (explaining the reasons why prosecutors and courts resist freeing even the demonstrably innocent death row inmate).

278. The *Chicago Tribune* analyzed "thousands of court records, appellate rulings and lawyer disciplinary records from across the United States" and found:

With impunity, prosecutors across the country have violated their oaths and the law, committing the worst kinds of deception in the most serious of cases. They have prosecuted black men, hiding evidence the real killers were white. They have prosecuted a wife, hiding evidence her husband committed suicide. They have prosecuted parents, hiding evidence their daughter was

should not be overly surprised at Arar's ordeal. If police can frame an innocent man, put him on death row,<sup>279</sup> and then resist all efforts to expose the fraud, they can also mistakenly send a man to torture in Syria. Seen in this light Arar is not unusual. Law enforcement bureaucracies are under great pressure to solve and prevent crime. Similarly, both Canadian and U.S. law enforcement and intelligence services were under great pressure to prevent another catastrophic terrorist attack. This enormous hydraulic pressure in both systems led to each casting a wider and wider net, thus leading to greater probability of error. The instinct to hide the inevitable mistakes, as evidenced by Arar, is no different from the pressures leading to error in serious criminal cases.

Scholar Sam Gross summarizes the problem in the capital case context:

The basic cause for the comparatively large number of errors in capital cases is a natural and laudable human impulse: We want murderers to be caught and punished. In some cases that impulse drives police and prosecutors to lie and cheat, but more often it simply motivates them to work harder to catch killers and to convict them. It works: More cases are cleared, more murderers are convicted. But harder cases are more likely to produce errors . . . . If there were some general method for identifying the errors, we wouldn't have this problem in the first place. But of course, there isn't. Instead, the errors that we do discover advertise the existence

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killed by wild dogs. They do it to win. They do it because they won't get punished. They have done it to defendants who came within hours of being executed, only to be exonerated.

Ken Armstrong & Maurice Possley, *The Verdict Dishonor: Trial and Error: How Prosecutors Sacrifice Justice to Win*, CHIC. TRIBUNE, Jan. 10, 1999, at C1.

279. Alan W. Clarke and Laurelyn Whitt write,

Walter McMillian, a black man dating a white woman in Alabama, provides an instructive example. Police framed him for a brutal murder. Only luck, and brilliant lawyering by Bryan Stevenson, Executive Director of the Equal Justice Initiative of Alabama, exposed the fraud and thereby secured McMillian's release.

The story is simple – the police leaned on a snitch in order to frame McMillian. Years after the conviction, a court ordered law enforcement officers to turn over a taped interview that the police had conducted with their jailhouse informant. The officers, however, neglected to erase the flip side of the tape, before turning it over to counsel. There, on the back side, Stevenson discovered that the snitch had initially told law enforcement officers that he did not even know Walter McMillian and had asked why they were asking him to make a story up incriminating a man he had never met. The officers made it clear that, by testifying against McMillian, the jailhouse informant could help his own case. His perjured testimony, at government insistence, put an innocent man on death row. But for the mistake in failing to hide law enforcement complicity in the lie, McMillian would have been executed.

BITTER FRUIT, *supra* note 45, at 120-21.

of others that we don't. What are the odds that an innocent prisoner will run into a movie producer who is struck by his story? What if the real killer is killed in a car crash, or dies from a drug overdose, or is never arrested, or never confesses?<sup>280</sup>

Arar's case then serves to advertise the innocence problem transferred to the war on terror. It leads one to ask how many other innocent people have been caught up and sent to torture? How many cases are left in this "war" to be discovered? How many Maher Arar's languish undiscovered? So, "mistakes were made"<sup>281</sup> and then hidden for pretty much the usual reasons, magnified by the workings of bureaucracies on both sides of the border. How many innocent people were wrongfully rendered to torture? We do not, and cannot, know the magnitude of the problem.

The Canadian justice system has, on average, done a better job at uncovering innocent people who were nonetheless convicted and incarcerated than has the United States.<sup>282</sup> Canadian courts provide greater appellate scrutiny,<sup>283</sup> more liberal access to civil courts in liability actions for police misconduct,<sup>284</sup> and, of course, the Canadian

280. Samuel R. Gross, *The Risks of Death: Why Erroneous Convictions Are Common in Capital Cases*, 44 BUFF. L. REV. 469, 499-500 (1996).

281. Condoleezza Rice, former Secretary of State during the Bush Administration, weakly admitted that Arar's case had been mishandled but neither acknowledged torture nor did she apologize. Scott Shane, *On Torture, Two Messages and a High Political Cost*, N.Y. TIMES, Oct. 30, 2007, at A18. She also acknowledged "inappropriate conduct." Christopher Mason, *Canada: U.S. Sends Reply, but No Apology, in Case of Deported Man*, N.Y. TIMES, Oct. 31, 2006, at A6. Her tepid non-apology is reminiscent of earlier non-apologies after wrongdoing. Ronald Reagan famously used the passive locution "mistakes were made" as a way of admitting while not taking full responsibility for the Iran-Contra affair and the phrase has since become used as a way to apologize while simultaneously deflecting responsibility. Similarly, "Richard Nixon's presidential resignation speech still stands as a classic of the genre. 'I deeply regret any injuries that may have been done in the course of events that led to this decision.'" Scot Lehigh, *The Art of Saying "I'm Sorry"; From the Pope to Michael Jackson, Regrets Are in Style - If Said Correctly*, BOSTON GLOBE, July 16, 1995, at 65. Plainly, in dealing with the Arar imbroglio, the U.S. seeks to use the political equivalent of the legal "confession and avoidance" technique of the common law demurrer.

