Unchecked and Unbalanced

Presidential Power in a Time of Terror

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Today's executive rendition system began six days after 9/11. A classified presidential directive issued that day granted the CIA dramatic new powers. According to Roger Cressey, deputy counterterrorism director at the White House in 2001, the preparation of this order was "incredibly fast"; it did not go through "the usual wordsmithing exercises." Yet the presidential finding, as signed by President Bush on September 17, 2001, gave the CIA broad authorization to kill, capture, or detain members of al Qaeda anywhere in the world. According to current and former intelligence officers, it authorized black sites, albeit in vague, general terms that lent themselves to plausible deniability. The finding did not require the CIA, when detaining and transferring suspects, to seek case-by-case approval from the White House, the State Department, or the Justice Department. The same finding released the "vast" new funds sought by Tenet to coax foreign intelligence services into new cooperation with the CIA.[29]

Congress was thus effectively excluded from debate about adopting the extraordinary rendition system. According to the *Washington Post*, "The CIA has decided to brief only the chairman and the ranking member of the two intelligence committees" about CIA activities. Even then, the Bush Administration gave legislators only skeletal details. Lawmakers complained that the briefings were too vague but felt constrained from discussing the matter in public, even in general terms. Limited briefing of congressional leaders cannot replace informed and robust debate involving both the Congress as a whole and the public on general contours of national security policy.[30]

Of course, congressional access to information is only a threshold requirement for informed debate. The Church Committee benefited from a bipartisan consensus on the need for serious oversight and change. Today, consensus across the aisle is more difficult to achieve. Senators aligned politically with the White House have staunchly opposed any debate about counterterrorism policies, even those raising fundamental questions of American values, as well as the effectiveness of the strategies being used. Senator Pat Roberts of Kansas condemned legislators on both sides of the aisle who expressed concern on detention issues as showing "an almost pathological obsession with calling into question the actions of men and women who are on the front lines of the war on terror." Roberts's rhetoric was a thinly veiled effort to stifle debate.[31]

Like the September 17, 2001, presidential finding, the legal opinions prepared by the Bush Administration to support extraordinary rendition have not been exposed to public or congressional scrutiny. The Justice Department's Office of Legal Counsel, or OLC, reportedly with input from then–White House Counsel Alberto Gonzales, provided the President and the intelligence

agencies with the justification of extraordinary rendition in an opinion dated March 13, 2002, and entitled "The President's Power as Commander in Chief to Transfer Captive Terrorists to the Control and Custody of Foreign Nations." The White House consistently resists congressional requests for this memo even though it offers no good cause for this secrecy.[32]

On September 6, 2001, President Bush announced that fourteen of the suspects held at black sites would be transferred to Guantánamo Bay Naval Base, Cuba, where he intended to have them tried before military commissions. His announcement marked the first official recognition of the secret CIA prisons.[33]

But the apparent concession was less than it seemed. Nothing in the President's speech suggested that the black site program would wholly come to end. Indeed, the *Washington Post* reported that supporters of black sites, including Vice President Cheney, received "the president's assurance, if only in theory, that the black sites program could be used again." One anonymous intelligence source told a *Washington Post* reporter, "Although there is no one in CIA custody today, it's our intent that the CIA detention program continue. . . . It's simply too valuable . . . to not allow it to move forward." Indeed, the advocacy organization Human Rights Watch cautioned that the group transferred to Guantánamo did not include at least thirteen other detainees reportedly held in black sites and whose subsequent whereabouts remained unknown.[34]

In his capacity as a law professor, John Yoo, the author of pivotal OLC opinions about post-9/11 presidential power, has revealed the likely legal justification for the program. In an article in the July 2004 issue of the *Notre Dame Law Review*, Yoo argued that the executive branch could transfer detainees wherever and in whatever fashion it chose. Referring back to British practice long before the American Revolution, Yoo drew on the practice of British monarchs during the seventeenth century. "[I]t was well-established under the British Constitution that the Crown had absolute authority to dispose as it saw fit of prisoners of war and other detainees." Yoo argued, "Parliament never sought to interfere with the executive's prerogatives regarding the disposition of prisoners of war."[35]

Extraordinary rendition thus became national policy via secretive executive lawmaking that circumvented Congress and repudiated the proper role of the federal courts. And the underlying legal justifications for extraordinary rendition, if Yoo's arguments accurately track the contents of his March 2002 OLC legal opinion, rely on monarchial prerogatives that are completely incompatible with a Constitution of separate branches, sharing power.

Rendition's Flawed Results

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Rendition's Flawed Results

Unilateralism in national security policy is not merely inconsistent with the Constitution's checks and balances. Too often, the result of removing external scrutiny is foolish policy that in fact harms national security interests. Extraordinary rendition illustrates well how secretive decision making is not simply constitutionally problematic—it is also unsound national security policy.

