

RENDITION TO TORTURE: THE CASE OF MAHER ARAR

JOINT HEARING

BEFORE THE
SUBCOMMITTEE ON INTERNATIONAL
ORGANIZATIONS, HUMAN RIGHTS, AND OVERSIGHT
OF THE
COMMITTEE ON FOREIGN AFFAIRS
AND THE
SUBCOMMITTEE ON THE CONSTITUTION,
CIVIL RIGHTS, AND CIVIL LIBERTIES
OF THE
COMMITTEE ON THE JUDICIARY
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RENDITION TO TORTURE: THE CASE OF MAHER ARAR

WEDNESDAY, OCTOBER 18, 2007

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON INTERNATIONAL
ORGANIZATIONS, HUMAN RIGHTS,
AND OVERSIGHT,
COMMITTEE ON FOREIGN AFFAIRS,
SUBCOMMITTEE ON THE CONSTITUTION,
CIVIL RIGHTS, AND CIVIL LIBERTIES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittees met, pursuant to notice, at 2:05 p.m., in room 2172, Rayburn House Office Building, Hon. William Delahunt [chairman of the Foreign Affairs Committee's Subcommittee on International Organizations, Human Rights and Oversight] presiding.

Mr. DELAHUNT [presiding]. The joint hearing of the Foreign Affairs Committee's Subcommittee on Oversight and the Judiciary Committee's Subcommittee on the Constitution will come to order.

On behalf of our subcommittee ranking member, Mr. Rohrabacher, and myself, let me thank Chairman Nadler and his ranking member, Mr. Franks, and their staffs for arranging this joint hearing.

Also, let me welcome the chairman of the full Committee on the Judiciary, Mr. Conyers.

Undoubtedly, we shall have subsequent hearings and request the appearance of administration officials to explain their role in the case of Maher Arar, because justice demands no less.

Last April, our subcommittee, along with the Foreign Affairs' Subcommittee on Europe, held a hearing where we heard from representatives of the European Parliament who had issued a report that was highly critical of the collaboration of European governments with the Bush administration's policy of so-called extraordinary rendition.

They testified that trans-Atlantic relations have suffered as a result and that this program accounts, in no small measure, for the low standing of the United States in terms of European public opinion, which we can ill-afford, because as the Government Accountability Office observed, such adverse foreign public opinion is important.

It threatens American national security in four ways: By increasing foreign public support for terrorism directed at Americans, by impacting the cost and effectiveness of military operations, by

weakening the United States' ability to align with other nations in pursuit of common policy objectives, and, last, by dampening foreign enthusiasm for U.S. business, services and products.

So it is not simply a popularity contest. It is about our vital national interest. For those unfamiliar the term "extraordinary rendition," I am referring to the practice where individuals suspected of links to al-Qaeda and other terrorist organizations are seized and transferred to countries such as Syria, which, according to the Department of State, systematically and without hesitation, utilizes torture.

As Michael Scheuer, the head of the CIA's bin Laden unit, who testified at our previous hearing, said, and I am quoting him, "It is basically finding someone else to do your dirty work."

I asked Mr. Scheuer at that hearing, "What about the case of someone who is innocent?" His response was, "Mistakes are made."

The rendition of Maher Arar was just such a mistake, a tragic mistake, that, befitting American justice and values, demands acknowledgment and redress.

The facts of Mr. Arar's case are profoundly disturbing. Rather than kidnapping someone off the streets in one country and bringing him to another for interrogation, our Government took Mr. Arar into custody at JFK Airport, on United States soil, while awaiting a connecting flight on his way home to Canada.

The administration would have you believe this is nothing more than an expedited removal under our immigration law. Don't be fooled. This was not simply an immigration matter.

He was detained in New York, interrogated relentlessly and denied an opportunity to make a single phone call for 7 days. Over his objections and without notice to Canada, he was placed on a private airplane, flown to Jordan, and then driven to Syria, a country he last lived in as a teenager.

There he was tortured and kept in a grave-like cell for the majority of his year-long detention. He was never charged with a crime, never given a hearing, never afforded due process, as we understand that concept.

After the Canadian Government obtained his release, it conducted its own review of the matter, consistent with that critical democratic principal of accountability.

The independently constituted Iraq commission spent 2½ years investigating the matter and produced an exhaustive factual report and policy review. Justice Dennis O'Connor, the commissioner of the inquiry, concluded, "There is no evidence that Mr. Arar was ever linked to terrorist groups, and I am able to say categorically that there is no evidence to indicate that Mr. Arar has committed any offense or that his activities constitute a threat to the security of Canada."

Based on the commission's recommendation, the Canadian Government apologized to and compensated Mr. Arar for its role in the rendition. That role involved providing raw intelligence without caveat to the U.S. Government that identified him as an Islamic extremist suspected of being linked to al-Qaeda, an allegation which had no basis in fact.

However, there was no evidence that Canadian officials participated or acquiesced in the American authority's decision to detain

Mr. Arar and remove him to Syria. Therefore, the commission, the Arar Commission in Canada, recommended that Canadian officials request that the United States Government apologize and remove Mr. Arar from its "no fly" list.

But when faced with such a request from one of our closest allies, the Bush administration did neither, nor did they provide an explanation for its decision to send Mr. Arar to Syria rather than Canada, as he had requested.

This provoked outrage, understandably so, in Canada and, according to another poll, a staggering 71 percent of Canadians hold a negative opinion of United States foreign policy.

And is it a coincidence that shortly after this poll, Canada refused to participate in the expansion of our ballistic missile defense system? The government of Prime Minister Martin notified the United States that while it would continue to be part of the NORAD warning system, it would not be taking part in that expansion.

The refusal of the Bush administration to be held accountable stands in sharp contrast to the actions of the Canadian Government and is an embarrassment to many of us. I would note the testimony of former Attorney General Gonzales as especially appalling.

He stated that Mr. Arar's removal to Syria was legal, since we had received diplomatic assurances from Syria that Mr. Arar would not be mistreated. From Syria, the same country that President Bush cited for its legacy of torture, oppression, misery and ruin, and that the State Department routinely condemns in its yearly country reports for torture.

Let me suggest that that is the height of hypocrisy. A country that we condemn for torture we trust to abide by a pro forma, unenforceable diplomatic assurance not to torture.

We betrayed our core values in this matter, values that Americans and Canadians share, values that set us apart among the family of nations and gives us a claim to moral authority inherent in great democracies.

So, Mr. Arar, let me personally give you what our Government has not—an apology. Let me apologize to you and to the Canadian people for our Government's role in this mistake. We regard Canada as a true and trusted ally and friend. My hope is that this hearing will demonstrate our commitment to those shared values that bind us together in this special friendship.

Before introducing our witnesses, let me turn to my friend and ranking member on this subcommittee, Dana Rohrabacher, for his opening statement, then to Chairman Conyers and Chairman Nadler and Mr. Franks.

Dana?

Mr. ROHRABACHER. Thank you very much, Mr. Chairman, and I do appreciate you holding this hearing. After all, when our other witness said mistakes are made, it is our job in oversight to take a look at those mistakes.

Obviously, we are looking at one of those mistakes, and I would hope sometime we might have a chance to look at some of the successes of the program, as well. But this is a mistake, and I would join you in offering an apology, and I would hope our Government

could do so officially for making a mistake and not owning up to it.

When we make mistakes, we should tell the truth and own up to it, and today we are making sure that we go on the record so that our executive branch is on notice that, yes, we believe that a mistake was made here and that an official apology, as well as perhaps some compensation, is justified.

However, let us note that this is a opportune moment to be having a hearing on the issue of rendition, because it just happens to be the subject of a movie that is about to come out. What a coincidence.

So today we will hear in great detail about this tragic mistake and this tragic case of Maher Arar. He is a citizen, a dual citizen of Syria and Canada. He was on his way home to Canada from a trip to Tunisia, where he was stopped at JFK Airport, and this is important, in September 2002.

Mr. Arar, I am going to be asking you exactly what date that was in September, but let us note how close that was to 9/11.

The Canadian Government had told our FBI that Mr. Arar was under investigation for possible terrorist activities and ties to al-Qaeda. Further, they said Mr. Arar had refused to cooperate with the Canadian authorities—that is what they said to us—and had suddenly left the country for Tunisia.

We now know that our FBI was given erroneous information. Today we see this tragedy for what it is—a probable mistake caused by human error, resulting in the heartbreaking ordeal of Mr. Arar.

So we need to make sure that we acknowledge that and offer our apologies and make sure that the other people who work for our Government know that we expect a higher level of expertise and responsibility than to permit these types of mistakes to be made, realizing that, in any human endeavor, there will be such mistakes.

But let us not ignore, while we are looking at this mistake, what was going on at that time, which I just mentioned. This was 1 year, 1 year after the most brutal and bloody foreign attack on American soil in the history of our country, 3,000 of our citizens less than a year before had been slaughtered in front of our face.

Our Government then had in custody a man who the Canadian authorities were telling us was probably a terrorist with al-Qaeda connections.

To complicate the situation, the Canadian Government informed our FBI that they didn't have enough evidence to charge him with terrorism. Thus, he would most likely go free if returned to Canada.

So our Government rendered him to his other country of citizenship, which was Syria. And as we will hear today, Mr. Arar's experience in Syria was a nightmare, was something that, yes, the Syrian Government should be ashamed of, and, yes, we should be ashamed that we had something to do with that, as well.

My friends on the other side of the aisle believe that the rendition program must be stopped because of errors like the one that led to Mr. Arar's ordeal. To them, I ask, should we halt every government program that, due to a human error, results in a tragedy?

Consider this: A recent study of our healthcare found that 195,000 Medicare deaths per year are completely preventable and due to human error.

Mr. Chairman, this is not a case of one person's tragedy resulting from bureaucratic error, but hundreds of thousands of people die because of human error in the Medicare system.

Thus far, I haven't heard anyone ever suggest that that means we should end this whole government involvement in taking care of our senior citizens' healthcare.

Another example, just in the past 2 months, U.N. peacekeepers have been killed or wounded by friendly fire in peacekeeping operations, in East Timor and Lebanon. Last year, four U.N. peacekeepers were killed by friendly fire in Israel and nine were killed by likely friendly fire in the Congo.

Have our friends on the other side of the aisle been calling for an end to U.S. peacekeeping missions? Is that something that we should take as the lesson when we have errors like friendly fire and other human errors that happen and mistakes that happen and downright bad judgment that happens when involved in this type of government program?

No. We don't do that. We haven't, for example, put the families of these deceased peacekeepers in front of committees to advocate that we end peacekeeping missions. And we shouldn't do that. But we should recognize the errors that have been made and try to correct them, but realizing that an error in a program does not mean that program, in and of itself, is a wrong program.

In fact, Mr. Chairman, when we become aware of the dangerous or deadly errors in government programs, we should do our best to fix those programs and minimize those errors. We should keep such programs alive because we believe that whatever programs we are talking about, including our military operations overseas, which always result in friendly fire, some friendly fire casualties, but we must not cancel programs or missions which we believe are important for the safety, security and wellbeing of the people of the United States and, yes, the world.

Today's hearing is an attempt to do away with rendition. That is my interpretation. Maybe I am wrong. You will have to let me know whether or not that is a wrong interpretation.

A government program, rendition, is used to fight our war against radicals who want to end our way of life and are willing to murder thousands, if not millions, of civilians in order to terrorize the populations of the Western democracies into retreat and submission.

Those of us who want to end this program will use Mr. Arar's tragic case, which resulted from government error and error of those people who are involved in the program, to prove that the rendition program has no merit. As I say, we do have to, number one, admit the error, and also understand that this was 1 year after 9/11.

But I challenge anybody to compare the error rate of rendition, this program, with the error rate in any other government program. And, yes, it did result in the horrible circumstance with this individual that we are talking to today, and we should make sure

that we offer our apologies and recognize that and try to make our system more efficient.

But, yet, the rendition program may actually be more effective than programs that cause the death of many more people.

As we are embroiled in an historic struggle against an enemy that is committed to destroying our way of life and murdering our citizens to terrorize our populations, we are using rendition to stop them and it works.

There has not been a single terrorist—major terrorist attack on America since 9/11. I would suggest that that isn't just a coincidence, that we have a rendition program that was obviously in play 1 year from 9/11, because of what we are hearing today, and the fact that the radicals who have already declared that they are willing to commit this and shown that they are willing to slaughter Americans have not been able to succeed in doing so.

There is no such thing as perfection and when you are dealing with human beings, to cut off a valuable tool in this war against radical Islam because of human error is foolish and is dangerous.

You are dealing with an enemy who does not honor treaties, an enemy who has but one code of ethics—destroy America and Western civilization. They do not wear uniforms on the battlefield. They do not identify with any country of origin, and they care nothing for diplomacy or human life, let alone the conventions or treaties that will be discussed today.

I support the honest efforts of my friends to put forth any type of effort to improve the rendition program and to admit mistakes and to offer apologies when mistakes are made, but that, again, is no reason, is no excuse to end a program which has perhaps protected the lives of hundreds of thousands, if not millions of Americans and people in the Western democracies.

Thank you very much, Mr. Chairman.

