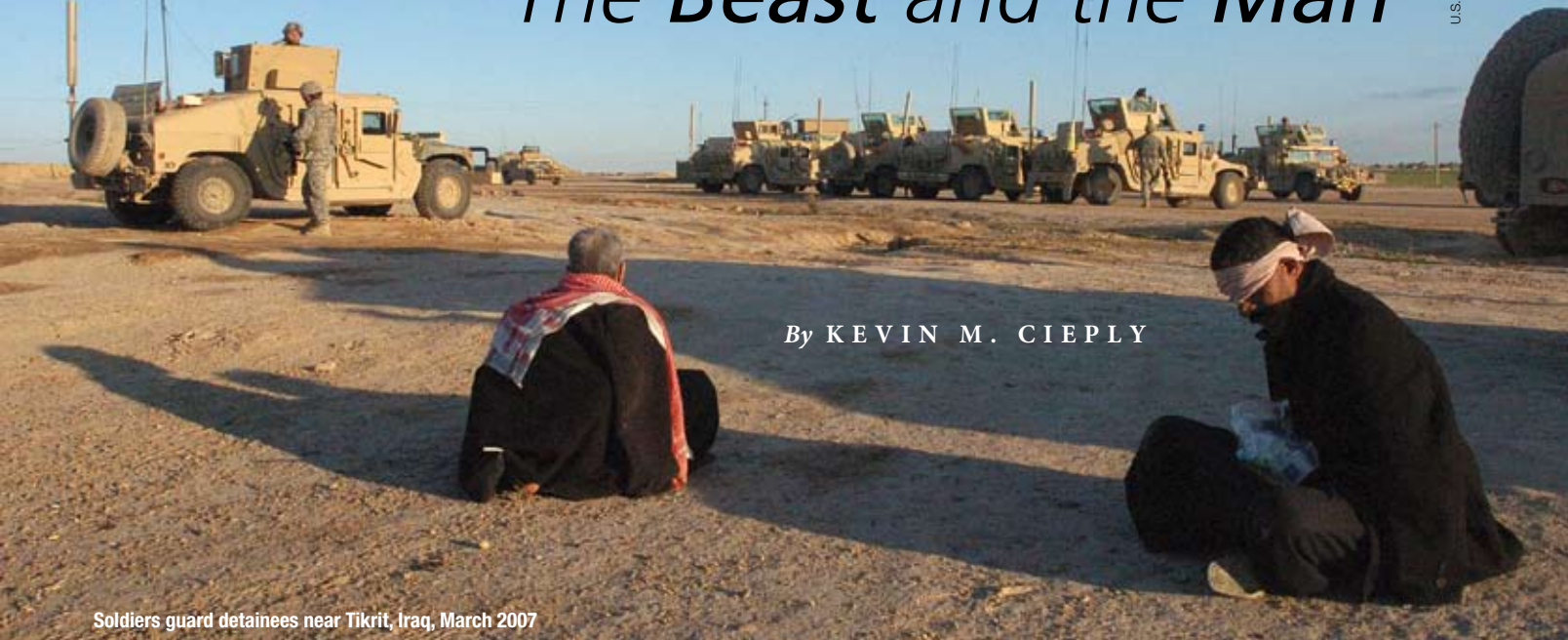


Rendition

The Beast and the Man

U.S. Army (Robert C. Brogan)



Soldiers guard detainees near Tikrit, Iraq, March 2007

By KEVIN M. CIEPLY

Tortured, incarcerated, and exiled, Niccolò Machiavelli swore never again to allow a throne to perish under the hand of aggression for want of action—bold, insidious action if need be. Left with nothing, Machiavelli concluded that a virtuous life, while overtly necessary, may lead to one’s demise if not balanced with shrewd action. Wiser from his experience with defeat and imprisonment, he composed a book that captured the lessons he had learned, providing the necessary knowledge for effective leadership of the state. *The Prince*¹ is one of the most famous and perhaps infamous books on politics ever written. In it, Machiavelli comes to his most well-known conclusion: the ends justify the means.²

Over four centuries later, in 1985, another political thinker, George Kennan, took time to reflect on his experiences and shared his lessons learned concerning ethics in foreign relations. Kennan, father of the containment theory against the Soviet Union, countered Machiavelli, albeit not directly, with the following ethical observations:

Colonel Kevin M. Cieply, ARNG, is a Senior Military Fellow in the Fletcher School of Law and Diplomacy at Tufts University.