Intelligence professionals recognize this point. As early as 1976, CIA director William Colby recommended "[i]mproved supervision" by Congress and "some public review" as a way of ensuring that "intelligence will remain within the new guidelines." Former CIA case officer Reuel Marc Gerecht, writing in the *Weekly Standard*, explained that "debate [about extraordinary rendition] could stop us from doing—or not doing—something that our collective national conscience would later regret. . . . One thing is certain: Our avoidance of this necessary debate is a disservice to the men and women of the CIA, the Pentagon, and the FBI."[36]

Has presidential unilateralism in rendition policy made the world safer? On numerous occasions, Secretary of State Condoleezza Rice claimed that current rendition policies "save[d] European lives." But Rice's claim is troublingly vague. The Administration controls the spigots of public information. Why not point to specific cases in which extraordinary rendition led to information being obtained that saved lives? Yet details to support Rice's claim have been in short supply.[37]

Rather, available evidence undermines the contention that extraordinary rendition generates useful information. Consider first the policy's intelligence-gathering goals. Extraordinary rendition is intended to channel detainees to forms of interrogation that would be unlawful when employed by American personnel. The armed forces already have an ample repertoire of interrogation tactics not involving torture (and, since the working group memo, involving torture). Experienced intelligence professionals express grave reservations about whether adding coercion works. Retired FBI agent Jack Cloonan successfully tracked down and brought to trial the al Qaeda members responsible for the 1998 bombings of U.S. embassies in Kenya and Tanzania. Cloonan argues that "torture—by hands American or foreign—is rarely ever useful or necessary." Other analysts agree, noting that much of the best pre-9/11 evidence about al Qaeda emerged through interrogations by FBI field agents who eschewed violent interrogation tactics. Former CIA officer Gerecht also explains that "a wide swath of the intelligence community" believes torture to be an "ineffective intelligence tool." This consensus has dissenters, including Gerecht himself. But there is little evidence that torture typically succeeds where other less

coercive methods fail. Certainly, there is no evidence torture is worth the moral and reputational price tag that comes with the mendacity and hypocrisy that its authorization spawns.[38]

Aside from moral costs, though, does it work to send detainees to another country for coercive interrogation and torture by another intelligence service which, you hope, will tell you everything that it learns? Intelligence professionals think not. Handing a person over to another country's custody means "voluntarily diminishing, if not ending" control over the circumstances of interrogation. This in turn corrodes the reliability of the information gained. Gerecht offers a pithy example: "The mind spins thinking how agency officials would phrase the sourcing notes in intelligence collected from Syrian debriefings: Information collected by a foreign intelligence service that the United States now strongly suspects is aiding Iraqi insurgents; this intelligence service also has a long history of operationally aiding Palestinian terrorist organizations and the Lebanese Hezbollah." Collaboration with Pakistani intelligence services would suffer the same seemingly fatal internal contradictions. That is, even if extraordinary rendition yields more information by using George Tenet's "aggressive interrogation techniques," there is no way to know if the information is reliable.[39]

The most important evidence to emerge from extraordinary rendition proved false and caused real harm to America. This was evidence extracted by torture from senior al Qaeda operative Ibn al-Sheikh al-Libi, who fell into American custody in the opening months of the Afghan conflict. Al-Libi had run the Khalden training camp in Afghanistan, where he trained Richard Reid and Zacarias Moussaoui. When al-Libi was captured, veteran FBI agent Jack Cloonan, on behalf of the FBI, argued for the use of long-standing noncoercive interrogation procedures for terrorism suspects. Cloonan pointed to the successes of the 1990s during the investigation of the embassy bombing to argue that these noninvasive methods worked. According to Cloonan, he was overruled at the highest levels. The CIA's "comments about getting boots on the ground and taking the gloves off both appealed to the president and could be quickly actualized by virtue of the CIA's black budget." So, on the flimsiest of justifications, the FBI lost control of al-Libi. The CIA bound and gagged al-Libi, stuffed him into a box, and shipped him to Egypt. In Egypt, CIA sources have told reporters, al-Libi was water-boarded and subjected to the "cold cell" treatment. Even though the CIA had been authorized to use both these techniques, its boss, George Tenet, wanted to use extraordinary rendition to take advantage of unsavory allies' experience with still *more* aggressive interrogation techniques. Whatever else was done to him, al-Libi broke and told the interrogators what they wanted to hear.

