No. 06-1667

United States Court of Appeals
FOR THE FOURTH CIRCUIT

KHALED EL-MASRI,
Plaintiff-Appellant

v.

GEORGE TENET, et al.,
Defendants-Appellees

UNITED STATES OF AMERICA
Intervenor-Appellee

On Appeal from the Untied States District Court
for the Eastern District of Virginia
The Honorable T.S. Ellis, III

BRIEF AMICUS CURIAE OF FORMER UNITED STATES DIPLOMATS SUPPORTING PLAINTIFF-APPELLANT AND REVERSAL (SEE INSIDE COVER FOR LIST OF *AMICI CURIAE*)

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STATEMENT OF THE ISSUE

Whether the District Court improperly dismissed at the pleadings stage the complaint of appellant, a German citizen who alleges he was kidnapped, tortured and unlawfully detained with the complicity of the Central Intelligence Agency ("CIA"), on the ground that no procedure can be devised that would permit the litigation of those claims without disclosing state secrets.

INTEREST OF THE AMICI

Amici are former United States diplomats and State Department officials with extensive experience in government service. *Amici* are deeply concerned about the impact of persistent claims of United States practices that include kidnapping, torture and arbitrary detention in violation of U.S. law and international law upon the United States' standing in the world and its ability to obtain much needed cooperation from foreign governments to defeat international terrorism. The District Court decision in this case, denying appellant a judicial forum for the claim that he was the victim of such practices, compounds those concerns.

Amicus Morton Abramowitz is a former Ambassador to Thailand and Turkey and was Assistant Secretary of State for Intelligence and Research. He is a former President of the Carnegie Endowment for International Peace.

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Amicus Edward L. Peck is a former Ambassador to Mauritania and was Chief of Mission in Iraq during the Carter Administration. He served as the Deputy Director of the Cabinet Task Force on Terrorism in the Reagan White House and as the Deputy Coordinator for Covert Intelligence Programs at the United States Department of State.

Amicus William D. Rogers served as Assistant Secretary of State for Latin American Affairs and Under Secretary of State for International Economic Affairs in the Ford Administration. He also held State Department and diplomatic posts in the Kennedy, Johnson and Carter Administrations. He is a past President of the American Society of International Law.

Amicus Pierre Shostal was United States Consul General in Hamburg and Frankfurt and served as Director of the United States Department of State's Office of Central European Affairs. He was also posted as a Foreign Service Officer to Moscow, Brussels, Rwanda, Malawi and Congo.

Amicus E. Michael Southwick is a former Ambassador to Uganda and served as Principal Deputy Assistant Secretary of State for Democracy, Human Rights, and Labor in the current Administration.

Amicus Ward Thompson is a former Director of the Office of Human Rights Policy and Programs in the State Department Human Rights Bureau, and was the Editor in Chief of the U.S. Country Reports on Human Rights Practices. He was also a member of the United States delegations to the Committee on Security and Cooperation in Europe Human Rights Experts Meetings in Ottawa and Copenhagen.

Amicus Peter Wolcott served as Foreign Service Officer with the United States Information Agency from 1962 to 1983 in Indonesia, Malaysia, Finland and Australia.

INTRODUCTION AND SUMMARY OF ARGUMENT

Appellant Khaled El-Masri, a German citizen, brought this suit in the District Court for the Eastern District of Virginia to recover for injuries he claims were inflicted when, with the complicity of the CIA and others, he was kidnapped and detained in Macedonia, and then removed to

Afghanistan where he was further detained, abused and interrogated. Mr. El-Masri alleges that he was released without ever being charged, months after his captors became aware that he was innocent of any crime or terrorist connection.