Mr. DELAHUNT. Thank you, Mr. Rohrabacher.

And I will call on the chair of the full Committee on the Judiciary, Mr. John Conyers of Michigan.

Chairman CONYERS. Thank you very much, Chairman Delahunt.

What a privilege this is to have two subcommittees working on a subject as important as this, and what a unique collection of members from both committees that are here.

The chairman, the distinguished ranking member from California, Dana Rohrabacher, Mr. Trent Franks of Arizona, Constitution Subcommittee Chairman Jerry Nadler of New York, Mel Watt of North Carolina, also on the Judiciary Committee, and the distinguished gentleman from Arizona, Jeff Flake.

I know that this is going to be quite meaningful, and I am also pleased to join in welcoming Professor David Cole, a Judiciary regular, and I am glad that he is here, as well.

To the ranking member, I was preparing some comments of praise when he began his statement, because it is so pleasing for me to find ourselves, Mr. Rohrabacher, on the same page. But as your comments went on, I decided that in the interest of honesty, that I wouldn't offer any congratulations at this point.

But I do hold out a hand of cooperation to work with you and to see just how far both of these committees are willing to move in this regard.

I would like, Mr. Chairman, to put into the record, by unanimous consent, the *New Yorker* article, dated February 14, 2005, "Outsourcing Torture."

Mr. DELAHUNT. Without objection.

[The information referred to follows:]

OUTSOURCING TORTURE
THE SECRET HISTORY OF AMERICA'S "EXTRAORDINARY RENDITION" PROGRAM.

The New Yorker
Annals of Justice
by JANE MAYER
February 14, 2005

On January 27th, President Bush, in an interview with the *Times*, assured the world that "torture is never acceptable, nor do we hand over people to countries that do torture." Maher Arar, a Canadian engineer who was born in Syria, was surprised to learn of Bush's statement. Two and a half years ago, American officials, suspecting Arar of being a terrorist, apprehended him in New York and sent him back to Syria, where he endured months of brutal interrogation, including torture. When Arar described his experience in a phone interview recently, he invoked an Arabic expression. The pain was so unbearable, he said, that "you forget the milk that you have been fed from the breast of your mother."

Arar, a thirty-four-year-old graduate of McGill University whose family emigrated to Canada when he was a teen-ager, was arrested on September 26, 2002, at John F. Kennedy Airport. He was changing planes; he had been on vacation with his family in Tunisia, and was returning to Canada. Arar was detained because his name had been placed on the United States Watch List of terrorist suspects. He was held for the next thirteen days, as American officials questioned him about possible links to another suspected terrorist. Arar said that he barely knew the suspect, although he had worked with the man's brother. Arar, who was not formally charged, was placed in handcuffs and leg irons by plainclothes officials and transferred to an executive jet. The plane flew to Washington, continued to Portland, Maine, stopped in Rome, Italy, then landed in Amman, Jordan.

During the flight, Arar said, he heard the pilots and crew identify themselves in radio communications as members of "the Special Removal Unit." The Americans, he learned, planned to take him next to Syria. Having been told by his parents about the barbaric practices of the police in Syria, Arar begged crew members not to send him there, arguing that he would surely be tortured. His captors did not respond to his request; instead, they invited him to watch a spy thriller that was aired on board.

Ten hours after landing in Jordan, Arar said, he was driven to Syria, where interrogators, after a day of threats, "just began beating on me." They whipped his hands repeatedly with two-inch-thick electrical cables, and kept him in a windowless underground cell that he likened to a grave. "Not even animals could withstand it," he said. Although he initially tried to assert his innocence, he eventually confessed to anything his tormentors wanted him to say. "You just give up," he said. "You become like an animal."

A year later, in October, 2003, Arar was released without charges, after the Canadian government took up his cause. Imad Moustapha, the Syrian Ambassador in Washington, announced that his country had found no links between Arar and terrorism. Arar, it turned out, had been sent to Syria on orders from the U.S. government, under a secretive program known as "extraordinary rendition." This program had been devised as a means of extraditing terrorism suspects from one foreign state to another for interrogation and prosecution. Critics contend that the unstated purpose of such renditions is to subject the suspects to aggressive methods of persuasion that are illegal in America—including torture.

Arar is suing the U.S. government for his mistreatment. "They are outsourcing torture because they know it's illegal," he said. "Why, if they have suspicions, don't they question people within the boundary of the law?"

Rendition was originally carried out on a limited basis, but after September 11th, when President Bush declared a global war on terrorism, the program expanded beyond recognition—becoming, according to a former C.I.A. official, "an abomination." What began as a program aimed at a small, discrete set of suspects—people against whom there were outstanding foreign arrest warrants—came to include a wide and ill-defined population that the Administration terms "illegal enemy combatants." Many of them have never been publicly charged with any crime. Scott Horton, an

expert on international law who helped prepare a report on renditions issued by N.Y.U. Law School and the New York City Bar Association, estimates that a hundred and fifty people have been rendered since 2001. Representative Ed Markey, a Democrat from Massachusetts and a member of the Select Committee on Homeland Security, said that a more precise number was impossible to obtain. "I've asked people at the C.I.A. for numbers," he said. "They refuse to answer. All they will say is that they're in compliance with the law."

Although the full scope of the extraordinary-rendition program isn't known, several recent cases have come to light that may well violate U.S. law. In 1998, Congress passed legislation declaring that it is "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."

The Bush Administration, however, has argued that the threat posed by stateless terrorists who draw no distinction between military and civilian targets is so dire that it requires tough new rules of engagement. This shift in perspective, labelled the New Paradigm in a memo written by Alberto Gonzales, then the White House counsel, "places a high premium on . . . the ability to quickly obtain information from captured terrorists and their sponsors in order to avoid further atrocities against American civilians," giving less weight to the rights of suspects. It also questions many international laws of war. Five days after Al Qaeda's attacks on the World Trade Center and the Pentagon, Vice-President Dick Cheney, reflecting the new outlook, argued, on "Meet the Press," that the government needed to "work through, sort of, the dark side." Cheney went on, "A lot of what needs to be done here will have to be done quietly, without any discussion, using sources and methods that are available to our intelligence agencies, if we're going to be successful. That's the world these folks operate in. And so it's going to be vital for us to use any means at our disposal, basically, to achieve our objective."

The extraordinary-rendition program bears little relation to the system of due process afforded suspects in crimes in America. Terrorism suspects in Europe, Africa, Asia, and the Middle East have often been abducted by hooded or masked American agents, then forced onto a Gulfstream V jet, like the one described by Arar. This jet, which has been registered to a series of dummy American corporations, such as Bayard Foreign Marketing, of Portland, Oregon, has clearance to land at U.S. military bases. Upon arriving in foreign countries, rendered suspects often vanish. Detainees are not provided with lawyers, and many families are not informed of their whereabouts.

The most common destinations for rendered suspects are Egypt, Morocco, Syria, and Jordan, all of which have been cited for human-rights violations by the State Department, and are known to torture suspects. To justify sending detainees to these countries, the Administration appears to be relying on a very fine reading of an imprecise clause in the United Nations Convention Against Torture (which the U.S. ratified in 1994), requiring "substantial grounds for believing" that a detainee will be tortured abroad. Martin Lederman, a lawyer who left the Justice Department's Office of Legal Counsel in 2002, after eight years, says, "The Convention only applies when you know a suspect is more likely than not to be tortured, but what if you kind of know? That's not enough. So there are ways to get around it."

Administration officials declined to discuss the rendition program. But Rohan Gunaratna, a Sri Lankan expert on terrorist interrogations who has consulted with several intelligence agencies, argued that rough tactics "can save hundreds of lives." He said, "When you capture a terrorist, he may know when the next operation will be staged, so it may be necessary to put a detainee under physical or psychological pressure. I disagree with physical torture, but sometimes the threat of it must be used."

Rendition is just one element of the Administration's New Paradigm. The C.I.A. itself is holding dozens of "high value" terrorist suspects outside of the territorial jurisdiction of the U.S., in addition to the estimated five hundred and fifty detainees in Guantánamo Bay, Cuba. The Administration confirmed the identities of at least ten of these suspects to the 9/11 Commission—including Khalid Sheikh Mohammed, a top Al Qaeda operative, and Ramzi bin al-Shibh, a chief planner of the September 11th attacks—but refused to allow commission members to interview the men, and would not say where they were being held. Reports have suggested that C.I.A. prisons are being operated in Thailand, Qatar, and Afghanistan, among other countries. At the request of the C.I.A., Secretary of Defense Donald Rumsfeld personally ordered that a prisoner in Iraq be hidden from Red Cross officials for several months, and Army General Paul Kern told Congress that the C.I.A. may have hidden up to a hundred detainees. The Geneva Conventions of 1949, which established norms on

the treatment of soldiers and civilians captured in war, require the prompt registration of detainees, so that their treatment can be monitored, but the Administration argues that Al Qaeda members and supporters, who are not part of a state-sponsored military, are not covered by the Conventions.

The Bush Administration's departure from international norms has been justified in intellectual terms by elite lawyers like Gonzales, who is a graduate of Harvard Law School. Gonzales, the new Attorney General, argued during his confirmation proceedings that the U.N. Convention Against Torture's ban on "cruel, inhuman, and degrading treatment" of terrorist suspects does not apply to American interrogations of foreigners overseas. Perhaps surprisingly, the fiercest internal resistance to this thinking has come from people who have been directly involved in interrogation, including veteran F.B.I. and C.I.A. agents. Their concerns are as much practical as ideological. Years of experience in interrogation have led them to doubt the effectiveness of physical coercion as a means of extracting reliable information. They also warn that the Bush Administration, having taken so many prisoners outside the realm of the law, may not be able to bring them back in. By holding detainees indefinitely, without counsel, without charges of wrongdoing, and under circumstances that could, in legal parlance, "shock the conscience" of a court, the Administration has jeopardized its chances of convicting hundreds of suspected terrorists, or even of using them as witnesses in almost any court in the world.

"It's a big problem," Jamie Gorelick, a former deputy attorney general and a member of the 9/11 Commission, says. "In criminal justice, you either prosecute the suspects or let them go. But if you've treated them in ways that won't *allow* you to prosecute them you're in this no man's land. What do you do with these people?"

The criminal prosecution of terrorist suspects has not been a priority for the Bush Administration, which has focussed, rather, on preventing additional attacks. But some people who have been fighting terrorism for many years are concerned about unintended consequences of the Administration's radical legal measures. Among these critics is Michael Scheuer, a former C.I.A. counter-terrorism expert who helped establish the practice of rendition. Scheuer left the agency in 2004, and has written two acerbic critiques of the government's fight against Islamic terrorism under the pseudonym Anonymous, the most recent of which, "Imperial Hubris," was a best-seller.

Not long ago, Scheuer, who lives in northern Virginia, spoke openly for the first time about how he and several other top C.I.A. officials set up the program, in the mid-nineties. "It was begun in desperation," he told me. At the time, he was the head of the C.I.A.'s Islamic-militant unit, whose job was to "detect, disrupt, and dismantle" terrorist operations. His unit spent much of 1996 studying how Al Qaeda operated; by the next year, Scheuer said, its mission was to try to capture bin Laden and his associates. He recalled, "We went to the White House"—which was then occupied by the Clinton Administration—"and they said, 'Do it.'" He added that Richard Clarke, who was in charge of counter-terrorism for the National Security Council, offered no advice. "He told me, 'Figure it out by yourselves,'" Scheuer said. (Clarke did not respond to a request for comment.)

Scheuer sought the counsel of Mary Jo White, the former U.S. Attorney for the Southern District of New York, who, along with a small group of F.B.I. agents, was pursuing the 1993 World Trade Center bombing case. In 1998, White's team obtained an indictment against bin Laden, authorizing U.S. agents to bring him and his associates to the United States to stand trial. From the start, though, the C.I.A. was wary of granting terrorism suspects the due process afforded by American law. The agency did not want to divulge secrets about its intelligence sources and methods, and American courts demand transparency. Even establishing the chain of custody of key evidence—such as a laptop computer—could easily pose a significant problem: foreign governments might refuse to testify in U.S. courts about how they had obtained the evidence, for fear of having their secret cooperation exposed. (Foreign governments often worried about retaliation from their own Muslim populations.) The C.I.A. also felt that other agencies sometimes stood in its way. In 1996, for example, the State Department stymied a joint effort by the C.I.A. and the F.B.I. to question one of bin Laden's cousins in America, because he had a diplomatic passport, which protects the holder from U.S. law enforcement. Describing the C.I.A.'s frustration, Scheuer said, "We were turning into voyeurs. We knew where these people were, but we couldn't capture them because we had nowhere to take them." The agency realized that "we had to come up with a third party."

The obvious choice, Scheuer said, was Egypt. The largest recipient of U.S. foreign aid after Israel, Egypt was a key strategic ally, and its secret police force, the Mukhabarat, had a reputation for brutality. Egypt had been frequently cited by the State Department for torture of prisoners. According to a 2002 report, detainees were "stripped and blindfolded; suspended from a ceiling or doorframe with feet just

touching the floor; beaten with fists, whips, metal rods, or other objects; subjected to electrical shocks; and doused with cold water [and] sexually assaulted.” Hosni Mubarak, Egypt’s leader, who came to office in 1981, after President Anwar Sadat was assassinated by Islamist extremists, was determined to crack down on terrorism. His prime political enemies were radical Islamists, hundreds of whom had fled the country and joined Al Qaeda. Among these was Ayman al-Zawahiri, a physician from Cairo, who went to Afghanistan and eventually became bin Laden’s deputy.