*Excessive secrecy, duplicity and clandestine skullduggery are simply not our dish—not only because we are incapable of keeping a secret anyway (our commercial media of communication see to that), but, more importantly, because such operations conflict with our own traditional standards and compromise our diplomacy in other areas. . . . One may say that to deny ourselves this species of capability is to accept a serious limitation on our ability to contend with forces now directed against us. Perhaps; but if so, it is a limitation with which we shall have to live.*³

Like Machiavelli, Kennan wrote these words as he reflected on significant life experiences.⁴ For him, the way a nation conducts its business not only tells the world much about what that nation stands for but also produces the best geostrategic outcomes when it conducts its business openly, fairly, and humanely.

Rendition is the practice of capture and transfer of an individual from one nation to another for the purposes of subjecting the individual to interrogation without following normal processes of extradition or removal.⁵ It is a secret process during which people suddenly disappear from public view for long periods, affording them no opportunity to object to the capture or transfer or

to seek third-party review to evaluate the capturing government’s claims of fair play. Essentially, it provides no transparency or due process, and leaves little room for public evaluation. In the past, we have criticized other countries for exercising means exhibiting similar characteristics.

For those reasons, it is the type of practice that Kennan, later in his life, would reject with the quip “simply not our dish.” And, as Kennan so prophetically wrote, its secrecy was ineluctably undermined by our democratic system,⁶ bringing forth a plethora of scrutiny,⁷ complicating our relations with the European Union and the Council of Europe,⁸ and diminishing our credibility as a world leader in human rights and a nation committed to the rule of law.⁹

But some aspects of rendition that would have concerned Kennan may be necessary in the Machiavellian sense. After all, Machiavelli advised, “You must know



NDU Special Collection

George Kennan, the father of containment theory against the Soviet Union

that there are two kinds of combat: one with laws, the other with force. The first is proper to man, the second to beasts; but because the first is often not enough, one must have recourse to the second. Therefore, it is necessary for a prince to know well how to use the beast and the man."¹⁰

Is rendition simply recourse to the beast at a necessary time? Or is it a practice that is inevitably inconsistent with the notions of morality, rule of law, and human rights? In short, is rendition a practice reluctantly allowed by the philosophy of Machiavelli but unalterably opposed by the idealism of Kennan, or a contemporary practice necessitated by circumstances that transcend traditional ethical theories?

One need not conceive of a hypothetical terrorist scenario to address this question. Let us look at the events surrounding the rendition of Khalid Sheikh Mohammed (KSM). To do so, we must first go back further in time to Abu Zubaydah. As President George W. Bush explained in his September 6, 2006, speech, Zubaydah "was a senior terrorist leader and a trusted associate of Osama bin Laden."¹¹ He was captured in Afghanistan shortly after 9/11 and questioned by the Central Intelligence Agency (CIA). He was initially uncooperative:

We knew that Zubaydah had more information that could save innocent lives, but he stopped talking. As his questioning proceeded, it became clear that he had received training on how to resist interrogation. And so the CIA used an alternative set of procedures. . . . But I can say the procedures were tough, and they were safe, and lawful, and necessary.¹²

Eventually Zubaydah "provided information to help stop a terrorist attack being planned from inside the United States, an attack about which we had no previous information."¹³ He also identified KSM as the mastermind of the 9/11 terrorist attacks and identified "one of KSM's accomplices in the 9/11 attacks, a terrorist named Ramzi bin al-Shibh. The information Zubaydah provided

to Machiavelli, even the renditions of El-Masri or Abu Omar would not discredit the practice, so long as the end results were achieved

helped lead to the capture of bin al-Shibh. And together, these two terrorists provided information that helped in the execution of the operation that captured [KSM]."¹⁴ News reports stated that KSM was captured in a suburb of Islamabad, Pakistan, on March 1, 2003. He was immediately rendered out of the country to an undisclosed location.¹⁵

It is important to note that the initial law enforcement methodology for dealing with KSM was unsuccessful. He was indicted in 1996 and a Federal arrest warrant was issued concerning his "alleged role in the airliner plot led by his nephew, Ramzi Yousef."¹⁶ The indictment and warrant had no effect; it was rendition that brought him in. It is also important to note that KSM was not transferred to Guantanamo Bay until September 2006,¹⁷ and he did not receive review by the Combatant Status Review Tribunal until March 10, 2007.¹⁸ Over 4 years passed from the time of his capture and rendition to the time of the first hearing in which he was given any form of due process.