282. Alan W. Clarke and Laurelyn Whitt write that "because of greater appellate scrutiny, commissions of inquiry in serious cases of wrongful conviction, and stricter rules requiring civil liability in the face of police error, Canada appears to be in some respects ahead of the United States in addressing the root causes of wrongful convictions." Clarke & Whitt, *supra* note 83, at 632-33.

283. *See id.*

284. *See Hill v. Hamilton-Wentworth Reg'l Police Servs. Bd.*, [2007] 3 SCR 129 (Can.) (stating the appropriate standard of care for the tort of negligent investigation). The U.S. practice that grants the police qualified immunity for their discretionary acts and shields them from "liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The

system of establishing commissions of inquiry<sup>285</sup> provides a systematic quasi-judicial procedure<sup>286</sup> for uncovering truth in the face of governmental wrongdoing.<sup>287</sup>

Not surprisingly, the Canadian system of justice has responded differently to Arar's ordeal than has that of the United States. The Commission of Inquiry headed by Associate Chief Justice of Ontario Dennis O'Connor<sup>288</sup> thoroughly investigated and exposed the facts of

Canadian standard, by contrast, provides broader access to the courts to vindicate the rights of those who have been harmed by overly zealous law enforcement.

285. "The Governor in Council may, whenever the Governor in Council deems it expedient, cause inquiry to be made into and concerning any matter connected with the good government of Canada or the conduct of any part of the public business thereof." CANADA FED. STATUTES, R.S.C. ch. I-11 (1985).

286. Justice Gomery, Judge of the Quebec Superior Court and Commissioner of Inquiry responded to a question from the audience at a symposium held at McGill University:

Given that it's a fact-finding trial and given this confusion between criminal and civil trials on the one hand and commission of inquiries on the other hand, are there any other reasons besides the perceived and actual impartiality of judges that a judge would have to head a commission of inquiry?

Justice Gomery: The confusion exists in the mind of the public, but there wasn't any confusion in my mind. But I can't see any alternative to having a judge preside over a commission of inquiry. First of all, he comes cloaked with a certain expected autonomy, independence, impartiality, and these things all go together. And I can't think of anybody else in our society that has that privileged position--they don't have to worry about the consequences of their decisions, you can't get fired, no matter how unpopular your decision might be or how much it offends, for example, the government in power. So judges are ideally suited to fulfill this role. But the trouble is that even if a judge is acting as a commissioner, people say, "gee that guy's a judge" and they think of judges as dispensing judgments and frankly in a commission of inquiry you're not dispensing justice, you're doing an investigative role and then making some recommendations. So, I guess the confusion is inevitable and all that you can do, all that I can do, is to keep on emphasizing that my reports are not judgments, my reports are not findings of fault, well, not civil fault, they may be findings of blameworthy conduct, but it's not fault in the sense that the word fault is used in our Civil Code or in the Criminal Code.

*The Pros and Cons of Commissions of Inquiry*, 51 MCGILL L.J. 783, 797-98 (2006).

287. COMMISSIONS OF INQUIRY: PRAISE OR REAPPRAISE? (Allan Manson & David Mullan eds., 2003). Not everyone praises commissions of inquiry, however. Noted trial lawyer Edward Greenspan has written,

I believe we should abolish commissions of inquiry that have nothing to do with public policy issues. Commissions of inquiry that are set up for the sole purpose of blaming particular people for wrongdoing, resulting in the destruction of reputations and standing in the community, have no place in our country. We already have a civil and criminal justice system. That is where justice truly lies.

Edward L. Greenspan, *Inquiries Are Not Like Courts of Law*, THE STANDARD, Nov. 18, 2005, at A6.

288. COMMISSION OF INQUIRY, *supra* note 254.

the case, and the Canadian government settled with Arar and gave him an official public apology.<sup>289</sup>

The United States court system, regrettably, has thus far been complicit in the wrong. In *Arar v. Ashcroft* both the district court and the court of appeals have held Arar remediless for rendition to torture.<sup>290</sup> This too is not wholly surprising, as the victims of rendition have thus far not received much traction in U.S. courts.<sup>291</sup> Courts in the United States then have, with few exceptions, been part of a larger bureaucracy determined to keep as much hidden as possible notwithstanding the greater openness shown by Canada.<sup>292</sup>

Arar reinforces Kafka's notion of the oppressive power of bureaucracy, but his case also speaks of the ability of some courts to provide a counterweight. Just as the United States might learn from the Canadian court system in its effort to uncover wrongful convictions, it might also learn from Canada's handling of cases like Arar's.

#### G. *State Secrets and Rendition: El-Masri*

The rendition of German citizen Khalid el-Masri shares many features with the renditions of Maher Arar, Binyam Mohamed and Ibn al-Shaykh al-Libi. It is the clearest instance of a case thwarted on state secrecy grounds simultaneously in two nations (the United States and Germany) – the focus in this section.