In 1995, Scheuer said, American agents proposed the rendition program to Egypt, making clear that it had the resources to track, capture, and transport terrorist suspects globally—including access to a small fleet of aircraft. Egypt embraced the idea. “What was clever was that some of the senior people in Al Qaeda were Egyptian,” Scheuer said. “It served American purposes to get these people arrested, and Egyptian purposes to get these people back, where they could be interrogated.” Technically, U.S. law requires the C.I.A. to seek “assurances” from foreign governments that rendered suspects won’t be tortured. Scheuer told me that this was done, but he was “not sure” if any documents confirming the arrangement were signed.

A series of spectacular covert operations followed from this secret pact. On September 13, 1995, U.S. agents helped kidnap Talaat Fouad Qassem, one of Egypt’s most wanted terrorists, in Croatia. Qassem had fled to Europe after being linked by Egypt to the assassination of Sadat; he had been sentenced to death in absentia. Croatian police seized Qassem in Zagreb and handed him over to U.S. agents, who interrogated him aboard a ship cruising the Adriatic Sea and then took him back to Egypt. Once there, Qassem disappeared. There is no record that he was put on trial. Hossam el-Hamalawy, an Egyptian journalist who covers human-rights issues, said, “We believe he was executed.”

A more elaborate operation was staged in Tirana, Albania, in the summer of 1998. According to the *Wall Street Journal*, the C.I.A. provided the Albanian intelligence service with equipment to wiretap the phones of suspected Muslim militants. Tapes of the conversations were translated into English, and U.S. agents discovered that they contained lengthy discussions with Zawahiri, bin Laden’s deputy. The U.S. pressured Egypt for assistance; in June, Egypt issued an arrest warrant for Shawki Salama Attiya, one of the militants. Over the next few months, according to the *Journal*, Albanian security forces, working with U.S. agents, killed one suspect and captured Attiya and four others. These men were bound, blindfolded, and taken to an abandoned airbase, then flown by jet to Cairo for interrogation. Attiya later alleged that he suffered electrical shocks to his genitals, was hung from his limbs, and was kept in a cell in filthy water up to his knees. Two other suspects, who had been sentenced to death in absentia, were hanged.

On August 5, 1998, an Arab-language newspaper in London published a letter from the International Islamic Front for Jihad, in which it threatened retaliation against the U.S. for the Albanian operation—in a “language they will understand.” Two days later, the U.S. Embassies in Kenya and Tanzania were blown up, killing two hundred and twenty-four people.

The U.S. began rendering terror suspects to other countries, but the most common destination remained Egypt. The partnership between the American and the Egyptian intelligence services was extraordinarily close: the Americans could give the Egyptian interrogators questions they wanted put to the detainees in the morning, Scheuer said, and get answers by the evening. The Americans asked to question suspects directly themselves, but, Scheuer said, the Egyptians refused. “We were never in the same room at the same time.”

Scheuer claimed that “there was a legal process” undergirding these early renditions. Every suspect who was apprehended, he said, had been convicted in absentia. Before a suspect was captured, a dossier was prepared containing the equivalent of a rap sheet. The C.I.A.’s legal counsel signed off on every proposed operation. Scheuer said that this system prevented innocent people from being subjected to rendition. “Langley would never let us proceed unless there was substance,” he said. Moreover, Scheuer emphasized, renditions were pursued out of expedience—“not out of thinking it was the best policy.”

Since September 11th, as the number of renditions has grown, and hundreds of terrorist suspects have been deposited indefinitely in places like Guantánamo Bay, the shortcomings of this approach have become manifest. “Are we going to hold these people forever?” Scheuer asked. “The policymakers hadn’t thought what to do with them, and what would happen when it was found out that we were turning them over to governments that the human-rights world reviled.” Once a detainee’s rights have been violated, he says, “you absolutely can’t” reinstate him into the court system. “You can’t kill him, either,” he added. “All we’ve done is create a nightmare.”

On a bleak winter day in Trenton, New Jersey, Dan Coleman, an ex-F.B.I. agent who retired last July, because of asthma, scoffed at the idea that a C.I.A. agent was now having compunctions about renditions. The C.I.A., Coleman said, liked rendition from the start. "They loved that these guys would just disappear off the books, and never be heard of again," he said. "They were proud of it."

For ten years, Coleman worked closely with the C.I.A. on counter-terrorism cases, including the Embassy attacks in Kenya and Tanzania. His methodical style of detective work, in which interrogations were aimed at forging relationships with detainees, became unfashionable after September 11th, in part because the government was intent on extracting information as quickly as possible, in order to prevent future attacks. Yet the more patient approach used by Coleman and other agents had yielded major successes. In the Embassy-bombings case, they helped convict four Al Qaeda operatives on three hundred and two criminal counts; all four men pleaded guilty to serious terrorism charges. The confessions the F.B.I. agents elicited, and the trial itself, which ended in May, 2001, created an invaluable public record about Al Qaeda, including details about its funding mechanisms, its internal structure, and its intention to obtain weapons of mass destruction. (The political leadership in Washington, unfortunately, did not pay sufficient attention.)

Coleman is a political nonpartisan with a law-and-order mentality. His eldest son is a former Army Ranger who served in Afghanistan. Yet Coleman was troubled by the Bush Administration's New Paradigm. Torture, he said, "has become bureaucratized." Bad as the policy of rendition was before September 11th, Coleman said, "afterward, it really went out of control." He explained, "Now, instead of just sending people to third countries, we're holding them ourselves. We're taking people, and keeping them in our own custody in third countries. That's an enormous problem." Egypt, he pointed out, at least had an established legal system, however harsh. "There was a process there," Coleman said. "But what's our process? We have no method over there other than our laws—and we've decided to ignore them. What are we now, the Huns? If you don't talk to us, we'll kill you?"

From the beginning of the rendition program, Coleman said, there was no doubt that Egypt engaged in torture. He recalled the case of a suspect in the first World Trade Center bombing who fled to Egypt. The U.S. requested his return, and the Egyptians handed him over-wrapped head to toe in duct tape, like a mummy. (In another incident, an Egyptian with links to Al Qaeda who had cooperated with the U.S. government in a terrorism trial was picked up in Cairo and imprisoned by Egyptian authorities until U.S. diplomats secured his release. For days, he had been chained to a toilet, where guards had urinated on him.)

Under such circumstances, it might seem difficult for the U.S. government to legally justify dispatching suspects to Egypt. But Coleman said that since September 11th the C.I.A. "has seemed to think it's operating under different rules, that it has extralegal abilities outside the U.S." Agents, he said, have "told me that they have their own enormous office of general counsel that rarely tells them no. Whatever they do is all right. It all takes place overseas."

Coleman was angry that lawyers in Washington were redefining the parameters of counter-terrorism interrogations. "Have any of these guys ever tried to talk to someone who's been deprived of his clothes?" he asked. "He's going to be ashamed, and humiliated, and cold. He'll tell you anything you want to hear to get his clothes back. There's no value in it." Coleman said that he had learned to treat even the most despicable suspects as if there were "a personal relationship, even if you can't stand them." He said that many of the suspects he had interrogated expected to be tortured, and were stunned to learn that they had rights under the American system. Due process made detainees more compliant, not less, Coleman said. He had also found that a defendant's right to legal counsel was beneficial not only to suspects but also to law-enforcement officers. Defense lawyers frequently persuaded detainees to cooperate with prosecutors, in exchange for plea agreements. "The lawyers show these guys there's a way out," Coleman said. "It's human nature. People don't cooperate with you unless they have some reason to." He added, "Brutalization doesn't work. We know that. Besides, you lose your soul."

The Bush Administration's redefinition of the standards of interrogation took place almost entirely out of public view. One of the first officials to offer hints of the shift in approach was Cofer Black, who was then in charge of counter-terrorism at the C.I.A. On September 26, 2002, he addressed the House and Senate Intelligence Committees, and stated that the arrest and detention of terrorists was "a very highly classified area." He added, "All you need to know is that there was a 'before 9/11' and there was an 'after 9/11.' After 9/11, the gloves came off."

Laying the foundation for this shift was a now famous set of internal legal memos—some were leaked, others were made public by groups such as the N.Y.U. Center for Law and National Security. Most of these documents were generated by

a small, hawkish group of politically appointed lawyers in the Justice Department's Office of Legal Counsel and in the office of Alberto Gonzales, the White House counsel. Chief among the authors was John C. Yoo, the deputy assistant attorney general at the time. (A Yale Law School graduate and a former clerk to Justice Clarence Thomas, Yoo now teaches law at Berkeley.) Taken together, the memos advised the President that he had almost unfettered latitude in his prosecution of the war on terror. For many years, Yoo was a member of the Federalist Society, a fellowship of conservative intellectuals who view international law with skepticism, and September 11th offered an opportunity for him and others in the Administration to put their political ideas into practice. A former lawyer in the State Department recalled the mood of the Administration: "The Twin Towers were still smoldering. The atmosphere was intense. The tone at the top was aggressive—and understandably so. The Commander-in-Chief had used the words 'dead or alive' and vowed to bring the terrorists to justice or bring justice to them. There was a fury."

Soon after September 11th, Yoo and other Administration lawyers began advising President Bush that he did not have to comply with the Geneva Conventions in handling detainees in the war on terror. The lawyers classified these detainees not as civilians or prisoners of war—two categories of individuals protected by the Conventions—but as "illegal enemy combatants." The rubric included not only Al Qaeda members and supporters but the entire Taliban, because, Yoo and other lawyers argued, the country was a "failed state." Eric Lewis, an expert in international law who represents several Guantánamo detainees, said, "The Administration's lawyers created a third category and cast them outside the law."

The State Department, determined to uphold the Geneva Conventions, fought against Bush's lawyers and lost. In a forty-page memo to Yoo, dated January 11, 2002 (which has not been publicly released), William Taft IV, the State Department legal adviser, argued that Yoo's analysis was "seriously flawed." Taft told Yoo that his contention that the President could disregard the Geneva Conventions was "untenable," "incorrect," and "confused." Taft disputed Yoo's argument that Afghanistan, as a "failed state," was not covered by the Conventions. "The official United States position before, during, and after the emergence of the Taliban was that Afghanistan constituted a state," he wrote. Taft also warned Yoo that if the U.S. took the war on terrorism outside the Geneva Conventions, not only could U.S. soldiers be denied the protections of the Conventions—and therefore be prosecuted for crimes, including murder—but President Bush could be accused of a "grave breach" by other countries, and be prosecuted for war crimes. Taft sent a copy of his memo to Gonzales, hoping that his dissent would reach the President. Within days, Yoo sent Taft a lengthy rebuttal.

Others in the Administration worried that the President's lawyers were wayward. "Lawyers have to be the voice of reason and sometimes have to put the brakes on, no matter how much the client wants to hear something else," the former State Department lawyer said. "Our job is to keep the train on the tracks. It's not to tell the President, 'Here are the ways to avoid the law.'" He went on, "There is no such thing as a non-covered person under the Geneva Conventions. It's nonsense. The protocols cover fighters in everything from world wars to local rebellions." The lawyer said that Taft urged Yoo and Gonzales to warn President Bush that he would "be seen as a war criminal by the rest of the world," but Taft was ignored. This may be because President Bush had already made up his mind. According to top State Department officials, Bush decided to suspend the Geneva Conventions on January 8, 2002—three days before Taft sent his memo to Yoo.

The legal pronouncements from Washington about the status of detainees were painstakingly constructed to include numerous loopholes. For example, in February, 2002, President Bush issued a written directive stating that, even though he had determined that the Geneva Conventions did not apply to the war on terror, all detainees should be treated "humanely." A close reading of the directive, however, revealed that it referred only to military interrogators—not to C.I.A. officials. This exemption allowed the C.I.A. to continue using interrogation methods, including rendition, that stopped just short of torture. Further, an August, 2002, memo written largely by Yoo but signed by Assistant Attorney General Jay S. Bybee argued that torture required the intent to inflict suffering "equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death." According to the *Times*, a secret memo issued by Administration lawyers authorized the C.I.A. to use novel interrogation methods—including "water-boarding," in which a suspect is bound and immersed in water until he nearly drowns. Dr. Allen Keller, the director of the Bellevue/N.Y.U. Program for Survivors of Torture, told me that he had treated a number of people who had been subjected to such forms of near-asphyxiation, and he argued that it was indeed torture. Some victims were still traumatized years later, he said. One patient couldn't

take showers, and panicked when it rained. “The fear of being killed is a terrifying experience,” he said.