The District Court dismissed Mr. El-Masri's claims at the very outset based on government invocation of the "state secrets privilege", holding that the "entire aim of the suit is to prove the existence of state secrets" and therefore, "it is clear that the use of special procedures during discovery and trial would be wholly inadequate to preserve the United States' privilege." (Slip Op. at 13-14; Joint App. 223-24.) Appellant persuasively shows that this dismissal at the threshold of litigation was improper. Given the already substantial publicly disclosed and publicly available facts pertaining to Mr. El-Masri's claims, the District Court could have devised ways to permit Mr. El-Masri to litigate his claim while safeguarding state secrets from public disclosure. (App. Br. at 29-57). We agree with Appellant that the District Court failed to comply with this Court's mandate that "dismissal [on state secrets grounds] is appropriate '[o]nly when no amount of effort and care on the part of the court and the parties will safeguard such [privileged state secret] material." *Sterling* v. *Tenet*, 416 F.3d 338, 348 (4th Cir. 2005) (quoting *Fitzgerald* v. *Penthouse Int'l, Ltd.*, 776 F.2d 1236, 1244 (4th Cir. 1985)).

Amici submit this brief to urge that the stringent care mandated by this Court in *Sterling* and *Fitzgerald* before allowing dismissal of a case on "state secrets" grounds is especially pertinent here. It should be applied with particular rigor in this Court's *de novo* review of the District Court's decision,[1] for denial of a judicial forum to Mr. El-Masri will affect not only his private interests but will damage vital public interests: our Nation's standing in the world community and our ability to obtain cooperation from foreign governments needed to combat international terrorism.

The basic facts of this case, as alleged by Mr. El-Masri, and as corroborated in substantial part from independent sources, have already received wide notoriety and caused diplomatic frictions. Moreover, the practices alleged here are part of a larger pattern of similar alleged practices in violation of domestic and international law. Our foreign allies and international organizations have publicly condemned these alleged violations, and the resulting opposition affects the ability of foreign governments to cooperate with the U.S. in anti-terrorism activities.

Denial of a judicial forum to Mr. El-Masri to adjudicate his claims of kidnapping, abusive interrogation and unlawful detention in addition immunizes unlawful government conduct from judicial scrutiny, and thus undermines the rule of law at home. It sends a message that the United States will not enforce fundamental U.S. and international legal

[1] *See id.* at 342 (requiring *de novo* review of states secret determinations); *Molerio v. FBI*, 749 F.2d 815, 820 (D.C. Cir.1984) (same).

prohibitions on such conduct. This perception further damages U.S. standing in the world community and our ability to obtain international cooperation in combatting terrorism.

Amici do not suggest that these considerations alter the existence of a privilege for state secrets or the need to protect state secrets from disclosure. But they do counsel an especially diligent and meticulous application of the caution mandated by this Court before concluding that Mr. El-Masri's claims should be dismissed at the threshold, and that there are no procedures that could permit the case to proceed while safeguarding privileged materials.

ARGUMENT

I. THE RULE OF LAW IS UNDERMINED WHEN NO JUDICIAL FORUM EXISTS FOR VIOLATIONS OF ELEMENTARY CIVIL AND HUMAN RIGHTS

The abuses alleged by Mr. El-Masri are violations of core principles of American criminal law including torture (18 U.S.C. § 2340A (2000)); kidnapping (18 U.S.C. § 1201 (2000)); conspiracy (18 U.S.C. § 373 (2000)); and assault (18 U.S.C. § 113(a)(4) (2000)); *see also* Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, § 2242, 112 Stat. 2822 (codified as note to 8 U.S.C. § 1231 (2000)) ("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.").

Two recently enacted statutes confirm Congress' concern with the criminal actions of federal agents overseas and the legislative intent to extend the United States' territorial criminal jurisdiction to reach such crimes. *See* USA PATRIOT Act, Pub. L. No. 107-56, § 804, 115 Stat. 377 (codified at 18 U.S.C. § 7(9)(A) (2000)) (extending special maritime and territorial criminal jurisdiction to reach "premises of United States diplomatic, consular, military or other United States Government missions or entities in foreign States"); Military Extraterritorial Jurisdiction Act of 2000, Pub. L. No. 106-523, §§ 1-2, 114 Stat. 2488-92 (codified at 18 U.S.C. §§ 3261-67 (2000)) (expanding U.S. criminal jurisdiction to encompass American civilians overseas whose "employment relates to supporting the mission of the Department of Defense overseas."). In these Acts, Congress confirmed that examination of criminal acts such as those alleged by Mr. El-Masri properly fall within the bailiwick of the federal courts notwithstanding the overlap of other sovereign interests.[2]

