



**Director, Center on the United States and Europe  
The Brookings Institution  
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International Organizations, Human Rights and Oversight and  
The House Committee on the Judiciary's Subcommittee on the Constitution,  
Civil Rights and Civil Liberties  
"Rendition to Torture: The Case of Maher Arar"  
October 18, 2007**

Chairman Delahunt, Chairman Nadler, Distinguished Members of the Committees:

I thank you for giving me the opportunity to testify today. The issues of rendition and torture have become intertwined in the public imagination in our nation and in the minds of our friends abroad. Abuses that have been committed in the name of the Global War on Terror rightly trouble the conscience of those who care about America's reputation and those who have been proud of our nation's role as a champion of the rule of law.

I share these concerns. Issues of morality and legality, however, are best addressed by philosophers and jurists. Today, I would like to discuss with you how the issue of "rendition to torture" threatens to undermine our efforts against terrorism.

Despite the many terrorist attacks that we have seen around the world -- and setting aside the special case of Iraq -- the United States and its allies have had a remarkably effective record in the area of tactical counterterrorism. Few who have worked in government in counterterrorism would have imagined after the events of September 11, 2001, that we would have done as well as we have. One of the main reasons for the tactical achievements of recent years has been the high degree of international cooperation in the fight against terror -- the unsung success of the post-9/11 period.

At the level of national leaders and policymakers, there is an acute understanding of the nature of the terrorist threat and the desire to maintain close cooperation. As a result of that understanding, countries that may publicly disparage or oppose some aspects of our foreign policy have still worked hand-in-glove on counterterrorism matters behind the scenes. France, whose opposition to the Bush administration's Iraq policy requires no précis, has hosted the joint operations center with the CIA in Paris called Alliance Base. It may be going too far to say that the CIA has become a global clearing house for terrorism-related intelligence and a coordinating body for counterterrorism efforts, but not much too far. As recent cases such as the disruption of the cell in Germany has shown, the cooperation has been close and effective. In the case last year of the Heathrow plot that aimed to destroy ten U.S. airliners in flight over the Atlantic, our British partners, with whom our cooperation is as close as it gets, prevented an attack that might have resulted in as many deaths as 9/11.

We should not take for granted that this cooperation can be sustained forever. As the recent National Intelligence Estimate on "The Terrorist Threat to the US Homeland," noted, "We are concerned, however, that this level of international cooperation may wane as 9/11 becomes a more distant memory and perceptions of the threat diverge." Since I believe we face an enduring threat, the prospect of declining cooperation is not a welcome one.

At least as much of a threat to the cooperation as the passage of time is the growth of resentment over how the United States conducts its efforts against jihadist terror, and it is an open question whether sufficient support for a "global war on terror" (or a more felicitously named successor) can be sustained in Europe and elsewhere if we stay on the course we have traveled in recent years. For now, some measure of

support will be forthcoming if only because several key European countries feel themselves under attack. But maintaining solidarity over the long-term will still require work because of the diminished sense of legitimacy attached to American policy.

It is difficult to disaggregate the various grievances that have brought us to this point. The legal gray zone of Guantánamo and the abuses at Abu Ghraib, CIA "black sites," have all played a part. The practice of rendition has also clearly been at the core of anger, in particular among our European allies but among others as well.

The case of Maher Arar, to which this hearing is devoted, has been a major one of concern for our allies and has occasioned a great deal of news reportage and commentary in Europe. These subcommittees are also well acquainted with the other two cases that have driven public opinion in Europe on the issue of rendition. One involves Khaled el-Masri, the German citizen who was apprehended in Macedonia, apparently because he had been mis-identified as a terrorist. According to his account, which has received great attention on both sides of the Atlantic, he was taken to Afghanistan and interrogated for five months under severe circumstances. In that case, a German court in Munich issued arrest warrants for 13 individuals involved in the action. The other case that has received great notoriety was that of Abu Omar, the Egyptian cleric who in 2003 was taken from Milan, reportedly to Egypt. Subsequently, 25 individuals – CIA officials and contractors, it appears – have been indicted in connection with this apparent rendition, and the affair has caused a small but significant crisis in U.S.-Italian relations – though it should be acknowledged that the murky role that the Berlusconi government played has not helped matters.

Undoubtedly and understandably, Europeans are not pleased about their citizens or legal residents disappearing off the streets of their cities or being shuttled against their will and without due process to detention centers in Afghanistan. One only needs to imagine how we would feel about something parallel happening here in the United States to understand the sense of outrage. What has surely exacerbated this anger has been the sense that torture is the inevitable concomitant to these movements – that these renditions have been effectively the outsourcing or offshoring of torture, and the accounts of Maher Arar and Khaled el-Masri haven driven that point home. We are all familiar with the deep slide of America's image in opinion polls around the world. The recent Transatlantic Trends survey of the German Marshall Fund and a consortium of partners has illustrated the declining appeal of U.S. leadership. A BBC survey earlier this year pointed out that most of the many countries polled now view the United States as having a negative influence on world events. Although the shadow of Iraq looms large over these results, the drumbeat allegations of torture have contributed to this diminution of our national image. So too have such investigations as the Council of Europe's and several European parliaments, not to mention news reports about the small cottage industry of airplane watchers, tracking apparent renditions at European airports. E.U. officials have threatened serious punishments for any country that has abetted American counterterrorism efforts that were deemed to be in violation of international law.