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What al-Libi said emerged on the world stage in September 2002, when Secretary of Defense Donald Rumsfeld alluded to "bulletproof" evidence of a connection between al Qaeda and Iraq. In February 2003, Secretary of State Colin Powell told the United Nations Security Council that a "senior terrorist operative . . . responsible for one of al Qaeda's training camps in Afghanistan" had given "credible" evidence that Saddam Hussein once offered to train al Qaeda operatives in the use of explosives and illicit weapons, including biochemical weapons. *Newsweek* confirmed that this "credible" source was al-Libi. President Bush, Vice President Cheney, and other senior officials all relied on al-Libi's statements about an al Qaeda–Iraq link to make their case for the Iraq war.[40]

But Administration officials knew early on that al-Libi's information was unreliable. As early as 2002, the Defense Intelligence Agency, which is part of the Defense Department, concluded that al-Libi "intentionally misled debriefers," by "describing scenarios to the debriefers that he knows will retain their interest." Sources "with firsthand knowledge of [al-Libi's] statements" told ABC News that although al-Libi did not *deliberately* mislead his interrogators, he did tell them what *he thought they wanted to hear.* Of course, this is what anyone who wants to stop being tortured does. It reveals the general problem with coercive methods. It's not that a suspect won't talk; it's that he can't stop himself talking, even when what he says is not true. As John McCain succinctly explained to the Senate, "You can get anyone to confess to anything if the torture's bad enough."[41]

Al-Libi's story also shows that publicly available information can sometimes be more reliable than the government's clandestine sources. Since the beginning of the 1990s, Osama bin Laden said he despised the former Ba'athist regime of Saddam Hussein, as he told his biographer, the Pakistani journalist Hamid Mir.[42] Here, the information in the public domain was correct. Despite repeated and strenuous assertions by the Bush White House, no legitimate connection was ever drawn between the Iraqi regime and the perpetrators of the 9/11 attacks. The administration, however, successfully argued that its secret sources ought to displace public knowledge. When secret information is harvested using such dubious methods, the public and Congress are wise not to accept at face value government claims of access to privileged knowledge.

The problem of false intelligence arising from extraordinary rendition is even more pervasive than the al-Libi story suggests. In al-Libi's case, the CIA at least had a detainee who had a culpable connection to al Qaeda. But extraordinary rendition removes the checks and accountability mechanisms that prevent the intelligence agencies from wielding their powers in arbitrary, capricious, or self-interested ways. Taking away these checks has a predictable re-

sult. Increasing evidence suggests post-9/11 extraordinary rendition yields an intolerably high proportion of "false positives"—innocent people detained by mistake.

In late 2005, the rendition system comprised about one hundred detainees, with two ranks of prisoners. About thirty were "major terrorism suspects," such as al-Libi or Khalid Sheikh Mohammed, who professed public allegiance to al Qaeda. In these cases, the risk that beyond-the-law detention is factually erroneous is low (whether it is wise is another matter). But another seventy or so detainees have "less direct involvement in terrorism" and "limited intelligence value." Among these individuals, there are also "a growing number" of what the CIA's inspector general calls "erroneous renditions." Numbers between ten and three dozen erroneous detentions have been reported—an extraordinarily high error rate.[43]

There are several reasons for this unacceptable error rate. Most important, extraordinary rendition is distinguished from the traditional law enforcement and criminal justice system by the absence of checks, such as courts and congressional oversight, to identify errors and correct the zeal of field-based operatives. A case that came to light in 2005 involving a German citizen, Khaled El-Masri, illustrates how this absence can allow the self-interested motives of intelligence personnel to overtake a critical view of a suspect's intelligence value.

Just before the end of 2003, El-Masri was on his way to a holiday in Macedonia after quarreling with his wife. At the Tabonovce border crossing, Macedonian border police hauled him off a bus and detained him because his name was similar to that of a known associate of one of the 9/11 hijackers. Macedonian police then contacted the Skopje station of the CIA. They reached its deputy chief, a junior officer, because the station chief was on vacation. Instead of carefully considering the evidence for and against the conclusion that El-Masri was indeed the 9/11 hijackers' former associate, the deputy station chief let petty bureaucratic imperatives take over. He used El-Masri as a chance to get ahead. According to one CIA officer, the deputy chief "really wanted a scalp because everyone wanted a part of the game."[44]

The deputy station chief was not the only one searching for scalps. In the CIA's Counterterrorism Center in Langley, Virginia, the director of the al Qaeda unit, an aggressive former Soviet analyst, when told of El-Masri's capture, "insisted that [El-Masri] was probably a terrorist, and should be imprisoned and interrogated immediately," even though the evidence against him was slim. On this basis, El-Masri was taken to a black site, an abandoned brick factory used as a prison in northern Kabul, in Afghanistan, where he was told: "You are here in a country where no one knows about you, in a country where there is no law. If you die, we will bury you, and no one will know." Like Arar and Habib and the three Yemeni men, El-Masri was innocent. And, three months