The Administration’s justification of the rough treatment of detainees appears to have passed down the chain of command. In late 2003, at Abu Ghraib prison, in Iraq, photographs were taken that documented prisoners being subjected to grotesque abuse by U.S. soldiers. After the scandal became public, the Justice Department revised the narrow definition of torture outlined in the Bybee memo, using language that more strongly prohibited physical abuse during interrogations. But the Administration has fought hard against legislative efforts to rein in the C.I.A. In the past few months, Republican leaders, at the White House’s urging, have blocked two attempts in the Senate to ban the C.I.A. from using cruel and inhuman interrogation methods. An attempt in the House to outlaw extraordinary rendition, led by Representative Markey, also failed.

In a recent phone interview, Yoo was soft-spoken and resolute. “Why is it so hard for people to understand that there is a category of behavior not covered by the legal system?” he said. “What were pirates? They weren’t fighting on behalf of any nation. What were slave traders? Historically, there were people so bad that they were not given protection of the laws. There were no specific provisions for their trial, or imprisonment. If you were an illegal combatant, you didn’t deserve the protection of the laws of war.” Yoo cited precedents for his position. “The Lincoln assassins were treated this way, too,” he said. “They were tried in a military court, and executed.” The point, he said, was that the Geneva Conventions’ “simple binary classification of civilian or soldier isn’t accurate.”

Yoo also argued that the Constitution granted the President plenary powers to override the U.N. Convention Against Torture when he is acting in the nation’s defense—a position that has drawn dissent from many scholars. As Yoo saw it, Congress doesn’t have the power to “tie the President’s hands in regard to torture as an interrogation technique.” He continued, “It’s the core of the Commander-in-Chief function. They can’t prevent the President from ordering torture.” If the President were to abuse his powers as Commander-in-Chief, Yoo said, the constitutional remedy was impeachment. He went on to suggest that President Bush’s victory in the 2004 election, along with the relatively mild challenge to Gonzales mounted by the Democrats in Congress, was “proof that the debate is over.” He said, “The issue is dying out. The public has had its referendum.”

A few months after September 11th, the U.S. gained custody of its first high-ranking Al Qaeda figure, Ibn al-Sheikh al-Libi. He had run bin Laden’s terrorist training camp in Khalden, Afghanistan, and was detained in Pakistan. Zacarias Moussaoui, who was already in U.S. custody, and Richard Reid, the Shoe Bomber, had both spent time at the Khalden camp. At the F.B.I.’s field office in New York, Jack Cloonan, an officer who had worked for the agency since 1972, struggled to maintain control of the legal process in Afghanistan. C.I.A. and F.B.I. agents were vying to take possession of Libi. Cloonan, who worked with Dan Coleman on anti-terrorism cases for many years, said he felt that “neither the Moussaoui case nor the Reid case was a slam dunk.” He became intent on securing Libi’s testimony as a witness against them. He advised his F.B.I. colleagues in Afghanistan to question Libi respectfully, “and handle this like it was being done right here, in my office in New York.” He recalled, “I remember talking on a secure line to them. I told them, ‘Do yourself a favor, read the guy his rights. It may be old-fashioned, but this will come out if we don’t. It may take ten years, but it will hurt you, and the bureau’s reputation, if you don’t. Have it stand as a shining example of what we feel is right.’”

Cloonan’s F.B.I. colleagues advised Libi of his rights and took turns with C.I.A. agents in questioning him. After a few days, F.B.I. officials felt that they were developing a good rapport with him. The C.I.A. agents, however, felt that he was lying to them, and needed tougher interrogation.

To Cloonan’s dismay, the C.I.A. reportedly rendered Libi to Egypt. He was seen boarding a plane in Afghanistan, restrained by handcuffs and ankle cuffs, his mouth covered by duct tape. Cloonan, who retired from the F.B.I. in 2002, said, “At least we got information in ways that wouldn’t shock the conscience of the court. And no one will have to seek revenge for what I did.” He added, “We need to show the world that we can lead, and not just by military might.”

After Libi was taken to Egypt, the F.B.I. lost track of him. Yet he evidently played a crucial background role in Secretary of State Colin Powell’s momentous address to the United Nations Security Council in February, 2003, which argued the case for a pre-emptive war against Iraq. In his speech, Powell did not refer to Libi by name, but he announced to the world that “a senior terrorist operative” who “was responsible for one of Al Qaeda’s training camps in Afghanistan” had told U.S. authorities that Saddam Hussein had offered to train two Al Qaeda operatives in the use of “chemical or biological weapons.”

Last summer, *Newsweek* reported that Libi, who was eventually transferred from Egypt to Guantánamo Bay, was the source of the incendiary charge cited by Powell, and that he had recanted. By then, the first anniversary of the U.S. invasion of Iraq had passed and the 9/11 Commission had declared that there was no known evidence of a working relationship between Saddam and Al Qaeda. Dan Coleman was disgusted when he heard about Libi's false confession. "It was ridiculous for interrogators to think Libi would have known anything about Iraq," he said. "I could have told them that. He ran a training camp. He wouldn't have had anything to do with Iraq. Administration officials were always pushing us to come up with links, but there weren't any. The reason they got bad information is that they beat it out of him. You never get good information from someone that way."

Most authorities on interrogation, in and out of government, agree that torture and lesser forms of physical coercion succeed in producing confessions. The problem is that these confessions aren't necessarily true. Three of the Guantánamo detainees released by the U.S. to Great Britain last year, for example, had confessed that they had appeared in a blurry video, obtained by American investigators, that documented a group of acolytes meeting with bin Laden in Afghanistan. As reported in the *London Observer*, British intelligence officials arrived at Guantánamo with evidence that the accused men had been living in England at the time the video was made. The detainees told British authorities that they had been coerced into making false confessions.

Craig Murray, the former British Ambassador to Uzbekistan, told me that "the U.S. accepts quite a lot of intelligence from the Uzbeks" that has been extracted from suspects who have been tortured. This information was, he said, "largely rubbish." He said he knew of "at least three" instances where the U.S. had rendered suspected militants from Afghanistan to Uzbekistan. Although Murray does not know the fate of the three men, he said, "They almost certainly would have been tortured." In Uzbekistan, he said, "partial boiling of a hand or an arm is quite common." He also knew of two cases in which prisoners had been boiled to death.

In 2002, Murray, concerned that America was complicit with such a regime, asked his deputy to discuss the problem with the C.I.A.'s station chief in Tashkent. He said that the station chief did not dispute that intelligence was being obtained under torture. But the C.I.A. did not consider this a problem. "There was no reason to think they were perturbed," Murray told me.

Scientific research on the efficacy of torture and rough interrogation is limited, because of the moral and legal impediments to experimentation. Tom Parker, a former officer for M.I.5, the British intelligence agency, who teaches at Yale, argued that, whether or not forceful interrogations yield accurate information from terrorist suspects, a larger problem is that many detainees "have nothing to tell." For many years, he said, British authorities subjected members of the Irish Republican Army to forceful interrogations, but, in the end, the government concluded that "detainees aren't valuable." A more effective strategy, Parker said, was "being creative" about human intelligence gathering, such as infiltration and eavesdropping. "The U.S. is doing what the British did in the nineteen-seventies, detaining people and violating their civil liberties," he said. "It did nothing but exacerbate the situation. Most of those interned went back to terrorism. You'll end up radicalizing the entire population."

Although the Administration has tried to keep the details of extraordinary renditions secret, several accounts have surfaced that reveal how the program operates. On December 18, 2001, at Stockholm's Bromma Airport, a half-dozen hooded security officials ushered two Egyptian asylum seekers, Muhammad Zery and Ahmed Agiza, into an empty office. They cut off the Egyptians' clothes with scissors, forcibly administered sedatives by suppository, swaddled them in diapers, and dressed them in orange jumpsuits. As was reported by "Kalla Fakta," a Swedish television news program, the suspects were blindfolded, placed in handcuffs and leg irons; according to a declassified Swedish government report, the men were then flown to Cairo on a U.S.-registered Gulfstream V jet. Swedish officials have claimed that they received assurances from the Egyptians that Zery and Agiza would be treated humanely. But both suspects have said, through lawyers and family members, that they were tortured with electrical charges to their genitals. (Zery said that he was also forced to lie on an electrified bed frame.) After spending two years in an Egyptian prison, Zery was released. Agiza, a physician who had once been an ally of Zawahiri but later renounced him and terrorism, was convicted on terrorism charges by Egypt's Supreme Military Court. He was sentenced to twenty-five years in prison.

Another case suggests that the Bush Administration is authorizing the rendition of suspects for whom it has little evidence of guilt. Mamdouh Habib, an Egyptian-born citizen of Australia, was apprehended in Pakistan in October, 2001. According to his wife, Habib, a radical Muslim with four children, was visiting the country to

tour religious schools and determine if his family should move to Pakistan. A spokesman at the Pentagon has claimed that Habib—who has expressed support for Islamist causes—spent most of his trip in Afghanistan, and was “either supporting hostile forces or on the battlefield fighting illegally against the U.S.” Last month, after a three-year ordeal, Habib was released without charges.

Habib is one of a handful of people subjected to rendition who are being represented pro bono by human-rights lawyers. According to a recently unsealed document prepared by Joseph Margulies, a lawyer affiliated with the MacArthur Justice Center at the University of Chicago Law School, Habib said that he was first interrogated in Pakistan for three weeks, in part at a facility in Islamabad, where he said he was brutalized. Some of his interrogators, he claimed, spoke English with American accents. (Having lived in Australia for years, Habib is comfortable in English.) He was then placed in the custody of Americans, two of whom wore black short-sleeved shirts and had distinctive tattoos: one depicted an American flag attached to a flagpole shaped like a finger, the other a large cross. The Americans took him to an airfield, cut his clothes off with scissors, dressed him in a jumpsuit, covered his eyes with opaque goggles, and placed him aboard a private plane. He was flown to Egypt.

According to Margulies, Habib was held and interrogated for six months. “Never, to my knowledge, did he make an appearance in any court,” Margulies told me. Margulies was also unaware of any evidence suggesting that the U.S. sought a promise from Egypt that Habib would not be tortured. For his part, Habib claimed to have been subjected to horrific conditions. He said that he was beaten frequently with blunt instruments, including an object that he likened to an electric “cattle prod.” And he was told that if he didn’t confess to belonging to Al Qaeda he would be anally raped by specially trained dogs. (Hossam el-Hamalawy said that Egyptian security forces train German shepherds for police work, and that other prisoners have also been threatened with rape by trained dogs, although he knows of no one who has been assaulted in this way.) Habib said that he was shackled and forced to stand in three torture chambers: one room was filled with water up to his chin, requiring him to stand on tiptoe for hours; another chamber, filled with water up to his knees, had a ceiling so low that he was forced into a prolonged, painful stoop; in the third, he stood in water up to his ankles, and within sight of an electric switch and a generator, which his jailers said would be used to electrocute him if he didn’t confess. Habib’s lawyer said that he submitted to his interrogators’ demands and made multiple confessions, all of them false. (Egyptian authorities have described such allegations of torture as “mythology.”)

After his imprisonment in Egypt, Habib said that he was returned to U.S. custody and was flown to Bagram Air Force Base, in Afghanistan, and then on to Guantánamo Bay, where he was detained until last month. On January 11th, a few days after the Washington Post published an article on Habib’s case, the Pentagon, offering virtually no explanation, agreed to release him into the custody of the Australian government. “Habib was released because he was hopelessly embarrassing,” Eric Freedman, a professor at Hofstra Law School, who has been involved in the detainees’ legal defense, says. “It’s a large crack in the wall in a house of cards that is midway through tumbling down.” In a prepared statement, a Pentagon spokesman, Lieutenant Commander Flex Plexico, said there was “no evidence” that Habib “was tortured or abused” while he was in U.S. custody. He also said that Habib had received “Al Qaeda training,” which included instruction in making false abuse allegations. Habib’s claims, he suggested, “fit the standard operating procedure.”

The U.S. government has not responded directly to Habib’s charge that he was rendered to Egypt. However, several other men who were recently released from Guantánamo reported that Habib told them about it. Jamal al-Harith, a British detainee who was sent home to Manchester, England, last March, told me in a phone interview that at one point he had been placed in a cage across from Habib. “He said that he had been in Egypt for about six months, and they had injected him with drugs, and hung him from the ceiling, and beaten him very, very badly,” Harith recalled. “He seemed to be in pain. He was haggard-looking. I never saw him walk. He always had to be held up.”

Another piece of evidence that may support Habib’s story is a set of flight logs documenting the travels of a white Gulfstream V jet—the plane that seems to have been used for renditions by the U.S. government. These logs show that on April 9, 2002, the jet left Dulles Airport, in Washington, and landed in Cairo. According to Habib’s attorney, this was around the same time that Habib said he was released by the Egyptians in Cairo, and returned to U.S. custody. The flight logs were obtained by Stephen Grey, a British journalist who has written a number of stories on renditions for British publications, including the London Sunday Times. Grey’s logs are incomplete, but they chronicle some three hundred flights over three years

by the fourteen-seat jet, which was marked on its tail with the code N379P. (It was recently changed, to N8068V.) All the flights originated from Dulles Airport, and many of them landed at restricted U.S. military bases.