Mr. El-Masri also alleges serious violations of treaties that are "Supreme Law of the Land." U.S. Const. art. VI, cl. 2. These include the

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[2] A denial of a forum for Mr. El-Masri's civil claims would make it inconceivable that the United States would exercise prosecutorial discretion to enforce *criminal* prohibitions against the conduct alleged here. On the logic applied here, such proceedings could not be pursued without disclosing state secrets, thereby immunizing criminal conduct too from judicial review.

International Covenant on Civil and Political Rights, arts. 7, 9, 10, Dec. 16, 1966, S. Exec. Doc. E. 95-2, 999 U.N.T.S. 171 (hereinafter, "ICCPR") (prohibiting torture, cruel, inhuman and degrading treatment, arbitrary arrest and detention, and requiring that all detained persons be treated with humanity), and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, arts. 1 and 16, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85 (hereinafter "Convention Against Torture") (prohibiting both torture and abusive treatment). *See also*, Universal Declaration of Human Rights, G.A. Res. 217A (III), art.5, U.N. Doc. A/810 (Dec. 10, 1948) ("No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."); *Filartiga* v. *Pena-Irala*, 630 F.2d 876, 884 (2d Cir. 1980) ("official torture is now prohibited by the law of nations"). Further, the Convention Against Torture obliges the United States not only to refrain from torture, but also to provide a civil remedy for the tortured. *See* Convention Against Torture, *supra*, art. 14(1) ("Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible."). In addition, Article 9(5) of the ICCPR requires that "[a]nyone who has been the victim of an unlawful arrest or detention shall have an enforceable right to compensation." *See* ICCPR, *supra*, art. 9(5). It is these mandatory civil remedies that the District Court rejected here.[3]

[3] In addition, if the Court accepts the government's claim that the "war on

Mr. El-Masri thus alleges some of the most serious crimes known to humankind: torture, kidnapping, and arbitrary detention. *Cf. Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 732 (2004) (noting that the federal courts hear claims based on certain definite and accepted international law norms, including torture); *id.* at 720 (describing customary international law); *see also Filartiga*, 630 F.2d at 880 ("torture committed by a state official against one held in detention violates established norms of the international law of human rights"). Invocation of the state secrets privilege to deny Mr. El-Masri any judicial forum immunizes conduct that violates fundamental prohibitions of U.S. and international law from judicial scrutiny and undermines the principle – basic to the rule of law – that no one is above the law.

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terror" constitutes an armed conflict, *cf.* Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 (Nov. 13, 2001) (finding that attacks al Qaida and other terrorists created a state of armed conflict with the United States), the United States' treaty obligations under Common Article 3 of the Geneva Conventions require that Mr. El-Masri be "treated humanely" and prohibit not only "violence to life and person," but also "outrages upon personal dignity," Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; *see also Hamdan* v. *Rumsfeld*, 126 S. Ct. 2749, 2757 (2006) (confirming applicability of Common Article 3 to global counter-terrorism operations).

II. DENIAL OF A FORUM TO MR. EL-MASRI WILL FURTHER UNDERMINE U.S. STANDING IN THE WORLD COMMUNITY AND THE ABILITY TO OBTAIN FOREIGN COOPERATION ESSENTIAL TO COMBAT TERRORISM

The United States unquestionably needs cooperation from other nations to combat international terrorism. The El-Masri incident and others like it, however, have already damaged U.S. standing in the international community, causing international frictions and threatening to undermine our ability to obtain foreign government cooperation in anti-terrorist efforts.[4] Denial of a forum to Mr. El-Masri to seek compensation for the harm allegedly inflicted upon him likely further compounds the damage to our Nation's security.