A bare bones recitation of the facts suffices for this purpose.<sup>293</sup>

289. Gloria Galloway, *Ottawa Settles with Arar*, GLOBE AND MAIL, Jan. 26, 2007, at A1.

290. *Arar v. Ashcroft*, 414 F. Supp. 2d 250 (E.D.N.Y. 2006), *aff'd.*, 532 F.3d 157 (2d Cir. 2008) (*reh'g en banc granted*).

291. *El-Masri v. Tenet*, 479 F.3d 296, 308-09 (4th Cir. 2007), *cert. den. sub nom.*, *El-Masri v. United States*, 552 U.S. 947 (2007) (holding that state secrets privilege requires dismissal because defendants can not properly defend themselves without using privileged evidence). *Contra* Mohamed v. Jeppesen Dataplan, Inc., 563 F.3d 992, 1009 (9th Cir. 2009) (holding dismissal on basis of the state secrets privilege unwarranted and remanding to the trial court to determine scope of the privilege).

292. The Second Circuit Court of Appeals has reheard this case and is expected to rule soon.

293. The publically available facts of el-Masri's ordeal are recounted in Swiss Senator Dick Marty's two reports on the subject to the Council of Europe. See European Union, Council of Europe Parliamentary Assembly, Committee on Legal Affairs and Human Rights, *Alleged Secret Detentions and Unlawful Inter-State Transfers of Detainees Involving CoE Member States*, Doc. 10957 (June 12, 2006) (prepared by Dick Marty), <http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc06/EDOC10957.htm> [hereinafter *Marty Report I*]; see also European Union, Council of Europe Parliamentary Assembly, Committee on Legal Affairs and Human Rights, *Secret Detentions and Illegal Transfers of Detainees Involving Council of Europe Member States: Second Report*, Doc. F-67075 (June 7, 2007) [hereinafter *Marty Report II*].

El-Masri is a German citizen of Lebanese descent. He was stopped at the border attempting to enter Macedonia in December 2003 and turned over to the CIA who in turn flew him to Afghanistan where he was sent to a prison known as “the Salt Pit,”<sup>294</sup> allegedly beaten, deprived of food, injected with drugs and held without charge in a filthy cell for five months. Eventually the CIA realized that it had made a mistake and released him in the middle of the night on dark road in Albania where he was met by others, and flown back to Germany. This reasonably simple case, possibly of mistaken identity, led to the interposition of the state secrets doctrine, which scuttled cases in both Germany and in the United States. The most definitive official report detailing el-Masri’s kidnapping by the CIA and ordeal at their hands has concluded that “it is now undisputed . . . that Mr el-Masri’s account of his ordeal is true.”<sup>295</sup> Moreover, former Secretary of State Condoleezza Rice directly intervened in his case, ordering him released once she learned that CIA officials had “concluded he was the victim of mistaken identity.”<sup>296</sup> She later officially apologized on behalf of the U.S. government to the German government (although not to el-Masri)<sup>297</sup> thus lending additional credence to el-Masri’s account.

In January 2007, German prosecutors sought arrest warrants for thirteen alleged CIA agents linked to Khaled el-Masri’s kidnapping from Macedonia in 2003 and his January 2004 rendition to

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294. David Johnston, *Rice Ordered Release of German Sent to Afghan Prison in Error*, N.Y. TIMES, Apr. 23, 2005, at A3.

295. See *Marty Report II*, *supra* note 293, at ¶ 271.

296. Johnston, *supra* note 294. However, Dick Marty concludes that the detailed knowledge of el-Masri’s real life by his interrogators “rules out the theory that Mr. El-Masri was the victim of mere mistaken identity.” *Marty Report I*, *supra* note 293, at ¶ 129. It is impossible to sort this dispute out with the publically available information, but if Dick Marty is correct in his assessment, it further undercuts the U.S. position and, would, if true, lend credence to the theory that U.S. officials decided on the mistaken identity theory to provide a sort of “good faith mistake” defense to actions that otherwise appear indefensible.

297. *Marty Report II*, *supra* note 293, at ¶ 297; Bruce Zagaris, *Extradition and Alternatives: Germany Charges 13 CIA Operatives in el-Masri Rendition Probe*, INT’L ENFORCEMENT L. REP. (Apr. 2007) (stating that “[i]n December 2005, German Chancellor Angela Merkel said U.S. Secretary of State Condoleezza Rice privately acknowledged in a meeting in Berlin that Masri had been ‘erroneously taken,’ a revelation that U.S. diplomats have denied”). Eric Mink also writes,

Former German Foreign Minister Otto Schily testified to a German parliamentary committee that the CIA mistake was acknowledged to him by Daniel R. Coats, then the U.S. ambassador to Germany. And at a joint press conference with Secretary of State Condoleezza Rice in 2005, German Prime Minister Angela Merkel said that American officials had admitted to her that Masri’s abduction had been a mistake.

Eric Mink, *CIA-Sponsored Kidnappings and Torture Undermine Anti-Terror Efforts*, ST. LOUIS POST-DISPATCH, Feb. 7, 2007, at B9.