Even if Habib is a terrorist aligned with Al Qaeda, as Pentagon officials have claimed, it seems unlikely that prosecutors would ever be able to build a strong case against him, given the treatment that he allegedly received in Egypt. John Radsan, a law professor at William Mitchell College of Law, in St. Paul, Minnesota, who worked in the general counsel's office of the C.I.A. until last year, said, "I don't think anyone's thought through what we do with these people."

Similar problems complicate the case of Khalid Sheikh Mohammed, who was captured in Pakistan in March, 2003. Mohammed has reportedly been "water-boarded" during interrogations. If so, Radsan said, "it would be almost impossible to take him into a criminal trial. Any evidence derived from his interrogation could be seen as fruit from the poisonous tree. I think the government is considering some sort of military tribunal somewhere down the line. But, even there, there are still constitutional requirements that you can't bring in involuntary confessions."

The trial of Zacarias Moussaoui, in Alexandria, Virginia—the only U.S. criminal trial of a suspect linked to the September 11th attacks—is stalled. It's been more than three years since Attorney General John Ashcroft called Moussaoui's indictment "a chronicle of evil." The case has been held up by Moussaoui's demand—and the Bush Administration's refusal—to let him call as witnesses Al Qaeda members held in government custody, including Ramzi bin al-Shibh and Khalid Sheikh Mohammed. (Bin al-Shibh is thought to have been tortured.) Government attorneys have argued that producing the witnesses would disrupt the interrogation process.

Similarly, German officials fear that they may be unable to convict any members of the Hamburg cell that is believed to have helped plan the September 11th attacks, on charges connected to the plot, in part because the U.S. government refuses to produce bin al-Shibh and Mohammed as witnesses. Last year, one of the Hamburg defendants, Mounir Motassadeq, became the first person to be convicted in the planning of the attacks, but his guilty verdict was overturned by an appeals court, which found the evidence against him too weak.

Motassadeq is on trial again, but, in accordance with German law, he is no longer being imprisoned. Although he is alleged to have overseen the payment of funds into the accounts of the September 11th hijackers—and to have been friendly with Mohamed Atta, who flew one of the planes that hit the Twin Towers—he walks freely to and from the courthouse each day. The U.S. has supplied the German court with edited summaries of testimony from Mohammed and bin al-Shibh. But Gerhard Strate, Motassadeq's defense lawyer, told me, "We are not satisfied with the summaries. If you want to find the truth, we need to know who has been interrogating them, and under what circumstances. We don't have any answers to this." The refusal by the U.S. to produce the witnesses in person, Strate said, "puts the court in a ridiculous position." He added, "I don't know why they won't produce the witnesses. The first thing you think is that the U.S. government has something to hide."

In fact, the Justice Department recently admitted that it had something to hide in relation to Maher Arar, the Canadian engineer. The government invoked the rarely used "state secrets privilege" in a motion to dismiss a lawsuit brought by Arar's lawyers against the U.S. government. To go forward in an open court, the government said, would jeopardize the "intelligence, foreign policy and national security interests of the United States." Barbara Olshansky, the assistant legal director of the Center for Constitutional Rights, which is representing Arar, said that government lawyers "are saying this case can't be tried, and the classified information on which they're basing this argument can't even be shared with the opposing lawyers. It's the height of arrogance—they think they can do anything they want in the name of the global war on terrorism."

Nadja Dizdarevic is a thirty-year-old mother of four who lives in Sarajevo. On October 21, 2001, her husband, Hadj Boudella, a Muslim of Algerian descent, and five other Algerians living in Bosnia were arrested after U.S. authorities tipped off the Bosnian government to an alleged plot by the group to blow up the American and British Embassies in Sarajevo. One of the suspects reportedly placed some seventy phone calls to the Al Qaeda leader Abu Zubaydah in the days after September 11th. Boudella and his wife, however, maintain that neither he nor several of the other defendants knew the man who had allegedly contacted Zubaydah. And an investigation by the Bosnian government turned up no confirmation that the calls to Zubaydah were made at all, according to the men's American lawyers, Rob Kirsch and Stephen Oleskey.

At the request of the U.S., the Bosnian government held all six men for three months, but was unable to substantiate any criminal charges against them. On Jan-

uary 17, 2002, the Bosnian Supreme Court ruled that they should be released. Instead, as the men left prison, they were handcuffed, forced to put on surgical masks with nose clips, covered in hoods, and herded into waiting unmarked cars by masked figures, some of whom appeared to be members of the Bosnian special forces. Boudella's wife had come to the prison to meet her husband, and she recalled that she recognized him, despite the hood, because he was wearing a new suit that she had brought him the day before. "I will never forget that night," she said. "It was snowing. I was screaming for someone to help." A crowd gathered, and tried to block the convoy, but it sped off. The suspects were taken to a military airbase and kept in a freezing hangar for hours; one member of the group later claimed that he saw one of the abductors remove his Bosnian uniform, revealing that he was in fact American. The U.S. government has neither confirmed nor denied its role in the operation.

Six days after the abduction, Boudella's wife received word that her husband and the other men had been sent to Guantánamo. One man in the group has alleged that two of his fingers were broken by U.S. soldiers. Little is publicly known about the welfare of the others.

Boudella's wife said that she was astounded that her husband could be seized without charge or trial, at home during peacetime and after his own government had exonerated him. The term "enemy combatant" perplexed her. "He is an enemy of whom?" she asked. "In combat where?" She said that her view of America had changed. "I have not changed my opinion about its people, but unfortunately I have changed my opinion about its respect for human rights," she said. "It is no longer the leader in the world. It has become the leader in the violation of human rights."

In October, Boudella attempted to plead his innocence before the Pentagon's Combatant Status Review Tribunal. The C.S.R.T. is the Pentagon's answer to the Supreme Court's ruling last year, over the Bush Administration's objections, that detainees in Guantánamo had a right to challenge their imprisonment. Boudella was not allowed to bring a lawyer to the proceeding. And the tribunal said that it was "unable to locate" a copy of the Bosnian Supreme Court's verdict freeing him, which he had requested that it read. Transcripts show that Boudella stated, "I am against any terrorist acts," and asked, "How could I be part of an organization that I strongly believe has harmed my people?" The tribunal rejected his plea, as it has rejected three hundred and eighty-seven of the three hundred and ninety-three pleas it has heard. Upon learning this, Boudella's wife sent the following letter to her husband's American lawyers:

Dear Friends, I am so shocked by this information that it seems as if my blood froze in my veins, I can't breathe and I wish I was dead. I can't believe these things can happen, that they can come and take your husband away, overnight and without reason, destroy your family, ruin your dreams after three years of fight. . . . Please, tell me, what can I still do for him? . . . Is this decision final, what are the legal remedies? Help me to understand because, as far as I know the law, this is insane, contrary to all possible laws and human rights. Please help me, I don't want to lose him.

John Radsan, the former C.I.A. lawyer, offered a reply of sorts. "As a society, we haven't figured out what the rough rules are yet," he said. "There are hardly any rules for illegal enemy combatants. It's the law of the jungle. And right now we happen to be the strongest animal." ?

Chairman CONYERS. Today we consider extraordinary rendition and, for years, the administration has repeatedly denied that it engages in this practice. And when it has been asked about these cases, it has acknowledged that it has transferred individuals to foreign states, but argues that such transfers comply with U.S. legal obligations because they obtain assurances from receiving countries that individuals will not be tortured.

Nevertheless, a multitude of cases have made it clear that, despite this stated policy, this government is sending people to other countries to be tortured, and there are a number in addition to the witness that is here today.

Now, extraordinary rendition presents some critical problems. First, it violates the international law prohibiting torture. The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, a treaty ratified by

our country in 1994, explicitly prohibits the transfer of persons to countries where there is a substantial likelihood that they will be tortured.

Notwithstanding the fact that the United States is required by law to abide by this convention, pursuant to an implementing statute, Title 22 United States Code Section 2242, the administration apparently takes the position that it does not apply extraterritorially as a matter of law.

Other statutes also seek to prohibit the practice of torture and implicate certain actions by this administration. These laws include the Federal Torture Statute, 18 USC Section 2340, the Torture Victim Protection Act, 28 USC Section 1350, and it seems to me that, as a nation, we must not evade these important legal prohibitions by rendering suspects to countries for torture.

I am reminded of Philippe Sands—a very interesting international lawyer—treatise on the *Lawless World*, I believe is the title, that tries to encourage this country and others to do more about working in concert nationally and internationally.

Now, the administration's assertion that it has received diplomatic assurances from countries that are not engaging in torture is not only unreliable, but it is insufficient. In fact, these assurances typically are obtained from countries, in fact, where there seems to be a strong likelihood of torture and, consistent with a general practice of this administration, there is no public information regarding the manner in which it obtains these assurances.

And, finally, the practice of extraordinary rendition severely undermines our nation's longstanding reputation as a standard bearer for protecting human rights. And unless and until the United States respects completely laws prohibiting torture, it cannot, in my judgment, expect other nations to respect those laws as they apply them, I worry, to Americans abroad.

The administration's actions, accordingly, therefore, place our own citizens in jeopardy. So as a nation, we are appalled at what happened to our witness.

Nevertheless, unlike Canada, which issued an apology and damages to Mr. Arar, we assert that he may not even seek redress in our courts. It is claiming that the state secrets privilege outweighs his violated human rights.

And so I am hoping that these two committees will help us reclaim our international reputation for basic human rights or risk squandering the constitutional values upon which the nation was founded.

And I thank the chairman for his indulgence.

Mr. DELAHUNT. I thank the gentleman.

And now let me proceed to a gentleman who has been passionate about this issue, the gentleman from New York, the chair of the Subcommittee on the Constitution, my friend and colleague, Jerry Nadler.

Mr. NADLER. Thank you.

This joint hearing of the Subcommittee on the Constitution, Civil Rights, and Civil Liberties and the Subcommittee on International Organizations, Human Rights, and Oversight tackles an issue that goes to the very heart of what sort of nation we are.

Last year, I tried repeatedly to get then-Attorney General Gonzales to answer questions—to answer what I considered a simple question: Does our Government claim the legal authority to snatch someone off the street and lock them up without a trial or turn someone over to another government for the purpose of being tortured?

Despite my best efforts, I could not get the Attorney General to answer this question before he left office.

I would have hoped that the answer would have been obvious and straightforward. The fact that the Attorney General would not answer it at all, combined with what information we now have about this administration's misconduct, is, frankly, terrifying.

Today we look at the administration's covert practice of rendition to torture—that is what we call it call it, rendition to torture and, in particular, at the case Maher Arar, a Canadian national of Syrian birth, who was snatched at Kennedy Airport, New York, locked up on the Federal detention center in Brooklyn, in my congressional district, and then shipped off to Syria by our Government.

And in Syria, he was imprisoned for a year without charge, held for a year and subjected to torture during his imprisonment. It turns out, according to the Canadian Government, which investigated this matter and issued their report, that Mr. Arar is not a terrorist, never was a terrorist, was never a threat to the United States or Canada or to anyone else.

And while the Canadian Government, to its credit, has acknowledged its role in this injustice, apologized to Mr. Arar and his family and compensated him, our Government still refuses to admit that it has done anything improper.

In fact, the administration hides behind a wall of state secrets to conceal the facts. Mr. Arar remains on the terrorist watch list and is not permitted to enter the United States, which is why he is testifying here today by video hookup.

Now, I heard one of the ranking minority members say that this is a regrettable mistake. I am glad he admitted it is a mistake. Our Government does not admit it was a mistake.

But it is worse than a mistake, because our Government seems to continue to claim the authority to snatch someone off the street, hide behind the fiction of expedited removal. This wasn't an expedited removal in this case. An expedited removal would have gotten him out of the country and sent him off to Canada. It wouldn't have even been necessary, because he was simply in the country to transfer from one plane to another to go to Canada.

This was a kidnapping. This was a kidnapping utilizing the fact that he was here in this country or, at least, technically not in this country, at Kennedy Airport, in order to get him into custody so that he could be sent to someone who does not have our scruples and our laws about torture.

It is a testament to Mr. Arar's character and commitment that despite understandable misgivings about ever returning to the United States, he nonetheless agreed to allow us to seek permission from the administration so that he could testify here in person today.

The administration refused. For that reason, Mr. Arar will have to testify via satellite hookup from Canada. I cannot recall another

occasion in which the Congress has had to go to such great lengths to get relevant testimony from a witness.

On behalf of my fellow citizens, I want to apologize to you, Mr. Arar, for the reprehensible conduct of our Government for kidnapping you, for turning you over to Syria, a nation that our own State Department recognizes as routinely practicing torture.

I also want to apologize for the continued and, from everything I have seen, some of which I am not at liberty to discuss, baseless decision to maintain the fiction that you are a danger to this country.

This conduct does not reflect the values of the American people. The great secrecy employed by the administration is, I believe, less an attempt to protect our security than it is an attempt to protect this administration from the consequences of its actions and from the consequences of being held accountable where it was clearly breaking the law. There is no excuse for that.

Now, we hear, we are told that the administration, rather than let Mr. Arar go to Canada, where he would be set free, because the Canadian Government said they didn't have enough evidence to hold him in detention for any crime and maybe he would, therefore, pose a threat to the United States, according to the administration, they decided to send him to Syria.