A. Cooperation With Foreign Governments Is Essential to Combat International Terrorism

After the September 11, 2001 terrorist attacks, the United States faced new threats from a non-state actor bent on spreading a murderous ideology. Success against this new foe "require[s] the coordinated efforts of all instruments of U.S. and partner national power." Chairman of the Joint Chiefs of Staff, *National Military Strategic Plan for the War on Terrorism*

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[4] *See* Association of the Bar of the City of New York and Center for Human Rights and Global Justice, *Torture by Proxy: International and Domestic Law Applicable to "Extraordinary Rendition"* (New York: ABCNY & NYU School of Law 2004) (avail. at http://www.abcny.org/pdf/report/Torture%20by%20Proxy%20-%20Final%20(PDF).pdf) (discussing United States practices known as "extraordinary rendition," involving the kidnapping of persons suspected of terrorism to countries where torture is known to be practiced).

21 (Feb. 1, 2006) (hereinafter, "National Military Strategic Plan").[5] Today, "[p]ractically every aspect of U.S. counterterrorism strategy relies on international cooperation." National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report* 379 (2004) (hereinafter "9/11 Commission Report").[6]

After September 2001, the United States quickly recognized the imperative need to strengthen diplomatic ties and cooperation with our international allies. In September 2002, the White House confirmed that "we need support from our allies and friends," and that the United States needed to "strengthen alliances to defeat global terrorism and work to prevent attacks against us and our friends." *National Security Strategy of the United States of America* 7 (Sept. 2002).[7] Earlier this year, the Chairman of the Joint Chiefs of Staff identified "expanding foreign partnerships and partnership capacity" as foundational requirements for the struggle against terrorism. National Military Strategic Plan at 5; *see also* Joseph S. Nye, Jr., *The Paradox of American Power: Why the World's Superpower Can't Go It Alone* xv (Oxford Univ. Press 2002) ("[W]e must not let the metaphor of

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[5] The National Military Strategic Plan is available at http://www.defenselink.mil/qdr/docs/2005-01-25-Strategic-Plan.pdf.

[6] The 9/11 Commission report is available at http://www.9-11commission.gov/report/index.htm.

[7] The National Security Strategy of the United States is available at http://www.whitehouse.gov/nsc/nss.pdf.

war blind us to the fact that suppressing terrorism will take years of patient, unspectacular work, including close civilian cooperation with other countries.").

The Report of the 9/11 Commission recommended "a comprehensive coalition strategy against Islamic terrorism." 9/11 Commission Report at 379. To command a leadership role in the international community, the 9/11 Commission explained, the United States must "offer an example of moral leadership in the world, committed to treat people humanely, abide by the rule of law, and be generous and caring to our neighbors." *Id.* at 376.

The 9/11 Commission's conclusions and prescription are echoed across the political spectrum. For example, conservative scholar Robert Kagan warned that "losing legitimacy with fellow democracies would be debilitating—perhaps even paralyzing—over time." Robert Kagan, *America's Crisis of Legitimacy*, Foreign Aff., Mar./Apr. 2004, at 65, 85. And liberal thinker Joseph S. Nye, Jr. explains that "it is just as important to set the agenda in world politics and attract others as it is to force them to change through the threat of use of military or economic weapons." Nye, *supra*, at 8-9; *accord* Gary Hart, *The Shield and the Cloak: The Security of the Commons* 127 (Oxford Univ. Press 2006) ("America cannot achieve more than a modest degree of security without the help of friendly nations . . . diplomacy is required."). In short, bipartisan, governmental and scholarly consensus confirms the central need to secure

cooperation in the struggle against terrorism by maintaining leadership as a nation committed to the rule of law and moral decency.

B. Impunity and Failure to Respect the Rule of Law Threaten to Undermine Essential Counter-Terrorism Cooperation

America's reputation—and thus its ability to rally international coalitions to overcome terrorism—is critically wounded when one of its own security agencies apparently violates laws enacted by Congress to protect basic rights, America's stated foreign policies, and the nation's treaty obligations—but the federal courts permit invocation of the state secrets privilege to give immunity for unlawful and notorious conduct. While in certain circumstances, this result might be unavoidable, it underscores the need to make every effort to avoid outright denial of a judicial forum and find ways to permit litigation to go forward without compromising state secrets.