Afghanistan.<sup>298</sup> Within six months, the press was reporting that the German prosecution of CIA agents was straining relations between the two countries;<sup>299</sup> splitting the German cabinet even as it was reported that the U.S. would not likely comply with any extradition request.<sup>300</sup> The German government acceded to U.S. pressure and refused the prosecution's request for formal extradition warrants for the Americans.<sup>301</sup> The core problem with bringing CIA kidnapers to justice in Germany appears to be state invocation of the state secrets doctrine,<sup>302</sup> which, in addition to the inability to extradite from the United States or to try the kidnapers *in absentia*,<sup>303</sup> has thwarted the prosecution in Germany. Moreover, members of the German *Bundestag's* parliamentary committee of inquiry (UA) have sought to inquire into the truth of el-Masri's abduction but have thus far been frustrated by executive invocation of official secrecy.<sup>304</sup> Thus, the state secrets doctrine is being used by the executive in Germany to block all further inquiry into el-Masri's kidnapping and alleged torture at the hands of the CIA. There seems to be little doubt that this is a result of U.S. diplomatic pressure to limit the damage to both countries.<sup>305</sup>

The state secrets doctrine also stymied el-Masri's attempt to pursue civilly those who had kidnapped him for damages in the courts of the United States.<sup>306</sup> This case is a reminder of how easy it seems to be for innocent people to find themselves swept up into the torture gulag without recourse of any kind.

#### H. *A Demoralized CIA? Abu Omar*

U.S. intelligence agents are becoming increasingly demoralized, fearing threatened domestic criminal prosecution,<sup>307</sup> attempted

298. Zagaris, *supra* note 297.

299. John Goetz et al., *German CIA Arrest Warrants Strain Ties with US*, BBC MONITORING EUROPE – POLITICAL, June 27, 2007.

300. *Bid to Arrest CIA Rendition Team Splits German Cabinet*, DEUTSCHE PRESS-AGENTUR, July 7, 2007 [hereinafter DEUTSCHE PRESS-AGENTUR].

301. Craig Whitlock, *Germans Drop Bid for Extraditions in CIA Case; 13 Agency Operatives Charged in Kidnapping*, WASH. POST, Sept. 24, 2007, at A9.

302. *Marty Report II*, *supra* note 293, at ¶ 299.

303. Defendants cannot be tried in absentia in Germany. Zagaris, *supra* note 297.

304. *Marty Report II*, *supra* note 293, at ¶ 290-92.

305. DEUTSCHE PRESS-AGENTUR, *supra* note 300 (noting that U.S. diplomats have objected vocally to the inquiry into the el-Masri affair).

306. *See* El-Masri v. Tenet, 479 F.3d 296 (4th Cir. 2007), *cert. den. sub nom.* El-Masri v. United States, 128 S. Ct. 373 (2007).

307. It has been alleged that the reason that the CIA destroyed videotapes of waterboarding and use of harsh interrogation techniques is because of the fear that public disclosure of these tapes could expose agents to federal prosecution. *CIA Torture Tapes Destroyed After Watchdog Concluded Methods Illegal*, THE PUBLIC RECORD, Dec. 11, 2008. Despite resistance, there have been continued calls for such prosecutions.

foreign prosecutions,<sup>308</sup> and civil lawsuits.<sup>309</sup> They have responded to that fear by purchasing private insurance.<sup>310</sup> Agents are also finding their careers stymied by the inability to go abroad because of the threat of criminal prosecution for renditions,<sup>311</sup> and have been forced to “choose between . . . family overseas and . . . employment”<sup>312</sup> with the U.S. government. Also, agents who think that they might someday be targeted by foreign prosecutions may ask whether this problem will follow even into retirement. If so, where, outside of the United States, can they safely travel? Agents face EUROPOL

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See Richard Owen, *CIA Agents Must Be Charged Over “Kidnap and Torture,” Says Judge*, TIMES (U.K.), Feb. 17, 2007, at 3. There have been no domestic prosecutions of CIA agents arising out of rendition or harsh interrogation practices, nor are any likely. See, e.g., Clarke, *Torture Culture*, *supra* note 177.

308. Prosecutions continue to sputter in Spain (universal jurisdiction asserted in the case of six former lawyers working in various capacities for the Bush Administration. See, e.g., Andrew Gilmore, *Spain Judge Weighing Probe of US Lawyers Who Promoted Guantanamo: Reports*, JURIST, Mar. 28, 2009, <http://jurist.law.pitt.edu/paperchase/2009/03/spain-judge-weighing-probe-of-us.php>) and also in Italy (as further addressed in this section on Abu Omar).

309. *Mohamed v. Jeppesen Dataplan, Inc.*, 563 F.3d 992 (9th Cir. 2009) involves a continuing domestic damages suit involving extraordinary rendition albeit against a contractor rather than directly against CIA agents. Abu Omar has filed a civil lawsuit in Italy against those agents allegedly involved in his rendition to Italy. See *Complaint of Sabrina de Sousa*, ¶ 41, *De Sousa v. Dep’t of State*, U.S. Dist. Ct. D.C., Case 1:09-cv-00896, May 13, 2009.

310. Clarke, *Creating*, *supra* note 19, at 45.

311. Bruce Zagaris points out

The Italian probe will be the first criminal trial of the U.S. extraordinary rendition program. Although the U.S. is unlikely to surrender any of the indicted suspects for extradition, the publication of their names makes international travel risky and shames the U.S. government. In addition, some of the suspects have been forced to abandon property and assets in Italy in order to avoid arrest and prosecution.

Zagaris, *supra* note 297.