But don't worry about it, they got assurances from the Syrians that he wouldn't be tortured, assurances from a government that our Government says lies all the time, assurances from a government that our Government says tortures as a matter of routine, assurances from a government that our Government says practices state terrorism.

Who in the Bush administration was foolish enough to believe in those assurances?

We have to decide whether the Bush administration is cynical and lying to us and to itself that they believe those assurances, which I believe to be the case, or was foolish in believing assurances from a government that it says cannot be believed. So the question really is, Was the administration a fool or an aid here? I think the evidence is an aid and a continuing aid.

I look forward to Mr. Arar's testimony and to the testimony of our expert witnesses. It is about time we exposed this conduct to the light of day. This nation deserves to have its government act in a manner that is consistent with our laws and our values and that it is not enough to say that this is a mistake and that we apologize, not as long as the policy underlying it continues and we continue to claim the right to snatch people off the street, kidnap them and send them to another government, where we know they will be tortured.

I hope one day to be able to apologize to Mr. Arar in person on American soil.

I yield back the balance of my time.

Mr. DELAHUNT. I thank the gentleman.

And now I turn to the ranking member from Arizona, Mr. Franks, on the Subcommittee on the Constitution.

For housekeeping purposes, once we hear from Mr. Franks, I will then introduce formally Mr. Arar for his statement and then I will

yield my time for questions to the other gentleman from Arizona, because I am aware that he has time constraints.

So with that, let me call on the ranking member, Mr. Franks.

Mr. FRANKS. Well, thank you, Mr. Chairman. And, Mr. Chairman, first, let me sincerely associate myself with the comments and opening statement of Ranking Member Rohrabacher.

I want to also express my sincere regret to Mr. Arar for the tragedy that has befallen him and want to be very clear on that point.

Mr. Chairman, extraordinary rendition is a term used to refer to the extrajudicial transfer of a person from one state to another and perhaps this, the most notable case of rendition involved here is the one involving Mr. Maher Arar, a dual citizen of Canada and Syria.

Mr. Arar filed suit in January 2004 against certain United States officials that he claims were responsible for rendering him to Syria.

On February 16, 2006, the U.S. district court for the eastern district of New York dismissed Mr. Arar's case on a number of grounds, including that certain claims raised against U.S. officials implicated national security and foreign policy considerations.

Separately, the Canadian Government established a commission to investigate Canada's involvement in Mr. Arar's arrest and transfer to Syria. The final report of that commission, released in September 2006, concluded that Canadian officials provided United States authorities with inaccurate information regarding Mr. Arar that led to his transfer to Syria.

The report made clear that the Canadian Government had reason to be suspicious of Mr. Arar, as he seemed to be close to Abdullah Almalki, who is believed to be a member of al-Qaeda. As the Canadian commission stated in its report:

"Canadian authorities properly considered Mr. Arar to be a person of interest in its investigation. Messrs. Almalki and Arar were seen walking together in the rain, conversing for about 20 minutes. Given Mr. Almalki was a target of the investigation, it was reasonable for authorities to investigate Mr. Arar."

Mr. Arar had even listed Mr. Almalki as an emergency contact on his rental application, indicating they might have close ties. Despite these legitimate concerns, the Canadian report itself indicates that Mr. Arar's ordeal was caused by Canadian officials providing the United States with inaccurate negative information regarding Mr. Arar and the threat he might pose to national security.

Specifically, the Royal Canadian Mounted Police provided American authorities with information about Mr. Arar that was "inaccurate and misleading, false, and that portrayed him in an unfairly negative fashion."

Examples include the description of Mr. Arar as being an "Islamic extremist individual suspected of being linked to the al-Qaeda terrorist movement"—several references to Mr. Arar as "suspect" or "principal subject or target or important figure." And the assertions that Mr. Arar had refused an interview with Canadian authorities.

The report also discusses the facts that Canadian authorities sent to the FBI that concluded that "Arar seemed to be connected

to many of the targets of our investigation. Arar had been asked for an interview as a potential witness, but Arar sought legal counsel and declined. Arar soon after departed the country rather suddenly for Tunisia.”

The Canadian commission concluded that this information was untrue and that “it is very likely that in making the decisions to detain and remove Mr. Arar, American authorities relied on information about Mr. Arar provided by Canadian authorities.”

So what we are left with from the official investigation by Canada into this incident is that whatever decisions were made by American authorities, whatever they were, they were driven by inaccurate information provided by Canadian authorities that cast Mr. Arar in a negative light.

Mr. Chairman, I sincerely believe that the story of Mr. Arar will ultimately not be shown to be a failure of United States rendition policy, but instead an enormous failure in the particular circumstances caused by false intelligence and information from Canada.

And I sincerely and truly, with my heart, regret any injustice that may have occurred to Mr. Arar by any hands whatsoever in any country, and I very much want to hear his story today.

So thank you, Mr. Chairman.

Mr. DELAHUNT. Thank you, Mr. Franks.

Before we proceed to introduce our panel that is in Ottawa, I ask for unanimous consent for a statement submitted from Amnesty International to be entered into the record. Without objection, it is so entered.

[The information referred to follows:]

STATEMENT BY AMNESTY INTERNATIONAL USA

Amnesty International commends the House Foreign Affairs Subcommittee on International Organizations, Human Rights and Oversight and the House Judiciary Subcommittee on the Constitution, Civil Rights and Civil Liberties for continuing to investigate the practice of extraordinary renditions.

Amnesty International’s 1.8 million members worldwide are dedicated to working against human rights abuses committed by governments and armed groups around the world. For more than four decades, our work has been guided by the Universal Declaration of Human Rights and other international laws and standards, including the Geneva Conventions and the Convention Against Torture, which the United States championed and helped create over many decades. Our annual report summarizes human rights concerns in 149 countries and territories. We strive to be objective and impartial.

Amnesty International joined the world in condemning the brutal attacks on September 11, 2001, denouncing them as crimes against humanity and demanding justice in accordance with the law. Amnesty International recognizes that governments not only have the right, but the obligation to ensure the security of their people. The best and most effective way to promote security is to preserve human rights and the rule of law. Departure from long established, fundamental legal protections only promotes lawlessness and ultimately makes everyone less safe.

The world looks to the United States as a leader to set the standards for protecting and promoting human rights, human dignity, and the rule of law. That is why it is especially devastating that policies and practices of the U.S. government today are inconsistent with U.S. law and international human rights standards. Evidence continues to mount of U.S. complicity in the extralegal transfer of people into the custody of countries where they are at risk of torture and other human rights abuses.

Amnesty International uses the term “rendition” to describe the transfer of individuals from one country to another, by means that bypass all judicial and administrative due process. In the “war on terror” context, the practice is mainly—although not exclusively—initiated by the United States, and carried out with the collabora-

tion, complicity or acquiescence of other governments. The most widely known manifestation of rendition is the secret transfer of terror suspects into the custody of other states—including Egypt, Jordan, and Syria—where physical and psychological brutality feature prominently in interrogations. The rendition network’s aim is to use whatever means necessary to gather intelligence, and to keep detainees away from any judicial oversight.

However, the rendition network has also served to transfer people into U.S. custody, where they may end up in detention centers in Guantánamo Bay, Cuba, Iraq, or Afghanistan, or in secret facilities known as “black sites” run by the Central Intelligence Agency (CIA). In a number of cases, individuals have been transferred in and out of U.S. custody several times.

Rendition is sometimes presented simply as an efficient means of transporting terror suspects from one place to another without red tape. Such benign characterizations conceal the truth about a system that puts the victim beyond the protection of the law, and sets the perpetrator above it.

Renditions involve multiple layers of human rights violations. Most victims of rendition were arrested and detained illegally in the first place: some were abducted; others were denied access to any legal process, including the ability to challenge the decision to transfer them because of the risk of torture. There is also a close link between renditions and enforced disappearances. Many of those who have been illegally detained in one country and illegally transported to another have subsequently “disappeared,” including dozens who have “disappeared” in U.S. custody. Every one of the victims of rendition interviewed by Amnesty International has described incidents of torture and other ill-treatment.

Because of the secrecy surrounding the practice of rendition, and because many of the victims have “disappeared,” it is difficult to estimate the scope of the program. In many countries, families are reluctant to report their relatives as missing for fear that intelligence officials will turn their attention on them. The number of renditions cases currently appears to be in the hundreds: Egypt’s Prime Minister noted in 2005 that the United States had transferred some 60–70 detainees to Egypt alone, and a former CIA agent with experience in the region believes that hundreds of detainees have been sent by the United States to prisons in the Middle East. However, this is a minimum estimate. Rendition, like “disappearance,” is designed to evade public and judicial scrutiny, to hide the identity of the perpetrators and the fate of the victims.

Amnesty International in cooperation with the Center for Constitutional Rights and the New York University International Human Rights Clinic are currently seeking documents related to the rendition and secret detention programs from several U.S. government agencies, including the Departments of Justice and Defense, and the CIA, through a federal lawsuit under the Freedom of Information Act. The agencies’ refusal to release a list of secretly-held detainees and an assessment of the legality of the secret programs prevents scrutiny by the public or the courts of enforced disappearances, and leaves detainees vulnerable to abuses that include torture and other ill-treatment.

Amnesty International welcomes Congressman Delahunt’s and Congressman Nadler’s commitment to holding oversight hearings into this unlawful practice. Any legislation addressing the practice of extraordinary rendition must also address the use of diplomatic assurances. AI considers diplomatic assurances, which the US government relies on in certain cases, to be unacceptable as evidence that no substantial risk of torture or ill-treatment exists in the receiving state. We note also that, in his interim report to the General Assembly, the UN Special Rapporteur on torture also expressed the firm view that such assurances are unreliable and ineffective in the protection against torture and ill-treatment; that such assurances are sought usually from states where the practice of torture is systematic; and that states cannot resort to them as a safeguard where there are substantial grounds for believing that a person would be subjected to such treatment upon return.¹

Experience has shown that monitoring alone does not mitigate the threat of torture when diplomatic assurances are obtained from countries with a record of using torture and ill-treatment on suspects in custody. The UN Committee Against Torture laid out four factors that must be taken into consideration before accepting such assurances from any country. In its periodic review of US compliance with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the committee stated:

¹ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/60/316, 30 August 2005, paras. 51–2.

When determining the applicability of its non-refoulement obligations under article 3 of the Convention, the State party should only rely on “diplomatic assurances” in regard to States which do not systematically violate the Convention’s provisions, and after a thorough examination of the merits of each individual case. The State party should establish and implement clear procedures for obtaining such assurances, with adequate judicial mechanisms for review, and effective post-return monitoring arrangements.²

The need for these critical safeguards was brought to light by the cases of Mohammed El Zari and Ahmed Agiza. Following their forcible return to Egypt, Mohammed El Zari and Ahmed Agiza alleged that they were tortured while in custody. The Swedish government has stated that there had been discussions with the Egyptian government about the right to visit them in prison. The Swedish authorities also requested that personnel from the Swedish Embassy in Egypt would be allowed to attend their trial.

In the end, notwithstanding the diplomatic assurances, Mohammed El Zari and Ahmed Agiza were, in fact, held incommunicado after their summary expulsion to Egypt. When they did get to see the Swedish Ambassador during his first visit, which only took place five weeks after they had been returned to Egypt, they both told him that they had been tortured or otherwise ill-treated in detention.

During the Swedish ambassador’s first prison visit to Ahmed Agiza on January 23, 2002, Ahmed Agiza complained of being forced to remain in a painful position during the flight from Sweden to Egypt, of being blindfolded during interrogation, of beatings by prison guards and of threats against his family by interrogators.

Mohammed El Zari has subsequently complained that he was interrogated for a further five weeks during which he was subjected to torture or other ill-treatment, including by having electric shocks applied to his genitals, nipples and ears. Further, he has stated that his torture was monitored by doctors who made sure that it would not leave him with visible scars. He has recounted how, eventually, he was forced to confess to crimes that he had not committed. Mohammed El Zari has also stated that he continued to attempt to alert the Swedish Ambassador to what was going on. In addition, the Swedish Ambassador’s first and subsequent prison visits were not conducted in private; Egyptian prison personnel were present and took notes.³

This case—in which Sweden relied on “diplomatic assurances” purporting to sufficiently reduce the well-founded risk of torture faced by the two men upon return to Egypt—illustrates the flaws inherent in resorting to such assurances. Diplomatic assurances are, in effect, attempts to replace insistence on full, state-wide implementation of binding multilateral treaties and customary obligations prohibiting torture and other ill-treatment absolutely, with bilateral arrangements secured with states which fail to respect their multilateral international obligations in the first place.

Diplomatic assurances’ inherent flaws have prompted Amnesty International and other human rights non-governmental organizations, as well as UN and other international experts and mechanisms, to oppose their use in principle, and to denounce them as practices that circumvent, and therefore undermine, the absolute prohibition on torture and other ill-treatment generally, and the prohibition of refoulement, in particular.

