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“CIA Kidnapping: No Remedy?”

New Year’s Eve, 2004, was not a good night for Khaled El-Masri. A German citizen of Lebanese descent, he was grabbed by local cops while traveling in Macedonia. They held him for three weeks and then handed him over to the CIA. The CIA flew him to a detention center in Afghanistan, where they held him *incommunicado* for four months.

En route, he claims, he was beaten, drugged, bound and blindfolded. In Afghanistan, he endured months of confinement in a small, filthy cell. Neither his family nor the German government had a clue as to where he was, or what might have happened to him.

El-Masri was a victim of what is known in international law as a forced disappearance. He also suffered violations of his human rights not to be subjected to prolonged arbitrary detention, or to cruel, inhuman and degrading treatment.

He was also, we now know, a victim of mistaken identity. The CIA was after someone else with a similar or the same name. After some months, they realized their mistake. They flew El-Masri back to Europe and dumped him in a remote area of Albania. Albanian officials took him to an airport, from which he finally flew home to Germany.

According to German Chancellor Angela Merkel, Secretary of State Condoleeza Rice later privately admitted the mistake to her.

Now, if the Russians picked up an American traveling in Macedonia, drugged and beat him, and then hauled him off to Chechnya for months of *incommunicado* interrogation, leaving his family terrified, only to return him months later with an “Oops, sorry, wrong guy,” you can guess the reaction in this country.

Not surprisingly, when El-Masri’s case became known, Europeans were outraged. Investigations and denunciations poured forth from the European Union and the Council of Europe. The CIA euphemism for what it did to El-Masri – “extraordinary rendition” – became an epithet in Europe.

Unlike the CIA, the Europeans recognized that the real problem here was not merely that the CIA kidnapped the wrong man. The CIA cannot legally be in the kidnapping and brutalizing business, period. International law prohibits such violations of human rights. Rights to liberty and due process of law belong to all human beings. They are not mere privileges, revocable at will by the CIA.

After these violations, the least one might expect for Mr. El-Masri is justice in American courts. Would we not expect justice from the Russians if they did this to an American? Is not the world entitled to expect justice from us?

Represented by the American Civil Liberties Union, Mr. El-Masri sued CIA Director George Tenet and others in federal court in northern Virginia. His ACLU lawyers alleged violations of the Due Process Clause of the Fifth Amendment, and of international human rights law under the Alien Tort Statute.

But the suit went nowhere. The US government intervened, claiming that the suit must be dismissed because litigating it would inevitably expose state secrets. New CIA Director Porter Goss submitted two affidavits, one public and one classified, to support the claim.

The government won. The district court dismissed the suit, the court of appeals affirmed, and the Supreme Court recently declined to review the case.

As the ACLU argued, the main facts of the case could not be state secrets: the CIA practice of extraordinary renditions had been publicly admitted by Secretary Rice and by CIA Directors Tenet and Goss. El-Masri's case had been reported by the media, and his allegations found to be substantially accurate by the Council of Europe's public report of its investigation.

But this was not enough, answered the court of appeals. The names of any CIA agents involved, among other details, remained secret. Although dismissing a lawsuit might produce "unfairness to individual litigants," that's just too bad: the plaintiff's personal interest must be "subordinated to the collective interest in national security."

The court's answer was both bad law and bad national security policy. This August the American Bar Association adopted a formal recommendation on claims of state secrets in lawsuits. Every effort should be made, says the ABA, to let the suit go forward. Discovery of non-secret information should be allowed. *In camera* hearings should be held. Only then, if the court still finds that state secrets would inevitably be revealed, should a lawsuit be dismissed.

And if the court imagines that throwing out suits by foreign citizens whose human rights have been blatantly violated by the CIA will strengthen our national security, it should think again. As a distinguished group of former American diplomats argued in a friend-of-the-court brief in the case, our national security depends on our national credibility.

The message we send to the world is now doubly damaging: we reserve the right, first, to kidnap your citizens, and, second, to deny them any redress.

As the ABA recommends, Congress should pass a law to end this injustice. The law should not only adopt the procedures recommended by the ABA, it should also authorize victims to sue the US government, so that the identities of individual CIA agents need not be central to the suit. And it should recompense Mr. El-Masri.

Surely we can do this much. Or are we no better than Vladimir Putin's Russia?

Doug Cassel's commentaries are generally broadcast Wednesdays during the noon hour of the Worldview program on Chicago Public Radio, 91.5 FM, and rebroadcast at 9 PM in the evening. Views expressed are personal views of the author and not necessarily those of Notre Dame Law School, the Center for Civil and Human Rights or Chicago Public Radio.