The 9/11 Commission sounded early warning of the consequences of failing to live up to America's best traditions of the rule of law: "Allegations that the United States abused prisoners in its custody make it harder to build the diplomatic, political, and military alliances the government will need." The 9/11 Commission Report, *supra*, at 379. The 9/11 Commission recommended working with allies to "develop mutually agreed on principles for the detention and humane treatment of captured international terrorists who are not being held under a particular country's

criminal laws." *Id.* at 379-80 (emphasizing the need to act in accord with Common Article 3 of the Geneva Conventions).

A year after the 9/11 Commission Report's publication, members of that body reiterated this conclusion:

> The U.S. government's treatment of captured terrorists, including the detention and prosecution of suspected terrorists in military prisons and secret detention centers abroad, as well as reports on the abuse of detainees, have elicited criticism from around the globe . . . . Dissension either at home or abroad on how the United States treats captured terrorists only makes it harder to build the diplomatic, political, and military alliances necessary to fight the war on terror effectively.

National Committee on Terrorist Attacks Upon the United States, *Report on the Status of 9/11 Commission Recommendations: Part III: Foreign Policy, Public Diplomacy, and Nonproliferation* 8-9 (Nov. 14, 2005).[8]

The El-Masri case and incidents like it have already harmed our international standing. *See, e.g.*, Editorial, *Secretary Rice's Rendition*, N.Y. Times, Dec. 7, 2005, at 32 (noting how extralegal seizures and detentions have "damaged [America's] moral standing [so] that the secretary of state had to deny that the president condones torture before she could visit some of the most reliable American allies in Europe.").

In Mr. El-Masri's home country, German prosecutors have opened an investigation into whether Mr. El-Masri's seizure and transfer violated German law and whether German officials were complicit in his

[8] Documents from the 9/11 Public Discourse Project are available at http://www.9-11pdp.org.

abduction,[9] while the German parliament has opened an investigation into the role of the German intelligence services in this affair.[10]

German Foreign Minister Frank-Walter Steinmeier, in what was seen as an "implied criticism that the United States has kept its allies in the dark," stated that the German government had tried and failed to get information from American authorities.[11] Commenting on the case, German Deputy Foreign Minister Gernot Erier cited the need for "a more fundamental discussion [with the U.S.] on how to pursue the fight with international terrorism."[12]

A case in Italy apparently similar to the seizure, detention, and ill-treatment of Mr. El-Masri also "has drawn intense criticism throughout Europe from human rights groups and politicians, who call it an example of how the CIA and its allies in European intelligence agencies have abused

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[9] Don van Natta Jr. and Souad Mekhennet, *German's Claim of Kidnapping Brings Investigation of U.S. Link*, N.Y. Times, Jan. 9, 2005, at A1.

[10] Victor Homola, *Germany, Spying Investigation Approved,* N.Y. Times, April 8, 2006, at A5.

[11] Richard Bernstein, *Germany Says It pressed U.S. Over Detention of One of Its Citizens,* N.Y. Times, Dec. 15, 2005, at A13.

[12] Daniel Dombey, et al. *Render Unto Washington,* Fin. Times, Dec. 13, 2005 at A13. As an analyst of the German Council on Foreign Relations explained, "The U.S. was once seen as a power that exerted true moral leadership for the whole world and convincingly stood for democracy and freedom . . . . That image has been undermined by past and present policies . . . ." David Crossland, *Europe Skeptical of U.S. Assurances*, Newsday, Dec. 9, 2005, at A8.

their powers and circumvented the law."[13] In February 2003, an Egyptian citizen Hassan Mustafa Osama Nasr was seized from the streets of Milan, and vanished. Only in April 2004 did Mr. Nasr's wife receive word that her husband had been taken to the American military airbase at Aviano in Italy, and from there flown to detention in Cairo, Egypt.[14] According to Italian prosecutors, "[t]he kidnapping of [Mr. Nasr] was not only a serious crime against Italian sovereignty and human rights, but it also seriously damaged counterterrorism efforts in Italy and Europe."[15]