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later, analysis of his passport demonstrated that he was not the suspected terrorist but someone else entirely. Rather than redress its error, the CIA kept El-Masri detained for a further two months. Indeed, the CIA released El-Masri only as a consequence of pressure from the State Department.[45]

The current absence of any judicial check on executive discretion compounds the problem. Like Arar, El-Masri sought judicial relief and was rebuffed. A federal district court in Alexandria, Virginia, rejected his claim on the basis of the "state secrets privilege," which is "an evidentiary privilege derived from the President's constitutional authority over the conduct of this country's diplomatic and military affairs." The court accepted the dubious proposition offered by the executive branch's lawyers that any official admission or denial of rendition practices would harm government security. To the contrary, it is courts' facile and thinly reasoned acceptance of a de facto lawless zone that poses the risk to constitutional order and individual liberties.[46]

The facts of El-Masri's case are, moreover, not unique. An extraordinary rendition conducted in Milan in 2003 was also the product of local CIA initiative. According to former intelligence officials who spoke to the *Washington Post*, "the kidnapping was the inspiration of the CIA station chief in Rome, who, like the Skopje deputy chief, wanted to play a more active role in taking suspected terrorists off the street" and had his officers come up with a list of people to seize.[47]

The intelligence services responsible for extraordinary rendition have every incentive to generate information to justify their practices, even if this information is false. But they have almost no incentive to make sure their decisions are correct. After all, once a person has been "disappeared," shipped off to a decrepit and forgotten jail in the Egyptian hinterland, who will say the agency was wrong? And if someone does complain, who would believe them? And even if they were believed, who would do anything? How many other false positives are there among the hundred-plus people detained in black sites? How many El-Masris were never let go?

We have seen this before. The absence of checks on executive power inevitably ends in a spiral of increasingly harmful and indiscriminate use of intelligence powers against innocent people.

Bureaucratic pressures are not the only dynamics pushing extraordinary rendition toward error, bad intelligence, and ruined lives. Torture also generates false evidence that can justify a decision to detain an innocent. If this sounds improbable, recall that Maher Arar "confessed," despite being innocent of any connection to terrorism, and was thereby detained for a whole year. It is impossible to know how many detainees "confess." Consider too what happened to one of the three Yemenis whose cases were documented by Amnesty International. He recounted being shown photographs of men and asked

whether he knew any of them. One of the photographs depicted the Al-Jazeera correspondent Taysir Alluni. The Yemeni detainee was "told that if he said he knew him, his situation would improve." Such interrogations are simply not going to provide worthwhile evidence. On the contrary, they will lead to detention of more innocents.[48]

Extraordinary rendition thus is a vicious circle. A decision to channel a suspect into the extraordinary rendition system instead of the traditional criminal justice system means evidence from that person, gathered by torture, cannot be used in American criminal prosecutions, where courts reject evidence gained by torture. The executive branch must therefore transfer the person named by the original suspect to detention facilities that do not adhere to adequate procedural protections. The more the intelligence agencies use extraordinary rendition, the more they *have to* use it.

Extraordinary rendition also jeopardizes the government's ability to convict in federal court those who are indeed guilty. Mistreatment, even outside rendition, imperils criminal prosecution. Consider how the prosecution of American citizen John Walker Lindh, who joined the Taliban and was captured in Afghanistan, suffered because of the FBI's decision (over Justice Department advice) to interrogate Lindh without a lawyer. Lindh asked for counsel but instead was held "blindfolded, naked, and bound to a stretcher with duct tape." Rough treatment and disregard of Lindh's request for counsel rendered his confession worthless, needlessly jeopardizing a worthwhile prosecution.

The same problem arises with evidence gathered through extraordinary rendition. Consider the case of American citizen Jose Padilla, who was first arrested in Chicago in early 2002. In May 2002, President Bush designated Padilla as an "enemy combatant" to be detained indefinitely as a result of evidence gathered in black site interrogations of Abu Zubaydah and Khalid Sheikh Mohammed. The government initially cited Padilla's involvement in a plot to use a radiological weapon, a "dirty bomb," in the United States. But the government never charged Padilla with this crime. After more than three years' detention without charge or legal process, Padilla was transferred from military custody and brought before a civilian court for criminal trial. Although the government did not retract its initial allegations, Padilla was not charged with the dirty bomb plot. Rather, the eventual charges focused on Padilla's alleged minor role in a separate conspiracy to provide aid to fighters outside the United States. The Justice Department could not charge Padilla with a dirty bomb plot because the evidence gathered from Zubaydah and Khalid Sheikh Mohammed could not be used in a federal court. That evidence would, by dint of its source, be considered wholly unreliable. The Justice Department's inability to charge Padilla, in short, emanated directly from decisions about how to treat Zubaydah and Khalid Sheikh Mohammed.[49]

