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A Symbol of "Extraordinary Rendition" Returns to the U.S.

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Tomorrow, a German man arrives at John F. Kennedy international airport. This seemingly unremarkable event is in fact a moment of personal bravery that ought to spur national contrition.

Khaled E-Masri, the arriving German national, tried to come to the United States once before. When he arrived, he was hauled aside, imprisoned, and then promptly deported back to his home in Germany.

His crime? Being a danger to the United States? On one of the federal government famous (and multitudinous) watch lists? Hardly. Khaled El-Masri was declined entry because he had been mistakenly kidnapped by the United States in 2003, taken to a U.S. base in Afghanistan, brutally interrogated, and detained long after the government--at its highest levels--knew him to be wholly innocent of any wrongdoing, or even tangential connection to terrorism. Khaled El-Masri was refused entry because he was an embarrassment: A public symbol, renowned across the world outside American borders, of the wretched consequences of America's "extraordinary rendition" policy.

Despite Secretary of State Condoleezza Rice's promise that intelligence errors would be addressed, and when necessary remedied through the federal courts, Mr. El-Masri has been denied any meaningful acknowledgment of his ordeal. While declining to comment on the El-Masri case in particular, the American ambassador to Germany has offered regrets for any mistakes that "may have been made." And the German government reports that American officials tried to buy Mr. El-Masri's silence, rather than acknowledging their terrible incompetence.

The Bush Administration's approach to national security is one of "take no prisoners, have no regrets." Claims of unfettered executive power, after all, fit ill with the mounting evidence of incompetence and sloppiness that the El-Masri case too acutely illustrates.

And since acknowledging its error would undermine its recklessly unilateral vision of national-security policy-making, the Administration is twisting other branches of government to hide its sins.

If Mr. El-Masri is allowed to enter the United States he will have the chance to see his case argued in court. [Lawyers from the ACLU](#) who represent Mr. El-Masri will argue on Tuesday before the United States Court of Appeals for the Fourth Circuit that Mr. El-Masri is entitled to a remedy for his nightmare. (Full disclosure: in my capacity at the Brennan Center, I am counsel for a group of retired American diplomats who have filed an amicus brief arguing that the denial of a judicial forum to Mr. El-Masri causes grievous harm to American standing in the world).

The ACLU lawyers in question are superlative--but they face an uphill slog. The District Court denied Mr. El-Masri's case on national security grounds before any discovery had begun, and the Government will argue that it was right to do so.

Before the (notoriously conservative) Fourth Circuit, government lawyers will contend that any confirmation or denial by the United States or its officials of the facts in Mr. El-Masri's case will harm the nation's security.

This is despite the fact that Mr. El-Masri has told his tale to the world's press without rebuttal from the United States. It is despite a plethora of physical evidence--including chemicals found in Mr. El-Masri's hair that prove he was taken to Afghanistan and flight logs that confirm his tale. Despite the fact that another prisoner held in Afghanistan has confirmed Mr. El-Masri's story. Despite the fact that several other governments and the intergovernmental Council of Europe are conducting active inquiries into his case. Despite all this, the Government insists that to say one word about this most shameful of public tales would undercut our collective well-being by violating "state secrets."

The "state secrets" argument that the Government makes in the El-Masri case has recently been rejected by three district courts in litigation concerning the NSA wiretapping. In these case, judges pointed out that Government cannot take a fact that is squarely in the public domain and simply recharacterize it as "secret." The same logic should allow Mr. El-Masri his day in court.

Indeed, the "state secrets" privilege has from its inception been more about covering up government malfeasance and incompetence than it has been about protecting national security. [Historian Louis Fisher](#) has recently shown that the 1953 Supreme Court case in which the government first successfully pressed the "state secrets" privilege involved no real national security issue: Rather, the privilege was used to conceal government incompetence that would have been the basis of tort liability.

More recently, the Government invoked the state secrets privilege last month in the case of Guantánamo detainee Majid Khan, arguing that Khan not be allowed to talk to his lawyer because he might reveal the [techniques used to interrogate him](#). State secrets, in other words, is a nice euphemism for "how we torture."

Imagine what it takes for Mr. El-Masri to get on a plane to the United States--to the country that tore a months-long hole in his life, that treated him as less than a human being, but something disposable, something close to a nullity. He deserves better than this. He deserves better than a "state secrets" argument that adds insult to the injuries already inflicted, an argument that wrongly discards the human entitlements of Mr. El-Masri, but also treats the American people, and the broader world public, as fools and an irrelevance.

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