Amnesty International will continue to press the U.S. Government not to accept diplomatic assurances as a basis for return, to cooperate with any and all investigations into this reprehensible practice, and to ensure accountability for any of its agents who are found to have violated the laws of the countries in which they are operating. The practice of extraordinary renditions violates U.S. and international law, has led to false confessions under torture, and has interfered with U.S. relations with its allies. Recently, John Bellinger, Legal Advisor to Secretary of State Condoleezza Rice, told journalists in Brussels “I do think these continuing investigations can harm intelligence cooperation—that’s simply a fact of life.”⁴ It is Amnesty International’s position that it is the illegal behavior of U.S. agents overseas and policies that directly contravene international law that have interfered with U.S. relations with its allies. Rather than criticize European bodies for investigating alleged human rights abuses, the United States should fulfill its own responsibility to conduct investigations and cooperate with others in order to ensure transparency

² <http://www.ohchr.org/english/bodies/cat/docs/AdvanceVersions/CAT.C.USA.CO.2.pdf>

³ For more information on this case, see Amnesty International’s report “The case of Mohammed El Zari and Ahmed Agiza: violations of fundamental human rights by Sweden confirmed,” <http://web.amnesty.org/library/Index/ENGEUR420012006?open&of=ENG-SWE>

⁴ Craig Whitlock, “U.S. Won’t Send CIA Defendants To Italy,” Washington Post, March 1, 2007.

and accountability for policies that violate its laws and treaty obligations. This hearing is an important step in that process.

AMNESTY INTERNATIONAL RECOMMENDATIONS:

Stop the practice of Extraordinary Renditions

- Do not render or otherwise transfer to the custody of another state anyone suspected or accused of security offences unless the transfer is carried out under judicial supervision and in full observance of due legal process.
- Ensure that anyone subject to transfer—prior to being transferred—has the right to challenge its legality before an independent tribunal, and that they have access to an independent lawyer and an effective right of appeal.
- Do not receive into custody anyone suspected or accused of security offences unless the transfer is carried out under judicial supervision and in full observance of due legal process.
- Investigate any allegations that their territory hosts or has hosted secret detention facilities, and make public the results of such investigations.

No diplomatic assurances

- Prohibit the return or transfer of people to places where they are at risk of torture or other ill-treatment.
- Do not require or accept “diplomatic assurances” or similar bilateral agreements to justify renditions or any other form of involuntary transfers of individuals to countries where there is a risk of torture or other ill-treatment.

No renditions flights

- Ensure that airports and airspace are not used to support and facilitate renditions or rendition flights.

Investigate violations

- Ensure the accountability of intelligence agencies, including by prohibiting the practice of mutual assistance in circumstances where there is a substantial risk that such co-operation would contribute to unlawful detention, torture or other ill-treatment, enforced disappearance, unfair trial, or the imposition of the death penalty.
- Ensure countries’ full co-operation with ongoing national and international investigations on rendition and secret detention, including by providing them with access to all relevant people and information.

Mr. DELAHUNT. Now, let me introduce our first panel, who, as I indicated, are participating in this hearing via videoconference from Ottawa.

Mr. Arar is a wireless technology consultant who spent time in greater Boston, having worked with a software company which is within the congressional district of my colleague, who may or may not join us, Congressman Ed Markey.

He was born in Syria and came to Canada in 1987 at the age of 17. He received his Canadian citizenship in 1991. He holds a bachelor’s degree from McGill University in computer engineering and a master’s degree from the University of Quebec in telecommunications.

He is currently pursuing a Ph.D. in wireless engineering at the University of Ottawa.

He is married and has two children.

Thank you very much, Mr. Arar, for agreeing to speak with us today.

Our second witness on this panel is Kent Roach, a professor of law, with cross-appointments in criminology and political science at the University of Toronto. A fellow of the Royal Society of Canada, he has authored nine books, including *Constitutional Remedies in Canada*.

In recent years, Professor Roach has focused much of his work on antiterrorism law and policy. He is the co-editor of “Global Antiterrorism Law and Policy” and “The Security of Freedom,” essays on Canada’s antiterrorism bill.

Professor Roach was also appointed to the five-person research advisory panel for the Arar Commission.

Let’s begin with the testimony of Mr. Arar. Please, sir, proceed.

STATEMENT OF MR. MAHER ARAR (VIA VIDEOCONFERENCE)

Mr. ARAR. Good afternoon, Chairman Delahunt and Chairman Nadler, Ranking Members Franks and Rohrabacher, members of both committees. Thank you for giving me this opportunity to speak to you today.

Let me begin by telling you—

Mr. DELAHUNT. Mr. Arar, if you can just suspend for a moment and we can have someone from our staff lower the volume. I am looking, and I don’t see any movement. Actually, the ranking member, Mr. Arar, is hard of hearing and he has requested that we leave it.

Mr. ARAR. Is it okay now?

Mr. DELAHUNT. Please proceed.

Mr. ARAR. Let me begin by telling you, Mr. Chairman, how grateful I am to you and other members of the committee for offering your apologies. I do hope that the government will eventually and officially apologize.

Forgive me for not being with you in person. I am forced to appear by video link because the U.S. Government prevents me from coming there, even though 5 years have passed since my original detention, and I have never been charged with any crime in any country.

Let me be clear—I am not a terrorist. I am not a member of al-Qaeda or any other terrorist group. I am a father, a husband, and an engineer. I am also a victim of the immoral practice of extraordinary rendition.

I am here today to tell you about what happened to me and how I was detained and interrogated by the United States Government, transported to Syria against my will, tortured and kept there for a year. I am here today because I believe it is my moral duty as a human being to help prevent what happened to me from happening to others.

The America I see and I hear about today is not the same America I admired when I lived there from 1999 to early 2001. Back then, I decided to learn from the professional American business culture by taking a high-tech job in Boston that I hoped would eventually allow me to start my own business in Canada.

In September 2002, I was returning to Canada for work from a family trip to Tunis, where my wife and children stayed behind with my ailing father-in-law. My return flight to Montreal connected through JFK Airport in New York. Upon viewing my valid Canadian passport, an immigration officer pulled me aside and took me to be fingerprinted and photographed.

I asked to make a phone call, but my request was denied. Sometime later, officers from the FBI and the New York police department arrived and began to interrogate me. My repeated requests

for a lawyer were all denied. I was told that I had no right to a lawyer because I was not an American citizen.

The interrogation that first day lasted about 8 hours, during which I was insulted and humiliated, and continued the next day, at the end of which they asked me to volunteer to go to Syria. Of course, I refused and I told them that I wanted to go to Canada.

I was then taken to the Metropolitan Detention Center in Brooklyn, where I was kept for the next 10 days. After 5 days of repeated requests, I was finally allowed to make a brief phone call to alert my family of my whereabouts.

More than a week passed before I was allowed to finally meet briefly with a lawyer on October 5. At 9 o'clock the next day, at night, on a Sunday, I was informed that my lawyer was waiting to see me. I was taken out of my cell and into a room where about seven people, or seven officials were waiting for me.

To my surprise, my lawyer was not there. When I asked them where my lawyer was, they told me "he" refused to come. They questioned me for about 6 hours, until 3 o'clock in the morning, and that was despite my repeated requests for my lawyer to be present and despite my requests to see a judge.

They mainly asked me why I did not want to go to Syria. I clearly and repeatedly told them that I was afraid I would be tortured there. I told them I would be tortured because I was being wrongly accused of being a member of al-Qaeda. I also conveyed to them my fear of returning to Syria, given that I had not fulfilled my compulsory military service.

My pleas fell on deaf ears. On October 8, at 3 o'clock in the morning, I was awakened and told that they had decided to remove me to Syria. When I told them again about my fears of being tortured, they told me they were not the office that deals with the torture convention.

By then, it was becoming more and more clear to me that I was being sent to Syria for the purpose of being tortured. I was put on a private jet and flown to Jordan, then driven to Syria and eventually ended up at the Palestine branch of the Syrian military intelligence on October 9.

There I was put in a dark underground cell that was more like a grave. It was 3 feet wide, 6 feet deep and 7 feet high. Life in that cell was hell. I spent 10 months and 10 days in that grave.

During the early days of my detention, I was interrogated and physically tortured. I was beaten with an electrical cable and threatened with a metal chair, the tire and electric shocks.

I was forced to falsely confess that I had been to Afghanistan. When I was not being beaten, I was put in a waiting room so that I could hear the screams of other prisoners. The cries of the women still haunt me the most.

Over the next 10 months, the only time I left my cell was to be interrogated or for meetings with the Canadian consul. I was allowed to meet with the consul seven times, but only in the controlled presence of Syrian officials. I was warned prior to those meetings not to say how I was being treated.

During the last visit, however, I burst out telling about the beatings and the horrible conditions I had been living in. After 374

days of torture and wrongful detention, I was finally released to Canadian Embassy officials on October 5, 2003.

These past few years have been a nightmare for me. My return to Canada, my physical pain has slowly healed, but the cognitive and psychological scars from my ordeal remain with me on a daily basis.

I still have nightmares and recurring flashbacks. I have lost confidence in myself and I live in constant fear of flying and being kidnapped again. I am not the same person that I was.

I have come to accept this as part of my new life, but I want to make sure that no one else has to go through what I have gone through.

In sharing my story and my experiences with you today, I hope that the effects of torturing a human being will be better understood. I also hope to convey how fragile our human rights have become and how easily they can be taken from us by the same governments that have sworn to protect them.

Thank you very much. I look forward to answering your questions.

[The prepared statement of Mr. Arar follows:]

**Testimony of
Maher Arar
Joint Oversight Hearing:
Rendition to Torture: The Case of Maher Arar
Committee on Foreign Affairs
Subcommittee on International Organizations, Human Rights, and Oversight
with
Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights, and Civil Liberties
United States House of Representatives
October 18, 2007**

I. INTRODUCTION

I would like to thank all of you for your invitation and for giving me this opportunity to share my experiences with you.

I am here today to tell you my story about how I was detained, interrogated, transported to Syria, tortured, and kept there in a 3 foot by 6 foot, unlit grave-like cell, away from my family for nearly a year. The physical and mental torture that I experienced during this time continues to haunt me daily.

I am a victim of extraordinary rendition. I hope that my story will help shed more light on the administration's role in this illegal and immoral practice of outsourcing torture by sending suspects to countries known to practice torture to extract information.

Even though the United States Government prevents me from coming to the United States, I am appearing before you today by video-link because I feel it is my obligation and moral duty as a human being to help prevent what happened to me from happening to other people.

Before I tell you my story, I should like to make one thing perfectly clear: I am not a terrorist. I am not a member of al-Qaeda and do not know anyone who belongs to that group. All I know about al-Qaeda is what I have heard, read and seen in the media. I have never been to Afghanistan or anywhere near Afghanistan. I am a Syrian-born Canadian. I moved to Canada with my parents when I was 17 years old, avoiding the mandatory Syrian military draft. I attended high school in Montreal and eventually attended McGill University. I obtained a Bachelors degree as well as a Masters degree in telecommunications. During my early undergraduate studies, I obtained my Canadian citizenship and, with it, relief from the worry that I would ever be forced to return to Syria to serve in the army. I met my wife, Monia at McGill. We fell in love and eventually married in 1994. I knew then that she was special, but I had no

idea how special she would turn out to be. If it were not for her I believe I would still be in prison.

We had our first child, our daughter Barâa, in February 1997. She is 10 years old now. In December 1997, we moved to Ottawa from Montreal. I accepted a job with a high tech firm called The MathWorks in Boston in 1999, and my job involved a lot of travel within the United States. In 2001 I decided to come back to Ottawa to start my own consulting company. We had our second child, our son Houd, in February 2002. He is 5 years old now.

This is who I am: a father; a husband; a telecommunications engineer; and an entrepreneur. I have never been charged in the United States, Canada, Syria or Jordan—or any country for that matter—despite the allegations made in the United States that I was a member of al-Qaeda, and despite having been exhaustively investigated. I have never had trouble with the police, and have always been a good citizen. I still cannot believe what has happened to me, and how my life, my reputation, and my career have been completely destroyed.

II. INITIAL STOP

In September 2002, I was with my wife and children and her family in Tunis. My wife, a Canadian citizen, is originally from Tunisia. While there, I got an email from my former employer, The MathWorks, who I was still doing consulting work for, saying that they might need me soon to assess a potential consulting job for one of their customers. I headed back home to prepare for work while my wife and children stayed in Tunisia.

I was using frequent flier miles to travel and the best flight I could get went from Tunis, to Zurich, to New York, to Montreal. So I departed Tunis, spent a night in Zurich, and then departed for Montreal, transiting through New York. My flight arrived in New York at approximately 2:00 p.m. on September 26, 2002. That was when my nightmare began.

I disembarked from the plane and lined up at the immigration counter. When it was my turn, I handed my valid Canadian passport to the immigration officer. When the officer entered my name into the computer, I was pulled aside and taken to another area.

Some time later, officials took my fingerprints and photographs. They told me that this was regular procedure.

Later, the airport police arrived and searched my bags. They also searched my wallet, asked me to boot up my laptop, and copied my Canadian passport. I was getting worried. I asked them what was going on. They would not answer my question. They would not even let me make a phone call.

Then a team, including a member of the FBI and a member of the New York Police Department, told me that they wanted to ask me some questions. They said they would question me and then would let me catch my flight to Montreal. I was scared. I did not know what was going on. No one would answer my questions. I told them I wanted a lawyer. They told me I had no right to a lawyer, because I was not an American citizen.