312. *Sabrina de Sousa*, Case 1:09-cv-00896. *Sabrina de Sousa’s Complaint*, filed in the United States District Court for the District of Columbia, on May 13, 2009 is available at <http://graphics8.nytimes.com/packages/pdf/world/20090514complaintfinal.pdf>. This lawsuit seeks to force the United States government to intervene and assert diplomatic or consular immunity on behalf of De Sousa. However as Bruce Zagaris points out,

One issue may be that “consular immunity” is limited by treaty to “acts performed in the exercise of consular functions.” Especially if the Italian court adjudicates the case, it may find that rendition of Abu Omar does not qualify as acts within the exercise of consular functions. The practical value of the case may be that the publicity may goad the CIA into some type of a compromise, wherein it helps De Sousa in order to resolve the case.

*Former U.S. Government Employee Sues for Immunity in CIA Rendition Case*, 25 INT’L ENFORCEMENT L. REP. 273 (2009). Similarly, Professor Curtis A. Bradley points out that “‘consular immunity’ [is] limited by treaty to ‘acts performed in the exercise of consular functions.’” Rendition may not qualify. Scott Shane, *Woman in Rendition Case Sues for Immunity*, N.Y. TIMES, May 13, 2009.

warrants for their arrest and cannot safely travel anywhere in the world where those warrants might be honored either directly, or as a result of an extradition treaty, for as long as those warrants remain outstanding.<sup>313</sup> Even employment outside of the CIA may be compromised.<sup>314</sup> Plainly, many agents face multiple adverse consequences for their participation in these programs, notwithstanding the inability of other countries to secure their presence by means of extradition.<sup>315</sup>

Many parochial Americans<sup>316</sup> may fail to see a problem. After all, if the United States never allows extradition, and Americans remain safe within the confines of U.S. sovereignty, have not they and the CIA succeeded without major consequence? This view fails to recognize that the CIA operates primarily abroad.<sup>317</sup> Agents who

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313. Sabrina de Sousa, Case 1:09-cv-00896, at ¶ 51 (“De Sousa runs the risk of arrest and detention if she ever leaves the territorial sovereignty of the United States.”).

314. Sabrina de Sousa, Case 1:09-cv-00896, at ¶ 62 (“De Sousa will be required to list the Italian criminal proceedings, the EUROPOL warrant, and even Abu Omar’s civil suit against her on even the most rudimentary job applications and background investigation forms, thereby severely restricting her options for future employment in her chosen profession.”).

315. The United States has stated that it will not honor an Italian extradition request in this case. *The First Criminal Trial Over the CIA’s “Extraordinary Rendition” of Terror Suspects Has Opened in Italy*, BBC NEWS, June 8, 2007, <http://news.bbc.co.uk/2/hi/europe/6732897.stm> [hereinafter *First Rendition Trial Opens*]; Elisabetta Poveldeo, *Judge Halts Italy Trial Testing U.S. Rendition*, INT’L HERALD TRIBUNE, June 19, 2007. Moreover, Sabrina de Sousa’s Complaint implies an understanding that the United States will not extradite her (and presumably her colleagues) to Italy. The Complaint states that De Sousa sought permission from her employer, the U.S. government, “to visit her family in India” but her “request was denied” and was informed of “the risk of her possible arrest and extradition to Italy” if she traveled to India. Sabrina de Sousa, Case 1:09-cv 00896, at ¶ 59. Thus, her complaint suggests an understanding that the United State government will protect her while within its jurisdiction but cannot do so if she travels to any country that has an extradition treaty that might honor a EUROPOL warrant.

316. While Americans may not be more parochial than citizens of other nations, they certainly have that reputation. A Lexis-Nexis June 28, 2009 search of the term “parochial Americans” in the file *News, All English*, revealed 232 publications using the phrase.

317. After the abuses of the 1960s and 70s, Congress placed limitations on the CIA, and other U.S. intelligence agencies, which largely prevent domestic surveillance. The U.S.A. Patriot Act largely gutted those reforms and again allowed for significant domestic surveillance by intelligence agencies. American Civil Liberties Union, *How the Anti-Terrorism Bill Puts the CIA Back in the Business of Spying on Americans*, Oct. 23, 2001, <http://www.aclu.org/natsec/emergpowers/12487leg20011023.html> (last visited Nov. 13, 2009). Nonetheless, its mission is primarily to focus on intelligence, “that reveals the plans, intentions and capabilities of our adversaries.” Central Intelligence Agency, *CIA Vision, Mission & Values*, <https://www.cia.gov/about-cia/cia-vision-mission-values/index.html> (last visited Jan. 21, 2009). Thus, agents must serve overseas.

cannot serve overseas may find promotions more difficult and cannot serve in the best and most important assignments.<sup>318</sup> Nor can they do the job for which they may have been trained.<sup>319</sup> Moreover, other agents see these requirements and balk at high-risk assignments thus further compromising agency effectiveness. Finally, agents generally are people who travel regularly and who speak multiple languages fluently.<sup>320</sup> Others, who may wish to retire abroad, will find that, too, impossible,<sup>321</sup> and some have apparently already lost property as a result of foreign prosecutions.<sup>322</sup> For these agents, confinement to the United States is decidedly a burden. While they may never face imprisonment, their lives are confined in ways that hurt both them and the effectiveness of the intelligence institutions they serve.