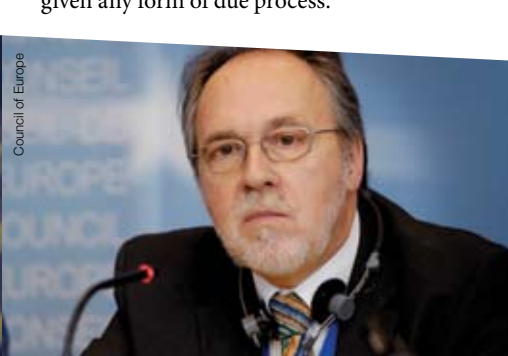
For every KSM, there may be a number of Khaled El-Masris or Abu Omars. The alleged facts of El-Masri's case indicated that in 2004, CIA agents seized him in Macedonia and flew him to Afghanistan for interrogation, where he claims he was beaten.¹⁹ El-Masri was not charged with a crime.²⁰ Concerning Abu Omar, on June 24, 2005, he was reportedly abducted by CIA agents in Milan, driven to the U.S. Air Force Base in Aviano, and flown via the U.S. Air Force Base in Ramstein, Germany, to Egypt, where he was allegedly tortured.²¹ He is free today and has not been charged. As a result, an Italian judge issued arrest warrants for 25 CIA agents and 1 U.S. Air Force officer concerning his rendition.²²

What do these examples tell us? Machiavellians would point to KSM as a banner case. Although the "alternative"²³ means used against Zubaydah or Ramzi bin al-Shibh may have been distasteful to some, they nonetheless were necessary. To Machiavelli, even the renditions of El-Masri or Abu Omar would not discredit the practice, so long as the end results such as the capture and confession of KSM were achieved. Kennan, of course, would not agree. He would attribute the results to Machiavelli, admitting that an approach centered on appropriate "means" may not seem as effective in the short term. He would even concede that some may consider it a "limitation" but retort that it is a limitation with "which we shall have to live." In other words, to Kennan, the principles of this nation and its modus operandi cannot be compromised even if less principled practices would produce desirable results.

The 9/11 Commission report refers to this issue of principled action: "The U.S. government must define . . . what it stands for. We should offer an example of moral



Javier Solana, High Representative for the Common Foreign and Security Policy and Secretary-General of the Council of the European Union



Dick Marty, Chairman of the Committee on Legal Affairs and Human Rights of the Council of Europe



The Council of Europe's Parliamentary Assembly Session, June 2007

leadership in the world, committed to treat people humanely, [and] abide by the rule of law.”²⁴ The commission embraced the import in Kennan’s message that “means” matter.

Time will clarify whose approach, Kennan’s or Machiavelli’s, is best for this nation. In the meantime, perhaps there is a middle ground. By maintaining the practice of immediate capture,²⁵ tempered by subsequent measures of transparency and due process, the United States can preserve one of the main utilities of rendition while at the same time bringing it toward the fold of universally accepted moral behavior. Transparency would allow the world to verify that this nation abides by the rule of law even when it admits that our “alternative set of procedures” or “tough” methods were used. Due process would establish that individuals are treated humanely. This is to say that the sine qua non of humane treatment is due process.²⁶ This may place a “serious limitation” on the United States, but some aspects of rendition need to be “simply not our dish,” even as other aspects are necessary. **JFQ**

NOTES

¹ Niccolò Machiavelli, *The Prince*, 2^d ed. (Chicago: The University of Chicago Press, 1998), 1532.

² *Ibid.*, 61. This concept seems to come principally from the following: “Hence it is necessary to a prince, if he wants to maintain himself, to learn to be able not to be good, and to use this and not use it according to necessity.” This concept, in understanding Machiavelli, is best understood when limiting its relevance to the survival of the state.

³ George F. Kennan, “Morality and Foreign Policy,” *Foreign Affairs* 64, no. 2 (Winter 1985/1986), 205.

⁴ Kennan wrote these words as an academic after leaving the actual practice of statecraft.

⁵ See Michael John Garcia, *Renditions: Constraints Imposed by Laws on Torture* (Washington, DC: Congressional Research Service, December 20, 2006).

⁶ See Dana Priest, “CIA Holds Terror Suspects in Secret Prisons: Debate Is Growing within Agency about the Legality and Morality of Overseas System Set up after 9/11,” *The Washington Post*, November 2, 2005, A1. See also Jane Mayer, “Outsourcing Torture: The Secret History of America’s ‘Extraordinary Rendition’ Program,” *The New Yorker*, February 14, 2005, 106, available at <www.newyorker.com/printables/fact/050214fa_fact6>.