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The government did, however, charge one of Padilla's alleged co-conspirators for his involvement in the dirty bomb plot—but it did so before a military commission at Guantánamo. Ethiopian student and British resident Binyam Mohammed was arrested in Pakistan, transferred first to Morocco, and then taken to Guantánamo, where he was charged with a conspiracy to explode a dirty bomb. Evidence that a federal court would not consider, however, may be admissible in a military tribunal. Extraordinary rendition, in short, provides one of the motives for derogating from the basic standards of American criminal justice.[50]

Extraordinary rendition thus tends toward the production of flawed evidence. It tends to foster new erroneous detentions. The results of extraordinary rendition show that structures of accountability endorsed by Congress and the federal courts are not mere sops to fainthearted idealists. They are essential to the legitimacy and effective functioning of any intelligence gathering system, especially one grounded in interrogation practices. Accountability, which is what checks and balances create, is a necessary part of effective counterterrorism, not a barrier to success.[51]

The Wages of Hypocrisy

Presidential unilateralism means turning the law aside. But executive branch officials are typically reluctant to admit this, pushing them to unavoidable hypocrisy, and even mendacity. Efforts by senior American officials, including President Bush and Secretary of State Condoleezza Rice, to defend their unchecked decision making only amplify the damage to counterterrorism policy by fostering distrust among allies and reducing our moral capital in a world already leery of a superpower.

Before leaving in December 2005 on a whistlestop European trip aimed at securing cooperation in counterterrorism efforts, Secretary of State Rice gave a speech on the tarmac at Andrews Air Force Base seeking to preempt mounting European concerns about extraordinary rendition. Rice's statements appeared unequivocal: "The United States does not permit, tolerate, or condone torture under any circumstances," she said. It is the "policy" of the administration, moreover, that: "The United States does not transport, and has not transported, detainees from one country to another for the purpose of interrogation using torture. . . . The United States has not transported anyone, and will not transport anyone, to a country when we believe he will be tortured." She added: "Where appropriate, the United States seeks assurances that transferred persons will not be tortured."[52]

Rice's comments echoed similar statements by the Attorney General and the President. Nine months previously, President Bush explained that extraor-

dinary rendition's goal is "to arrest people and send them back to their country of origin with the promise that they won't be tortured. That's the promise we receive." A few days earlier, Attorney General Alberto Gonzales underscored that United States policy is not to send suspects "to countries where we believe or we know that they're going to be tortured." But, unlike Rice and the President, Gonzales acknowledged that the United States "can't fully control" what happens on a suspect's receipt.[53]

Such justifications reek of hypocrisy. Take first the Administration's claim to be following the law. Both Rice and Gonzales carefully referred to a "policy," and avoided talking of the "law." A policy is a nonbinding preference that may be overridden. Their choice of words trades on a loophole in federal law. When the United States ratified the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 1994, it also adopted a series of "declarations," "reservations," and "understandings" that limit American responsibilities under the Convention. One of these caveats states that ratification alone did not endow the Convention's rules with legal force under U.S. law. A law would need to be enacted by both houses of Congress and signed by the president for legal consequences to flow under U.S. law.[54]

FARRA

Only one of the laws enacted to implement the Convention, however, addresses *overseas* transfers and renditions. This law, the 1998 Foreign Affairs Reform and Restructuring Act, or FARRA, states that: "It shall be the *policy* of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States." Rice's and Gonzales's statements rely on FARRA's policy statement but do not acknowledge its nonbinding quality.[55]

More troubling is Secretary Rice's reference to diplomatic "assurances," echoing the President's reference to a country's "promise" not to torture. Diplomatic assurances, or formal representations from one government to another, are today's version of plausible deniability—except today they are not even plausible. The form assurances take is unclear. The *Washington Post* reports that the CIA's general counsel demands a "verbal assurance from each nation that detainees will be treated humanely."[56] Given State Department human rights reports, and all the other evidence about torture in nations that collaborate with the United States in extraordinary rendition, there is no reason to believe the promises contained in any assurance. Further, assurances lack the force of law. Nor is there reason to accept that the assurances, including those received from Syria in Maher Arar's case, were believed by the President or Dr. Rice: countries that routinely violate their own laws against torture and trash their

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Unsurprisingly, there is no evidence to suggest the United States ever protested to Syria, Egypt, or any of its other extraordinary rendition partners about torture after a transfer. In February 2005, the new CIA chief Porter Goss told Congress that the CIA had an "accountability program" to monitor posttransfer conduct, but tellingly conceded that once a prisoner was out of the CIA's control, "there's only so much we can do."[57] In Arar's case, the State Department received "appropriate assurances from Syrian officials" prior to the transfer. But these assurances were clearly not respected; they simply gave cover for the Administration's assertion that it was not violating its obligations under the Convention Against Torture.[58]