In June 2005, Italian prosecutors issued arrest warrants for thirteen American intelligence operatives based on charges of kidnapping.[16] Since June 2005, further warrants for alleged CIA officials have been issued; a total of twenty-two such warrants are now outstanding; in addition, a warrant was issued against an employee at the U.S. military airbase at Aviano.[17] On July 5, 2006, Italian authorities took the further step of

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[13] Craig Whitlock, *Prosecutors: Italian Agency Helped CIA Seize Cleric,* Wash. Post, July 6, 2006, at A15; *accord* Charles M. Sennott, *Italy Seethes at US Abduction of Imam,* Boston Globe, July 3, 2005, at A9.

[14] Craig Whitlock, *Europeans Investigate CIA Role in Abductions: Suspects Possibly Taken to Nations that Torture,* Wash. Post, March 13, 2005, at A1.

[15] Craig Whitlock, *CIA Ruse Is Said to Have Damaged Probe in Milan,* Wash. Post, Dec. 6, 2005, at A1.

[16] Craig Whitlock and Dafna Linzer, *Italy Seeks Arrest of 13 in Alleged CIA Action,* Wash. Post, June 25, 2005, at A1.

[17] Stephen Grey and Elizabetta Polovedo, *Italy Arrests 2 in Kidnapping of Imam in '03,* N.Y. Times, July 6, 2006, at A1.

arresting two officials of the Italian intelligence service Sismi in relation to the seizure and transfer of Mr. Masr.[18]

Further, Italian Prime Minister Silvio Berlusoni summoned the American ambassador and demanded the United States show "full respect" for Italian sovereignty.[19]

Allegations of U.S. seizure and rendition practices in Sweden also have had negative impacts for anti-terrorism cooperation. Two Egyptian asylum seekers were allegedly seized in Stockholm and flown by U.S. officials to Egypt where they were allegedly tortured.[20] Disclosure of the incident triggered an investigation by the Office of the Parliamentary Ombudsman, as well as a subsequent parliamentary investigation, and forced Sweden's director of security police Klas Bergenstrand to promise that foreign agents would not be permitted to take command of further prisoner transfers.[21] Under new regulations on deportation, Swedish police must retain control of all such operations, and must alone conduct all body

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[18] Stephen Grey and Elizabetta Polovedo, *Inquiry in 2003 Abduction Rivets Italy*, N.Y. Times, July 8, 2006, at A8.

[19] Charles M. Sennott, *Italy Seethes at US Abduction of Iman,* Boston Globe, July 3, 2005, at A9.

[20] Jane Mayer, *Outsourcing Torture*, New Yorker, Feb. 14, 2005, at 106; *see also* Craig Whitlock, *New Swedish Documents Illuminate CIA Action: Probe Finds 'Rendition' of Terror Suspects Illegal,* Wash. Post, May 21, 2005, at A1.

[21] Sennott, *supra*, at A9.

searches.[22] The United Nations Committee Against Torture, which monitors and enforces compliance with the Convention Against Torture, *see* Convention Against Torture, *supra*, art. 17, also concluded that Sweden had violated its international human rights obligations by participating in the transfer. *See Agiza* v. *Sweden*, Decision of the U.N. Comm. Against Torture, Commc'n No. 233/2003, U.N. Doc. CAT/C/34/D/233/2003 (2005).

Beyond these investigations, several other nations responded critically to allegations that the United States engages in extra-legal seizure, transfer, or detention of persons on European soil.[23] These reactions embody

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[22] Victor L. Simpson, *U.S. Allies Resist Secret Deportations*, Associated Press, June 19, 2005.