⁷ See Margaret L. Satterthwaite, *Rendered Meaningless: Extraordinary Rendition and the Rule of Law* (New York: Center for Human Rights and Global Justice, 2006), draft available at <http://www.chrgj.org/docs/wp/WPS_NYU_CHRGJ_Satterthwaite_Rendition_Final.pdf>. See also the Committee on International Human Rights of the Association of the Bar of the City of New York (ABCNY) and Center for Human Rights and Global Justice (CHRGJ), “Torture by Proxy: International and Domestic Law Applicable to ‘Extraordinary Rendition’” (New York: ABCNY and CHRGJ, New York University School of Law, 2004), available at <www.nyuhr.org/docs/TortureByProxy.pdf>; Amnesty International, “Torture and secret detention: Testimony of the ‘disappeared’ in the ‘war on terror,’” Amnesty International Index: AMR 51/108/2005 (August 2005); Trevor Paglen and A.C. Thompson, *Torture Taxi: On the Trail of the CIA’s Rendition Flights* (Hoboken: Melville House Publishing, 2006); Council of Europe Parliamentary Assembly Committee on Legal Affairs and Human Rights, “Alleged Secret Detentions in Council of Europe Member States,” Information Memorandum II (January 22, 2006), available at <http://assembly.coe.int/Main.asp?link=/CommitteeDocs/2006/20060124_Jdoc032006_E.htm>; Council of Europe Parliamentary Assembly Committee on Legal Affairs and Human Rights, “Alleged Secret Detentions and Unlawful Interstate Transfers Involving Council of Europe Member States,” Draft Report—Part II (June 7, 2006), available at <http://assembly.coe.int/CommitteeDocs/2006/20060606_Ejdoc162006PartII-FINAL.pdf>.

⁸ See Condoleezza Rice, remarks upon her departure for Europe, December 5, 2005, available at <www.state.gov/secretary/rm/2005/57602.htm>.

⁹ *The Washington Post* reported that China’s response to the 2006 *Country Reports on Human Rights Practices* (Washington, DC: Department of State, 2006) “has sharpened to reflect increasing reports of U.S. abuses against foreigners suspected of connections to terrorism. These include accusations of kidnapping, torture and imprisonment without legal recourse—the same abuses often raised by the United States with Chinese authorities.” See Edward Cody, “Beijing Hits Back at U.S. for Raising Rights Concerns,” *The Washington Post*, March 9, 2007, A16, available at <www.washingtonpost.com/wp-dyn/content/article/2007/03/08/AR2007030800747.html?nav=rss_print/asection>.

¹⁰ Machiavelli, 69.

¹¹ George W. Bush, remarks from the East Room of the White House, September 6, 2006, available at <www.npr.org/templates/story/story.php?storyId=5777480>.

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ Maria Ressa et al., “Top al Qaeda operative caught in Pakistan,” CNN.com, March 1, 2003, available at <www.cnn.com/2003/WORLD/asiapcf/south/03/01/pakistan.arrests>. Another report stated that: “[s]ome counterterrorism officials expressed frustration that the Pakistani government had so quickly disclosed information about [KSM’s] arrest.” See “Officials: Alleged al Qaeda paymaster in custody,” CNN.com, March 4, 2003, available at <www.cnn.com/2003/WORLD/asiapcf/south/03/03/pakistan.arrests>.

¹⁶ Ressa et al.

¹⁷ Bush.

¹⁸ See “Verbatim Transcript of Combatant Status Review Tribunal Hearing for ISN 10024,” available at <www.foxnews.com/projects/pdf/transcript_ISN10024.pdf>.

¹⁹ See Council of Europe Parliamentary Assembly Committee on Legal Affairs and Human Rights, “Alleged Secret Detentions”; see also “Germany issues CIA arrest orders,” BBC News, January 31, 2007, available at <<http://news.bbc.co.uk/1/hi/world/europe/6316369.stm>>.

²⁰ *Ibid.*

²¹ See Council of Europe Parliamentary Assembly Committee on Legal Affairs and Human Rights, “Alleged Secret Detentions,” 38; see also “Italy Orders CIA Agent Arrests,” CBS News/Associated Press, June 24, 2005, available at <www.cbsnews.com/stories/2005/06/24/world/main703982.shtml>.

²² See Collen Barry, “Alleged Agents of CIA Charged, Judge Enables Trial in Italy,” *The Boston Globe*, February 17, 2007.

²³ Bush.

²⁴ National Commission on Terrorist Attacks upon the United States, *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States* (New York: Norton, 2004), 376.

²⁵ Aggressive capture, even when it violates local law, may be justified under Article 51 of the United Nations Charter as self-defense. Moreover, the doctrine of *male captus bene detentus* recognizes that violation of law in the extraterritorial capture of an individual does not, per se, render the detention unlawful. Implied in this doctrine, however, is the expectation that the illegality of the capture should not infect postcapture treatment of the individual. See Malvina Halberstam, “International Kidnapping: In Defense of the Supreme Court Decision in Alvarez-Machain,” *American Journal of International Law* 86 (1992), 736, n. 11.

²⁶ Geoffrey S. Corn, “Hamdan, Fundamental Fairness, and the Significance of Additional Protocol II,” *Army Lawyer* 8 (August 2006), states that procedural legitimacy remains the sine qua non of compliance with the principle of humane treatment.