Relying on diplomatic assurances is a clear violation of the Convention Against Torture. The Convention, which is the law of the land, bars a signatory state from expelling, returning, or extraditing a person to another country "where there are substantial grounds for believing he would be in danger of being subjected to torture." Explaining its scope, the treaty directs signatories to "take into account all relevant considerations including, where applicable, the existence in the country concerned of a consistent pattern of gross, flagrant, or mass violations of human rights." Hence, the treaty focuses attention on the *actual* risk to a person—not whatever antitorture laws a country might have signed, and still less, a convenient, ad hoc "assurance" or "promise."[59]

Diplomatic assurances are simply a convenient "check the box" way of evading the Convention's prohibition on returns to torture, an empty gesture at compliance when the U.S. government knows it is violating the law. Indeed, as the advocacy group Human Rights Watch has noted, there is no known instance in which "assurances have been sought from a county in which torture and ill-treatment were not acknowledged human rights problems."[60]

There is no doubt that the Administration knows it is rendering people to countries that regularly torture. The State Department's report on Egypt in 2005 painted a grim picture of "a systematic pattern of torture by the security forces," including "stripping and blindfolding victims; suspending victims from a ceiling or doorframe with feet just touching the floor; beating victims with fists, whips, metal rods, or other objects; using electric shocks; and dousing victims with cold water." Sexual abuse was not uncommon. The State Department's human rights report on Syria that same year described how Syria's prisons and justice system suffer from "[c]ontinuing serious abuses including the use of torture in detention, which at times, results in death; poor prison conditions; arbitrary arrest and detention; [and] prolonged detention without trial."[61]

The Administration's statements are the epitome of hypocrisy. We condemn countries at the same time that we collaborate with them in the very practices we claim to abhor. Diplomatic assurances are simply the grossest evidence of that hypocrisy. They stretch the credulity of America's citizens and its allies, to say nothing of nations and people who already view the United States with skepticism.

Unsurprisingly, European audiences received Secretary Rice's defense of the extraordinary rendition system with skepticism as well. European politicians and journalists roundly condemned extraordinary rendition. A Conservative Party member of Britain's parliament described Rice's comments as "surgically precise language to obfuscate and distract" that had been "drafted by lawyers with the intention of misleading an audience." Journalists in Britain and elsewhere seized on the ambiguities in Rice's speech around the term "policy" and the use of diplomatic assurances as evidence that the Bush Administration was engaged in manifest hypocrisy, as well as acts in gross violation of long-established international law.[62]

Public uproar led several countries, including Canada, Sweden, Italy, and Germany, and the European Union overall to establish judicial or parliamentary investigations of specific extraordinary renditions concerning their citizens or the use of their territory. During Rice's visit, Germany's foreign minister and prime minister pressed for clarification of the American position. Rice's evasive responses only sparked more outrage. The conservative German newspaper *Die Welt* bluntly stated that "no one believes these [diplomatic] assurances." With less restraint, the leftist *Tageszeitung* ran a fake CIA recruiting advertisement proclaiming, "Torturers Wanted: U.S. Citizens May Not Apply." Secretary Rice's visit, rather than answering concerns, served to crystallize the view, held across the European political spectrum, that the American government was engaged in morally reprehensible policies with which European states should have no truck.[63]

Rice's justification also prompted a sharply worded judicial rebuke. In December 2005, Britain's House of Lords, the nation's highest court, issued an opinion barring the use of evidence gained by torture in immigration proceedings. Uniformly praised across the political spectrum in the United Kingdom, the Lords' judgment condemned the extraordinary rendition system in no uncertain terms. "The use of torture is dishonorable," wrote Lord Goff. "It corrupts and degrades the state which uses it and the legal system which accepts it. . . . In our own century, many people in the United States, heirs to [the] common-law tradition, have felt their country dishonored by its use of torture outside the jurisdiction and its practice of extra-legal 'rendition' of suspects to countries where they would be tortured."[64]

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consequent popular, press, and judicial opprobrium, have little strategic consequence. A distinguished proponent of the realism thesis in international relations (although not of rendition policy), Professor John Mearsheimer argues that international legal norms "have minimal influence on state behavior and thus hold little promise for promoting stability in the post Cold-War world." According to Mearsheimer and other realists, mere moral indignation, sound, and fury in European cafés and courts has scant relevance to decisions about national security.[65] In the "world of stark and harsh competition" depicted by Mearsheimer and his fellow realists, nation-states are red in tooth and claw. They have little time to pause and ruminate on the morality of counterterrorism cooperation, let alone sanction their allies for overreaching. "[A]ll states are forced to seek the same goal: maximum relative power," goes Mearsheimer's teaching.[66]

Might then the executive branch's decision to step above the law, setting rights and values aside, be defensible in pragmatic terms? Experience with rendition policy suggests not. The unavoidable hypocrisy of claiming to stand above the law does real harm to the nation's interests.