[23] In March 2005, Spanish police opened a criminal investigation into the use of Majorca airport as a transit point for unlawful seizures and detentions by American intelligence agencies. *See* Stephen Grey and Renwick McLean, *Spain Looks Into C.I.A.'s Handling of Detainees*, N.Y. Times, Nov. 14, 2005, at A8. In addition, Sweden, Norway, Germany, Ireland, and Denmark have either opened formal inquiries into the use of CIA flights, or have otherwise protested the presence of CIA-operated aircraft in their countries. *See* Craig Whitlock, *Europeans Probe Secret CIA Flights: Questions Surround Possible Illegal Transfer of Terrorism Suspects*, Wash. Post, Nov. 17, 2005, at A22. Romania and Poland also began investigations into whether American intelligence services maintained secret detention centers on their sovereign territories. *See* Eur. Parl. Ass., Comm. of Leg. Aff. and Human Rights, "Alleged secret detentions in Council of Europe member states: Information Memorandum II," Doc. No. AS/Jur(2006)03rev, ¶¶ 26, 27 (Jan. 22, 2006) (hereinafter "Council of Europe Memorandum") (avail. at http://www.cfr.org/publication/9720/alleged_secret_detentions_in_council_of_europe_member_states.html) (last viewed July 28, 2006); *see also* Eur. Parl., "Interim Report on the alleged use of European countries by the CIA

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and reflect broad public revulsion overseas at torture or abusive treatment. Predictably, democratic governments respect and respond to such public judgments, abstaining from cooperation with the United States.

International bodies also echo and reinforce criticism of the United States, further compromising our capacity to garner international support for counter-terrorism efforts.

The Council of Europe—an intergovernmental organization of 46 states in which the United States has observer status—began an investigation into U.S. policies of arrest, detention, and coercive interrogation of terrorism suspects outside lawful procedural channels. The resulting, deeply critical, report opened by noting such practices were

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for the transport and illegal detention of prisoners," Doc. No. A6-0213/2006 (June 15, 2006) (documenting investigations) (hereinafter, "Interim Report") (avail. at http://www.europarl.europa.eu/comparl/tempcom/tdip/interim_report_en.pdf (last viewed July 28, 2006).

Seizures and detention by the United States outside any legal framework also received criticism from British legislators. *See* Richard Bernstein, *Skepticism Seems to Erode Europeans' Faith in Rice*, N.Y. Times, Dec. 7, 2005, at A25 (noting Mr. El-Masri's case as one reason for opposition to U.S. counter-terrorism policies). A former U.K. Foreign Office official labeled British involvement in U.S. prisoner seizures and transfers "'massively damaging' in the battle against international terrorism." James Sturke, *Rendition 'massively damaging' to counter-terrorism effort,* The Guardian (U.K.), June 7, 2006 (quoting former Foreign Office minister Tony Lloyd as stating that "the real issue is that this is massively damaging to the battle against terrorism.").

receiving "media coverage worldwide," and by underscoring that such practices had been expressly condemned by the Council of Europe Parliamentary Assembly in 2005. Council of Europe Memorandum ¶ 1 (citing Eur. Parl. Ass., Comm. on Leg. Aff. And Human Rights, "Lawfulness of detentions by the United States in Guantanamo Bay," Doc. 10497, Res. 1433, § 10 (2005) (condemning practice of extraordinary rendition by the United States)). The Swiss Rapporteur conducting the investigation concluded that:

> It is... unacceptable and appalling to ease one's conscience by delegating such tasks – illegal secret detention and the use of torture – to third countries.... The current US Administration obviously considers that the traditional instruments of a democratic State governed by the rule of law – justice, constitutional guarantees of a fair trial, respect for human dignity – are inappropriate for facing up to the terrorist threat.

Id. ¶ 101-02.