Egyptian cleric Abu Omar provides the most important rendition to torture case that illustrates the way in which the war on terror has demoralized our intelligence services and reduced their effectiveness. Beyond demoralization arising from the moral and legal fallout from rendition, it also demonstrated a bumbling, hapless, Maxwell Smart<sup>323</sup> side to the agency that contributed to public disclosure and heightened the agency's humiliation.

According to allegations surfacing in an Italian prosecution,

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318. While the CIA employs many people domestically, its mission and focus on information about the nation's adversaries places many of its jobs abroad. See Central Intelligence Agency, *Careers*, <https://www.cia.gov/careers/index.html> (last visited Nov. 13, 2009).

319. The CIA's "Professional Trainee Program's" minimum requirements include "a strong interest in international affairs" and states a preference for "[f]oreign travel and area knowledge, prior residency abroad, cross-cultural sensitivity, and foreign language proficiency." *Id.* at <https://www.cia.gov/careers/opportunities/ clandestine/professional-trainee-program.html> (last visited Nov. 13, 2009).

320. *Id.*

321. For example, in 1979, Dominic Perrone, an American intelligence officer, was declared *persona non grata* for alleged interference in Italy's internal affairs and had to leave the country. *Italy: "Impermissible" US Interference in Intelligence Services*, BBC SUMMARY OF WORLD BROADCASTS, Feb. 17, 1979. The author has been reliably informed by Perrone family members that Dominic Perrone, who spoke fluent Italian, had decided to retire in Italy and had bought a home there. He was given twenty-four hours to leave at great personal and financial loss. Modern intelligence agents implicated in unlawful renditions from other nations face similar disabilities. Ironically, Perrone had done nothing illegal but had authored a report highly critical of certain Italian agencies, the leaking of which irritated Italy's short-lived communist government. That the communists did not long hold power in Italy did not help Perrone, who lived for the rest of his life in Florida.

322. *Id.*; see generally *First Rendition Trial Opens*, *supra* 315.

323. Maxwell Smart was the blundering secret agent of the 60's comedy *Get Smart*. See Carl Birkmeyer, *Get Smart Website*, <http://www.wouldyoubelieve.com/> (last visited Nov. 13, 2009).

twenty-six Americans and six Italians,<sup>324</sup> snatched Abu Omar from the streets of Milan in broad daylight as he walked to noon prayers and in front of witnesses.<sup>325</sup> Operating in the open, using traceable cell phones<sup>326</sup> and staying openly at expensive hotels, paying for room and board with easily traceable credit cards,<sup>327</sup> this kidnapping seems not so much James Bond as tragically inept.<sup>328</sup> The trail that they left suggests complicity at the highest levels of the Italian government.<sup>329</sup> Nonetheless, Abu Omar, who was suspected of connections to terrorist organizations, including the infamous Abu Musab al-Zarqawi,<sup>330</sup> was rendered to Egypt (which has a ferocious reputation for torturing political prisoners<sup>331</sup>) where he was confined and “tortured with electric shocks, hung upside down, and sexually abused.”<sup>332</sup>

The details are not as important as the consequences. Abu Omar

324. *First Rendition Trial Opens*, *supra* note 315.

325. Bazzi Mohamad, *The CIA's Italian Job*, NATION, Apr. 9, 2007, at 22.

326. *Italian Spies to Take Stand at CIA Kidnapping Trial*, AGENCE FRANCE PRESSE, May 26, 2009.

327. Corera, *supra* note 125.

328. Journalist and author Stephen Grey notes:

[E]ven if an Italian official had given the green light, there was consternation at the tradecraft employed by the CIA team that had allowed their movements to have been so closely tracked. One former senior officer of the directorate of operations told me: “Even if the Italians were involved, this whole operation was botched. Using such a large team, involving the local stations, staying in such luxury, and making such a large scale use of cell phones and traceable credit cards was only asking for trouble.”

GREY, *supra* note 110, at 212-13.

329. *See id.* While European governments have claimed ignorance of this rendition, retired CIA officer Mike Scheuer thinks that the sloppiness of this operation demonstrates that the Italians were cooperating with U.S. intelligence. Corera, *supra* note 125. Moreover, the fact that six Italian intelligence agents including the former chief of military intelligence, Niccolo Pollari, have also been charged, suggests that the prosecution likewise does not believe that the U.S. acted alone.

330. GREY, *supra* note 110, at 196. Abu Musab al-Zarqawi orchestrated many attacks on U.S. military personnel and government agents in Iraq. He was the al-Qaeda chief in Iraq until killed by an American air strike on June 7, 2006. *Id.*

331. Human Rights Watch says:

Egypt has been ruled under a state of emergency for most of the last three decades. The Emergency Law allows arbitrary arrest and indefinite detention without trial. Human Rights Watch said the emergency law creates an atmosphere of repression and impunity in which torture flourishes. A renewal of the law was rammed through Egypt's People's Assembly in 2003.

HUMAN RIGHTS WATCH, *U.S./Egypt: Bush Mubarak Summit Should Spotlight Torture, Rights Abuses*, Apr. 8, 2004, <http://www.hrw.org/en/news/2004/04/08/usegypt-bush-mubarak-summit-should-spotlight-torture-rights-abuses>. Similarly, Bazzi Mohamad points out that Egypt's intelligence service is notorious for using torture. *The CIA's Italian Job*, NATION, Apr. 9, 2007, at 22.