As an initial matter, extraordinary rendition led to diplomatic setbacks for the United States. In 2005, Dutch foreign minister Ben Bot suggested that the Netherlands' contribution to NATO deployments in Afghanistan would be jeopardized if American officials "continue[d] to beat around the bush" on the question of "black sites" in Europe. Bot's statement gives concrete form to the public pressure on European governments on extraordinary rendition.[67]

European governments may see pragmatic advantages in yielding to public protests about the immorality of extraordinary rendition. Their objections to extraordinary rendition are a way of seizing moral high ground. Further, moral condemnation has strategic uses. As Robert Kagan observes, "Europe's assaults on the legitimacy of U.S. dominance may also become an effective way of constraining and controlling the superpower."[68]

In addition, extraordinary rendition creates roadblocks to police and intelligence cooperation. In Sweden, for instance, public outcry was triggered by a report in the television program *Kalla Facta* that Swedish police handed over two Egyptian asylum seekers to CIA custody at one of Stockholm's airports for them to be rendered into Egyptian custody. After transport, one was allegedly tortured and sentenced to twenty-five years' imprisonment. As a consequence, Swedish police drafted new regulations for deportations, requiring Swedish, not foreign, control of such operations.[69]

Resistance to intelligence and law enforcement cooperation comes from official sources too. The British House of Lords in December 2005 prohibited use of possibly coerced evidence in immigration decisions, rejecting the argument of Eliza Manningham-Buller, head of Britain's Security Service, that

intelligence services needed to rely on foreign intelligence services for information, and could not be in the business of querying what methods were used to extract vital information.[70]

German courts also balked at acquiescence to the extraordinary rendition system and the use of black sites, with serious consequences for counterterrorism efforts in Germany. In early 2004, German courts acquitted two Moroccan men accused of direct involvement in the planning of the 9/11 attacks. Mounir el-Motassadeq and Abdelghani Mzoudi were released because the United States declined to provide testimony sought from detainees at black sites, including Ramzi bin al-Shibh. Although no explanation was forthcoming, it seems reasonable to suppose that al-Shibh had been subjected to coercive interrogation techniques that the Administration had no wish to see examined and condemned in a German courtroom. Faced with the acquittals, the Justice Department produced a summary of al-Shibh's statements. A German court then convicted el-Motassadeq on a lesser count of belonging to al Qaeda but acquitted him of the more serious charge of complicity in the attacks. The court criticized the United States for continuing to withhold evidence centrally relevant to the complicity count.[71]

Worse, extraordinary rendition led to criminal charges against CIA agents in Italy. On February 17, 2003, CIA agents snatched in broad daylight from the streets of Milan an Egyptian cleric, Osama Moustafa Hassan Nasr. As a university student, Nasr joined Jamaat al Islamiya, a violent jihadist faction in Egypt. With Jamaat itself facing violent repression by the state, Nasr fled to Albania, then Germany, and finally Italy. On February 17, 2003, CIA agents bundled him into a van. His wife and two children had no word of him until April 2005, when they received a letter from him, mailed from Alexandria, Egypt.

Nasr's kidnapping—"the inspiration of the CIA station chief in Rome, who wanted to play a more active role in taking suspected terrorists off the street"—occurred without full Italian cooperation. But as a former member of the Egyptian Brotherhood, Nasr had been under regular surveillance by the Italian police.[72] In June 2005, Milan prosecutor Armando Spataro issued Europe-wide arrest warrants for twenty-two alleged CIA operatives. In July 2006, Italian police arrested two Italian intelligence agents, Marco Mancini and Gustavo Pignero, alleging that both had been involved in the planning and execution of Nasr's kidnapping. Spataro explained that Nasr had been the subject of ongoing Italian investigation, and that the CIA's kidnapping had "seriously damaged counterterrorism efforts in Italy and Europe. . . . In fact, if Nasr had not been kidnapped, he would now be in prison, subject to a regular trial, and we would have probably identified his other accomplices." Rev-

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elations that the CIA operatives involved in the kidnapping stayed in luxury hotels in Milan, Florence, and Venice before and after the kidnapping, racking up more than $100,000 in bills, only added to the impression that the operation had been conceived in a reckless and foolish manner, more James Bond than George Smiley.[73]

Finally, extraordinary rendition weakens international judicial and prosecutorial cooperation by providing a low-cost means of circumventing formal legal channels, undercutting countries' incentives to improve methods of cooperation. Long-term counterterrorism strategy depends on the United States' ability both to eliminate lawless pockets in which al Qaeda can thrive and to strengthen the democracies of countries in which al Qaeda seeks recruits. Extraordinary rendition, however, strengthens abusive intelligence services in nondemocratic states, such as Egypt, Jordan, and Syria, against forces of liberal and democratic reform.