These are the public facts. Allow me to share some more private, anecdotal information on the damage that has been done by the excesses in our counterterrorism efforts.

European officials have told me that their own efforts to repatriate individuals involved in radical activities to their countries of origin in the Maghreb have come increasingly under criticism and could yet be halted.

Others involved in intelligence work have openly expressed their fear that parliamentarians, acting under public pressure, could one day restrict their cooperation with the United States.

Senior European officials, political leaders and prominent policy intellectuals have privately warned of the serious damage that has been done to American leadership in the Alliance.

Implicit in all these discussions was the conviction that another round of revelations

of abuse and human rights violations could have a catalytic effect. All of those I have spoken with are strong advocates of close cooperation with the United States on counterterrorism and view this cooperation as vital to their national security.

Having leveled these criticisms and provided this warning, let me now add that I nonetheless believe that the rendition program has helped the nation significantly in its counterterrorism mission and can continue to make a positive contribution. I think most would agree that renditions that include bringing an indicted terrorist suspect to the United States to stand trial here will be unobjectionable if the country in which he is found wishes that he be moved outside the formal extradition process. This, of course, was the case with Ramzi Yousef and Mir Aimal Kasi. In both instances, Pakistan wished to avoid the public criticism – and perhaps political interference -- that keeping the suspects in prison would have caused. I would add, although not all would concur, that a rendition involving taking a major terrorist such as Osama bin Laden from a state that was harboring terrorists, as Taliban-ruled Afghanistan was – even without that state's acquiescence or permission – would also be acceptable.

I also believe that that when certain guidelines are observed, the more controversial practice of rendition between a second and third country can also be acceptable. What follows is not meant to be a legal set of guidelines but a general description of what an acceptable rendition program would look like. Among the standards that would need to be observed are:

Renditions should be undertaken to disrupt terrorist activity, not for intelligence-gathering purposes.

Renditions will only result in the transfer of individuals to third countries that have an arrest warrant, indictment or other legal process pending against the individual.

There can be no renditions to countries where the individual is likely to be tortured.

Recipients of rendered individuals must give assurances that they will treat those individuals according to international norms of human rights, and these countries will be monitored closely by the State Department and the Intelligence Community for compliance. Failure to comply would result in the termination of cooperation on renditions.

No renditions will be carried out in which a person is seized in a country that observes, by agreed upon standards, the rule of law. (For example, no renditions off the streets of European countries.)

These guidelines, I believe, reflect those that were in operation during the Clinton Administration, when I served as director for counterterrorism on the National Security Council staff. Several months ago, Chairman Delahunt's subcommittee heard some rather remarkable and colorful testimony from Michael Scheuer, the former chief of the CIA's bin Laden unit. Although Mr. Scheuer and I have very different views about the Clinton administration's counterterrorism record, I believe that you will see in his statement that the guidelines I have sketched above were indeed those in force at the time. (He did not address the issue of renditions in "rule of law" countries, but I believe he would not disagree with my characterization.)

Mr. Scheuer spoke disparagingly of the characterization by President Clinton and National Security Advisor Sandy Berger regarding the standards of treatment they believed the rendition subjects were receiving in recipient countries. I cannot speak to that issue, and I concede that Mr. Scheuer was closer to the action in this highly compartmented area than I was. Nonetheless, in multiple interviews for my books, *The Age of Sacred Terror* and *The Next Attack*, that I conducted with officials involved in the program, including lawyers who worked directly on renditions, my understanding that the U.S. government insisted on guarantees that there would be no torture of rendered individuals was confirmed to me. These same individuals reiterated that there was monitoring of the treatment of those rendered and the relevant human rights practices of these countries. I cannot be certain that those standards were upheld in every instance, but I believe that serious efforts were made to see that they were.

I recognize that the Bush administration has made similar claims about how it employs the tool of rendition, and the president has declared that the United States does not employ or condone torture. I find this statement difficult to reconcile with the fact that Maher Arar was sent to Syria, something that I believe would not have been done in the Clinton administration. ("We didn't do business with those people [the Syrians]—it was off the table," was the way one former CIA lawyer put it to me.) In light of this – and other revelations – the criticism that the administration has "defined down" torture and not observed our responsibilities under the Torture Convention seems to me convincing.

In a perfect world, every country would have democratically elected officials and solid institutions, including a functioning judiciary. Renditions would not be necessary. But renditions reflect the reality that dangerous people turn up with some frequency in countries with inadequate legal systems that need to shield their cooperation with the United States from domestic opposition. If we are going to be able to carry out renditions – and I fear the practice has been terminally tarnished – and, even more importantly, if we are to maintain the efficacy of our international counterterrorism efforts, this blot on our record needs to be recognized, and our practices corrected. Stronger Congressional oversight should help, and legislative action may be required.

As I indicated earlier, our partners, especially in Europe, are hoping for a revalidation of America's moral character and mission. Our allies need to be convinced that the U.S. has not jumped the rails for good, forsaken the rule of law made torture and other human rights violations an integral part of the struggle against terror. This will be a task for this Congress and also for the next president, and how well it is done will bear directly on our national security.

Thank you again for the opportunity to appear here today.