332. PETER JAN HONIGSBERT, *OUR NATION UNHINGED* 190 (2009).

was ultimately released and has filed civil suit against his kidnappers and, most importantly, is apparently cooperating with the Italian prosecution of all twenty-six Americans and six Italian intelligence operatives. This prosecution received a difficult blow, weakening the case, when Italy's highest court ruled that important parts of the evidence collected by prosecutors could not be used because of the country's state secrets law.<sup>333</sup> But the prosecution has vowed to continue and says that it can proceed with lawfully obtained evidence.<sup>334</sup> Judge Oscar Magi has rejected a defense effort to end the proceedings.<sup>335</sup> Moreover, Italy allows prosecutions *in absentia*<sup>336</sup> and thus does not require the defendant's presence before proceeding. This means that all of the problems with foreign travel continue for the time being and continued disclosures will almost certainly add to the CIA's humiliation and loss of effectiveness, not only in Italy but also in all of Europe.<sup>337</sup> Thus this case, more than any, other remains a sea-anchor continuing to impede the effectiveness of our intelligence services.

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333. Rosa Anna Tremoglie, *Italian Court Rules in Favor of National Security*, HUMAN EVENTS ONLINE, March 19, 2009, <http://www.humanevents.com/article.php?id=31133> (pointing out that the case was weakened by the Constitutional Court's decision, and that the Court's decision in this case cannot be appealed).

334. Italian Spies to Take Stand at CIA Kidnapping Trial, AGENCE FRANCE PRESSE, May 27, 2009.

335. Maria De Cristofaro & Sebastian Rotella, *Italian Judge Lets Trial of CIA Agents Proceed; A Defense Request to End the "Rendition" Case is Dismissed, But Some Evidence is Barred*, L.A. TIMES, May 21, 2009, at A24. On November 4, 2009, as this article was going to press, the Fourth Chamber of the Court of Milan convicted 22 CIA agents, a former U.S. Air Force Colonel, and five Italian intelligence agents for the extraordinary rendition of Osama Moustafa Hassan Nasr, aka Abu Omar. See Craig Whitlock, *Italy Convicts 23 Americans*, WASH. POST, Nov. 5, 2009; Carrie Schimizzi, *Italy Judge Convicts 23 Former CIA Agents in Rendition Trial*, JURIST, Nov. 4, 2009, <http://jurist.law.pitt.edu/paperchase/2009/11/italy-judge-convicts-23-former-cia.php> [hereinafter Whitlock, *Italy Convicts*]. The United States State Department indicated that there would be an appeal. Whitlock, *Italy Convicts*, *supra*. The former CIA station chief Robert Seldon Lady was sentenced to eight years imprisonment and Sabrina de Sousa was sentenced to five years. *Id.* All were tried in absentia and are not in custody. *Id.*

336. *First Rendition Trial Opens*, *supra* note 315.

337. Italian intelligence has also been hurt. Rosa Anna Tremoglie points out that [T]here will not be an investigation on the possible participation of SISMI in the abduction of Abu Omar. However, damage already has been done because of this case. The Italian intelligence service has been "jumped," and many agents have been "burned." This means that the confidentiality of the SISMI has been compromised and that the agents, because their names have been made public, can't be used in future secret operations.

Tremoglie, *supra* note 333. Moreover, the head of Italian military intelligence, Nicolo Pollari was forced to resign as a result of the Abu Omar kidnapping. See Gina Doggett, *Ex-top Italian Spy Denies Involvement in CIA Kidnapping*, AGENCE FRANCE PRESSE, May 27, 2009.

Besides demoralization of large numbers of agents, with the decreases in efficiency and agency humiliation noted above, this episode created four shorter term problems for U.S. intelligence agencies:

1. The premature actions of the U.S. agents thwarted a competing Italian investigation that might have born fruit. Domestic police were actively investigating Abu Omar and others; the kidnapping interfered with this on-going investigation. According to the Italian prosecutor Armando Spatoaro: “We could have discovered other illegal links . . . This kidnapping was also very dangerous because it pushed [the] Islamic moderate part of the community to become extremists.”<sup>338</sup>
2. “[T]he CIA’s increasingly toxic reputation in Europe is causing some serious headaches, and may be making vital co-operation in the war against terrorism even harder to maintain.”<sup>339</sup> The authoritative *Marty Reports* to the Council of Europe<sup>340</sup> make it difficult to repair this problem. The information is now too widely disseminated and the report’s prestige makes it politically difficult to ignore. Moreover, Abu Omar’s case is not alone. It is (like the Arar case) only one of the more completely investigated, and therefore believable, of the many extraordinary rendition cases that have come to light. It will be difficult for many intelligence agencies to fully cooperate with our intelligence agencies in light of this history.
3. More generally it temporarily strained relations with Europe. This problem is being addressed by the Obama administration and is likely to be the least of the problems stemming from this or any other rendition.
4. Radicalization of the moderate Muslim. Spatoaro’s point about how kidnappings and torture can serve to radicalize moderate Muslims, has been replicated in other contexts. An important investigative report by Tom Lassiter of the McClatchy-Tribune News Service reveals: “In a classified review of 35 men released from Guantanamo, Pakistani police intelligence concluded in 2005 that the men – most of whom had been subjected to ‘severe mental and physical torture’ – had ‘extreme feelings of resentment and hatred against USA.’”<sup>341</sup>

“A lot of our friends are working against the Americans now, because if you torture someone without any reason, what do you expect?” Issa Khan, a former detainee from Pakistan, said in an interview in Islamabad. “Many people who were in Guantanamo are

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338. Corera, *supra* note 125.