Since the overthrow of the Egyptian monarchy in 1952, Egypt has labored under "total executive domination," in which democratic and parliamentary resistance is subdued through a host of constitutional and extralegal methods. The parliamentary elections of 2005 thus were "hardly free and fair," but were accompanied by violent repression by security forces. In December 2005, an Egyptian court sentenced Ayman Nour, a leading opposition figure, to five years' hard labor in a case widely seen as retribution for running against President Hosni Mubarak. The Egyptian prime minister has admitted to receiving, even by mid-2005, "60 to 70" terrorist suspects, whether through rendition or by extradition, since 9/11. In the same period, Egypt received approximately $50 billion annually in U.S. aid, with a significant amount flowing to security agencies who work with the CIA. Egyptian-American cooperation in extraordinary rendition strengthens the least law-abiding elements of the Egyptian state, its internal security forces, and thus corrodes prospects for Egyptian democracy.[74] Certainly, we may never be able to avoid all cooperation with such security agencies, but it surely does not behoove us to work with them in a way that undermines our strategic goals in the region and limits our ability to bring international pressure to bear against lawless and undemocratic practices.

In Jordan, which has been a "hub" for extraordinary renditions, CIA personnel work hand in hand with the Jordanian intelligence service, the General Intelligence Directive. As a consequence, the Jordanian government received what one analyst calls "a free pass on human rights." In Syria, intelligence services were responsible for the undermining of democratic governance in their own country. They also played a pivotal role in destabilizing Lebanon, efforts that reached a peak with the murders of Lebanese politicians Rafik Hariri and Gibran Tueni in late 2005. Indeed, the German newsweekly *Der Spiegel* has re-

ported that a Syrian general who figured in the U.N. investigation of the Lebanese leader Rafik Hariri's murder was also a liaison with Germany in the extraordinary rendition of a German citizen named Muhammed Haydar Zammar. As long as the brutal intelligence services of countries such as Egypt and Syria have behind-the-scenes support from the CIA, efforts to promote stable, predictable governance—the sine qua non of the international rule of law—will founder.[75]

The Costs of Presidential Unilateralism

Hypocrisy is the price tag of unilateral executive action in violation of settled American law. America's actions are scrutinized by the rest of the world—and, as Colin Powell has learned, other nations will "doubt the moral basis of our fight against terrorism." American values and standards used to be high moral benchmarks for many across the world; thus American misconduct takes on a meaning that transcends borders, with consequences for the rule of law in countries around the world. Egypt's president Hosni Mubarak declared that U.S. policy proved "that we were right from the beginning in using all means, including military tribunals, to combat terrorism." Sudan and Zimbabwe, too, justified "disappearances" of political foes on the ground that America does the same. American efforts to reform the United Nations' Human Rights Commission were stymied in part because the United States was no longer viewed as a credible advocate for human rights. Thus, the Zimbabwean representative to the body swatted away American criticisms, proclaiming that "those who live in glass houses should not throw stones." Pointing to American offshore detention policies, the representative asserted that the United States had "a lot of dirt on its hands." Indeed, in May 2006 the UN Committee Against Torture, a treaty body that monitors compliance with antitorture norms, issued a damning condemnation of American torture and extraordinary rendition policy.[76]

Hypocrisy's consequences pinch close to home too. The 9/11 Commission explained that the United States must "offer an example of moral leadership in the world, commit to treat people humanely, abide by the rule of law, and be generous and caring to our neighbors." The 9/11 Commission echoed the findings of the Church Committee on the careful choice of allies:

> When Muslim governments, even those who are friends, do not respect these principles, the United States must stand for a better future. One of the lessons of the long Cold War was that short-term gains in cooperating with the most repressive and brutal governments were too often outweighed by long-term setbacks for America's stature and interests.

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By flouting the checks and balances of limited government under law, extraordinary rendition undermines American support for democracy and pluralism. Although President Bush says "any comparison" of America to its enemies is "unacceptable to think," this comparison is inevitably made by millions overseas when they hear of American torture and extraordinary rendition.[77] To millions of Arabs and Muslims, stories of extraordinary rendition and black sites speak louder than words about American values. America, of course, has not fallen to al Qaeda's level. But, as Captain Fishback said, "our actions should be held to a higher standard." And extraordinary rendition's persistence gives al Qaeda a potent recruiting tool.

Executive branch unilateralism is no mere abstract legalistic concern. It ought to concern all those with a stake in the nation's security. Extraordinary rendition undermines counterterrorism efforts and blights our reputation. In the end, it is but the latest harmful, foolish policy to emerge from the failure to respect the Constitution's carefully calibrated government of separate branches, sharing powers.