Similarly, the Interim Report stated that the U.S. was "directly responsible for the illegal seizure, removal, abduction and detention of terrorist suspects" and that such acts "are contrary to the fundamental principles of human rights law." Interim Report, *supra* note 23, at 7. Moreover, the Interim Report expressly "condemn[ed] the practice of extraordinary renditions" and stated that the European Parliament "considers . . . the extraordinary rendition of persons to places where torture is endemic

. . . a violation of the principle of 'non-refoulement' as laid down in Article 3 of the UN Convention Against Torture." *See Id.* at 7-8.[24]

Likewise, the United Nations Committee Against Torture stated that it is "concerned by the [United States'] rendition of suspects, without any judicial procedure, to States where they face a real risk of torture" and instructed the U.S. to "apply the *non-refoulement* guarantee to all detainees in its custody, cease the rendition of suspects ... to States where they face a real risk of torture, in order to comply with its obligations under article 3 of the Convention [Against Torture]." U.N. Comm. Against Torture, *Conclusions and Recommendations of the Committee Against Torture, Advance Unedited Version*, ¶ 20, U.N. Doc. No. CAT/C/USA/CO/2 (May 18, 2006).

In sum, the El-Masri case and incidents like it have already had a strong negative impact on the standing of the United States in the world community and threaten the cooperation needed to combat terrorism. Denial of a forum at the outset of litigation to Mr. El-Masri and the use of the state secrets privilege to immunize kidnapping, torture and unlawful detention from judicial scrutiny are likely to send a message to our foreign allies that will exacerbate those effects.

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[24] *See also* Dan Bilefsky, *EU Inquiry Links 1,000 Flights to CIA,* Int'l Herald Trib., April 27, 2006, at 1 (noting that European Parliament held three months of hearings on the subject); *see also* John Crewdson, *Suspected CIA Tactics Spread Outrage in EU,* Chicago Trib., Jan. 1, 2006, at C4 (noting formation of special EU investigative commission).

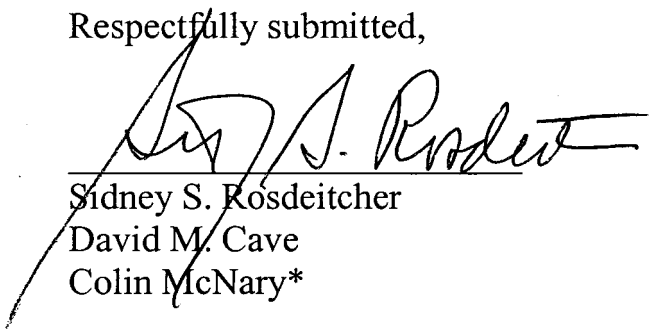
CONCLUSION

Practices of the kind alleged by Mr. El-Masri have already damaged our standing in the world community. An independent judiciary willing to administer justice and rectify the damage inflicted by such practices is central to our influence in the wider world. It is hard to imagine a greater or more damaging offense to that influence than executive detention without judicial review, particularly when it enables torture. When the courthouse door is slammed shut in the face of such notorious allegations—with the result that a person the United States has allegedly seized and detained and tortured is denied even the *possibility* of redress—the work of diplomacy is rendered more difficult, and the damage to our reputation and our counter-terrorism goals, becomes incalculable.

Amici respectfully ask this Court to consider these vital concerns in determining whether the District Court erred in declining to more carefully consider procedural means for guarding legitimate state secrets while permitting further litigation of Mr. El-Masri's grave and substantial claims.

Dated: New York, New York
July ~~31~~ 28, 2006

Respectfully submitted,



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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
No. 06-1667

KHALED EL-MASRI, Plaintiff-Appellant, v. GEORGE TENET, et al.,, Defendants-Appellees, UNITED STATES OF AMERICA, Intervenor-Appellee.	Appeal from the United States District Court for the Eastern District of Virginia, Alexandria Virginia Cause Below: No. 1:05-cv-1417 Hon. T.S. Ellis, III, Judge

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32

Pursuant to Fed. R. App. P. 32(a), I certify that:

(1) This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5172 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and

(2) This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type and style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2002 in 14 point Times New Roman.

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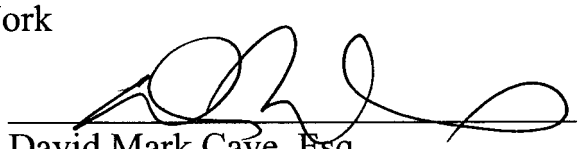
July 28, 2006



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