339. *Id.*

340. See sources cited *supra* note 293.

341. Tom Lassiter, *The Accidental Incubator for Radical Islamists Al Qaeda and Taliban Leaders Managed to Exploit Guantanamo*, STAR-LEDGER, June 17, 2008, at 1.

now working with the Taliban.”<sup>342</sup>

If kidnapping and torture creates more enemies, then Abu Omar’s case became part of and illustrative of that process.

## V. CONCLUSION

Rendition became extraordinary when it changed from an extra-legal method of bringing fugitives to an otherwise fair trial, and became a way to avoid the *jus cogens* proscription against torture. Hiding behind euphemisms like “harsh interrogations,” empty diplomatic assurances, and an unreviewable and unrealistically high “more likely than not” standard for assessing the risk of torture, the United States kidnapped supposed terrorists and sent them for questioning in countries where mutilation, electrocution, hanging, stretching, and sexual assault are acceptable interrogational techniques.

We have paid a price. Some of the information gained thereby was false. And, false information had a cost beyond simple confusion and the expense of running down false leads. Al-Libi’s false information under Egyptian torture supplied part of the case for war in Iraq.

In renditions such as Binyam Mohamed’s, two close allies, the United States and the United Kingdom, conflicted at multiple levels of government. Moreover, notwithstanding fierce resistance by both the Bush and Obama administrations, the ugly truth about his rendition to torture leaked out. It remains unclear whether cooperation between the two nations’ intelligence services has fully recovered; and if it has, it can only be because the United States has given way and quit rendering British citizens to torture.

Renditions have masqueraded as simple immigration matters. Arar’s case embroiled bureaucracies in Canada and the United States. Both defended their respective indefensible actions by continuing to smear an innocent man. The case is an object lesson in how once a bureaucracy (including our respective legal systems) determines guilt, it becomes an unswayable Leviathan, bound and determined to be right even when patently wrong. Thus, Arar’s case has implications for rendition and is also a cautionary tale about courts and bureaucracies. Arar’s case confirms Kafka’s warning about the power of bureaucracy to destroy the individual and to claim the moral high ground while doing it. His case tells citizens to be skeptical of the oppressive power of all levels of government – even in relatively liberal democratic countries. It tells citizens to be skeptical even when close democratic allies cooperate.

An overblown and unjust use of state secrets as a defense

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<sup>342</sup> *Id.* at 1-2.

animated several renditions, including most notably that of El-Masri, whose damage suit for rendition to torture was lost because the government, aided and abetted by the courts, hid behind an overbroad assertion of the state secrets doctrine. Other rendition cases such as Binyam Mohamed's now before the district court in California, and the prosecution of Abu Omar's kidnappers in Italy remain to be determined.<sup>343</sup> One can hope that the state secrets doctrine will not become an all-purpose way of preventing the public from learning more about the United State's extraordinary rendition program, or keeping its victims from receiving justice.

What more evidence do we need in order to assess this program? One could point to many other similar renditions – Abou Elkassim Britel, Ahmed Agiza (Sweden to Egypt), Mohamed Farag Ahmad Bashmilah, and Bisher Al-Rawi among others. Those covered here, however, raise the most significant legal, political and moral issues. Moreover, many of the other known renditions suffer from the same defects as those chosen for this study, and therefore do not make new or different points about the practice.

This policy has failed. It has not deterred terrorism, has impeded intelligence gathering, and has put the United States at odds with its closest allies. It has obstructed foreign policy initiatives and interfered with legitimate prosecutions in multiple countries. And it has demoralized intelligence agents while radicalizing opponents.

The evidence also points to transnational resistance to U.S. renditions that is slowly curbing the worst excesses and may ultimately force the great Leviathan to come more into compliance with international law. The various pressures on the United States seem, when viewed singly, quite small. The cumulative effect, however, at least since *Alvarez-Machain*, has been to continually make it harder for the U.S. to operate freely. Under any conceivable utilitarian calculus, the practice proves wanting. It seems safe to predict that extraordinary rendition's days are numbered.

Finally, not all moral calculations are instrumental. Renditions to torture cast the United States as an outlaw, as a nation openly presenting a defective moral compass. That is important irrespective of consequences.

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343. As this Article went to print, convictions and acquittals came down in this case. See Stacy Meichtry, *Italy Rules in Rendition Case*, WALL STREET J., Nov. 5, 2009, at A12 ("An Italian court convicted 23 U.S. intelligence operatives on charges of kidnapping an Egyptian imam on a Milan street . . . . The decision is a landmark ruling on the controversial U.S. practice of abducting suspected terrorists and flying them to other countries for interrogation . . . . Obama administration officials voiced dissatisfaction with the ruling."); see also Amnesty International, *Convictions in Abu Omar Rendition Case a Step Toward Accountability*, Nov. 5, 2009, <http://www.amnesty.org.au/news/comments/22055/>.