They interrogated me for nearly five hours. They kept telling me that they would let me go on the next plane if I answered their questions. I had nothing to hide and answered all their questions. I asked for a lawyer again and again. They just ignored me.

During this interrogation, they kept referring to a thick written report. The information that they had about me was so private I thought that it must be from Canada. They asked me where I worked and how much money I made. They swore at me and insulted me. It was *humiliating*. They wanted me to answer every question quickly. I told them everything I knew. But they treated me as if I were lying and accused me of having a selective memory.

They asked me about my travel within the United States. I told them about my work permits and my business there. They asked about information on my computer and whether I was willing to share it. I was. In fact, I welcomed the idea but they never brought the laptop into the room to look at it.

They asked me about different people, a few I know and most I do not. They asked me about Abdullah Almalki, and I told them I worked with his brother, Nazih, at high tech firms in Ottawa, and that the Almalki family had come from Syria about the same time as mine so our families knew of each other. I told them I did not know Mr. Almalki well, but had seen him a few times and I described the times I could remember. I told them I had a casual relationship with him. I told them I had last seen him in October 2001 when we had lunch together. I didn't understand why they were questioning me about Mr. Almalki.

Then they pulled out a copy of my rental application/lease from 1997. They pointed out that Mr. Almalki had signed the application. I had completely forgotten that he had signed it for me when we moved to Ottawa in 1997. When we first moved there, the members of the Almalki family were some of the only people we knew in Ottawa at that time. That is why I had phoned Mr. Almalki's brother, Nazih. He could not come, so he sent his brother Abdullah instead. This was a small detail from five years before that I had forgotten.

But they thought I was hiding this. I told them the truth. I had nothing to hide. I told them everything I knew. I had never had problems in the United States – or any country before – and I could not believe what was happening to me.

After about five hours, at around 9:00 p.m., these men left and I was brought back to the waiting area where I was questioned by a female INS officer. She was behind a screen and typing. She asked many of the same questions but focused on whether I was affiliated with any groups. This interrogation lasted for another three hours. I had to stand during the entire interrogation.

By this point, I had been detained and interrogated for about ten hours. My requests for a phone call and a lawyer were ignored and no one would tell me what was going on.

III. TRANSFER TO AIRPORT FACILITY

Despite the fact that they informed me they were going to let me go, the airport police came and chained my wrists and ankles. They took me in a van to a place where many people

were being held in another building by the airport. I kept asking but they would not tell me what was happening. They said that I would know tomorrow.

At 1:00 a.m. on September 27, 2002, they put me in a room with metal benches in it. I could not sleep at all. There was no bed and the lights were on all night. I was very, very scared, tired and disoriented.

At 9:00 a.m. the next morning, I was questioned again on and off for approximately eight hours. They asked me about what I think about Bin Laden. I told them that I do not agree with Bin Laden's views and think he is crazy. They also asked me about Palestine and Iraq. I told them that I support peace, but think that there must be just peace. They then asked me about my bank accounts, my email addresses, my relatives, the mosques I pray in, about everything. I responded to everything. They asked me to open my palm pilot. I opened it and showed them everything they asked to see.

At around 5:00 p.m., a man from U.S. Immigration arrived and asked me to volunteer to go to Syria. I refused to agree to that. I said I wanted to go home to Canada or be sent back to Switzerland where my flight had originated. I repeated this to them again and again throughout my detention. He told me that I was of "special interest." I asked again for a lawyer and was again refused.

Then they asked me to sign a form - they would not let me read the questions and answers. I was exhausted, confused and disoriented, so I just signed it.

Around that time, they finally brought me a cold meal - this was the first food I had eaten in over 30 hours.

IV. TRANSFER TO METROPOLITAN DETENTION CENTER

It was now the evening of my second day in detention. At about 8:00 p.m. on September 27th, I was again shackled and chained and driven to what I later learned was the Metropolitan Detention Center ("MDC") in Brooklyn, and placed in the maximum security section. They told me not to move or talk in the van. They would not tell me what was happening or where I was going.

At the prison, they strip-searched me. It was humiliating and against my religion to be naked in front of others. They put me in an orange suit and took me to a doctor, where they made me sign forms and gave me a shot. I asked what it was for and they would not tell me. My arm was red for almost two weeks from the shot.

They took me to a cell where I was placed in solitary confinement. I had never seen a prison before in my life. I was terrified. I asked again for a phone call and for a lawyer. They just ignored me.

Scared and tired, I was not able to sleep that night until early in the morning. This is the first time I had slept since leaving Zurich two days earlier. At the MDC, they treated me differently than the other prisoners. For example, they would not give me a toothbrush or

toothpaste, or reading material. I was also frequently videotaped from the time I arrived at MDC.

For five days, my family did not know where I was. Finally, on October 1st, I was allowed to make a phone call to my wife's mother in Canada. In the brief two minutes that I was allowed, I tried to tell her where I was, to explain my fears about being sent to Syria, and that I needed a lawyer.

Around October 2nd, I was given a document that said that I was inadmissible to the United States because I was not a U.S. citizen, was a native of Syria and a citizen of Syria and Canada, and was a member of al-Qaeda.

On October 3rd, Canadian Consul Maureen Girvan visited me and I showed her the document I had been given. I told her clearly that I was scared of being deported to Syria. She told me that that would not happen and that a lawyer was being arranged. I was very upset and scared. I could barely talk.

Around October 3rd or 4th, INS officials brought me a document, saying they had decided to deport me and I had a choice of where to be deported. I designated that I wanted to go to Canada. It asked if I had concerns about going to Canada, and I indicated no.

On Saturday, October 5th, an immigration lawyer, Amal Oummih, came to see me. We could only talk for a short period. She said she would try to help me. She told me not to sign any document unless she was present. She assured me that, according to U.S. law, if I was going to be deported I could choose to go to Canada.

On Sunday, October 6th at about 9:00 p.m., the guards came to my cell and told me that my lawyer was waiting for me. I thought it was a strange time for my lawyer to visit. They took me into a room with seven or eight people in it. My lawyer was not there. I asked where my lawyer was. They told me my lawyer had refused to come and started questioning me. I told them I did not want to proceed without my lawyer.

Nonetheless, they continued to question me. Throughout the interrogation, I asked again and again for a lawyer. They just continued questioning me. They wanted to know why I did not want to go back to Syria. I told them that I would be tortured there. I explained to them that, having left when I was 17, I had not done my military service. I had heard many stories from my family of people being imprisoned for this. It was not hard to imagine what would likely happen there. Like many police state countries, Syria does not let you renounce your citizenship. To them, you remain a citizen and subject to their authority regardless of your wishes.

Also, by this point, it had been alleged that I was a member of al Qaeda. I was afraid that if I were sent to Syria and falsely labeled as a member of al Qaeda, I would be tortured.

They asked me to sign a document and I refused. I told them again they could not send me to Syria as I would be tortured. I asked again for a lawyer. Around 3:00 a.m. on October 7th, after about six hours of questioning, they took me back to my cell.

Around 3:00 or 4:00 in the morning on Tuesday, October 8th, a prison guard woke me up and told me I was leaving. They took me to another room where I was strip-searched again and chained and shackled. Then two officials took me inside a room and read me what they said was a decision by the Immigration Director. They told me that, based on classified information that they could not reveal to me and because I knew a number of men in Canada, including Abdullah Almalki and Ahmad Abou El Maati, they had decided to deport me to Syria.

I said again that I would be tortured there. I was extremely disoriented and emotional. I kept crying but they did not really seem to care. Then the lady just flipped a couple of pages and read a part of the document telling me that they were not the office that deals with the Torture Convention.

V. TRANSFER TO SYRIA

I was driven to an airport in New Jersey and placed on a luxurious, private jet. I found that to be extremely strange. I was the only passenger; there were two pilots, a flight attendant - who was the only woman - and approximately four other people, who were my escorts. I remained chained and shackled.

We flew first to Washington, where we stayed for about an hour. Everyone except the pilot and the flight attendant left the plane. A new team of four people boarded the plane. I heard them talking on the phone saying that Syria was refusing to take me directly, but that Jordan would. I also overheard information that identified them as belonging to the Special Removal Unit.

Then we flew to Maine for refueling. Approximately half an hour later, the plane departed again. Eventually I could tell where the plane was going, because they did not blindfold me and there was a small overhead screen showing the trajectory of the plane on a map. It indicated that the plane's destination was Rome, Italy. We landed in Rome and stayed there for less than an hour, and then flew to Amman, Jordan. I was chained and shackled in the plane nearly the entire trip. The men would even go to the washroom with me. During the last two hours of the flight however, they removed the chains and shackles and allowed me to move freely.

I had a conversation with the head of the team, who told me that his family was originally from Syria and that his last name was Kouri. When I asked whether he spoke Arabic his response was negative. I shared with him my fears of being tortured. I thought that when they put me on the plane they had forgotten to bring my luggage. I mentioned this to Mr. Kouri. Then, before I was taken off the plane in Amman, Mr. Kouri asked me to remove the brown suit that they had given me to wear when I left MDC, and he gave me a T-shirt and a pair of jeans.

The whole time I was on the plane I was thinking about how to avoid being tortured. I then became convinced that I was being sent to Syria exactly for that purpose.

The plane landed in Amman at about 2:00 a.m. on October 9th. They took me out of the plane and we were met by six or seven men. These men, who I saw for no more than 5 seconds, spoke in Arabic only. I was blindfolded, chained, and put in a van. I was forced to bend my

head down in the back seat. I was beaten on the back of my head. Every time I tried to talk, they beat me.

Thirty minutes later we arrived at a building, which seemed to be a detention center but it was very quiet, and I could feel that I was being transported in elevators. I was taken to a cell where my blindfold was removed, and later I was taken to be inspected by a doctor with military clothes. They asked routine questions. I was then blindfolded again and brought to a cell and placed in solitary confinement.

I was kept in Jordan for about ten hours. During this time, I was questioned by an investigator who told me that I had nothing to worry about and that I would go to Syria to do my military service. They took my fingerprints and photograph, blindfolded me, and put me in a van. I asked where I was going, and they told me I was going back to Montreal.

About forty-five minutes later, I was put into a different car. The men in the car started beating me again. They made me keep my head down. It was very uncomfortable, but every time I moved, they beat me again.

Over an hour later we arrived at what I think was the border with Syria. I heard a man say, "He is the guy. We are giving him to you." I was transferred to a different car.

VI. TRANSFER TO SYRIAN PALESTINE BRANCH

Two or three hours later, we arrived and I was taken into a room. This is when I saw photos of the Syrian president, and when I realized I was indeed in Syria. Two guards who were in the room went through my hand luggage and took some chocolates I had bought in Zurich and my watch. When I asked one of the people where I was, he told me I was in the Palestine branch of the Syrian Military Intelligence. It was about 6:00 p.m. on October 9.

Then three men came and took me into a room. I was very scared. They put me on a chair and one of the men started asking me questions. I later learned that this man was a colonel. He asked me about my brothers and why my family had left Syria. I answered all the questions. If I did not answer quickly enough, he would point to a metal chair in the room and he would ask: 'Do you want me to use this?' I did not know then what the chair was for but learned later that it was used to torture people. I was extremely terrified and did not want to be tortured. The interrogation lasted for about four hours. There was no violence on the first day - only threats.

At about 1:00 a.m., guards came to take me to the basement. They opened a door, and I looked in. I could not believe the cell I saw. I asked how long I would be kept in this place. He did not answer, but put me in and closed the door.

The cell was like a grave. It was three feet wide, six feet deep, and seven feet high. It had a metal door, with a small opening in it that did not let in light because there was a piece of metal on the outside for sliding things into the cell. There was a small opening in the ceiling, about one foot by two feet with iron bars. Over that was another ceiling, so only a little light came through this. There were cats and rats up there, and from time to time the cats urinated through the opening into the cell. There were two blankets, two dishes and two bottles. One

bottle was for water and the other one was used for urinating during the night. Nothing else. No light.

I spent ten months and ten days inside that grave.

VII. BEATINGS

The day after I arrived I was taken upstairs. The beating started that day and was very intense for a week and then less intense for another week. They beat me with a shredded electrical cable about 2 inches in diameter. One of the men beating me said that he could not believe the United States would send someone innocent here.

During this period of intense interrogation, I was usually taken to a waiting room from where I could hear other prisoners being tortured and screaming. I would be questioned for a couple of hours, put in a waiting room to hear the other screams and cries, and then brought back to continue the interrogation. One time, I heard them banging a man's head repeatedly on a desk really hard. The women's screams haunt me the most.

My second and third days there were the worst. They used the cable again and hit me everywhere on my body. One of the interrogators asked if I knew what this was. I was crying. I said, 'Yes, I know what it is. It's a cable.' He said, 'Open your right hand. I opened my right hand and he beat me very strongly. He said, 'Open your left hand.' I opened my left hand. He beat me on my left palm. Then he stopped and asked me questions. I said to him, 'I have nothing to hide.' They mostly aimed at my palms, but sometimes missed and hit my wrists. They were sore and red for three weeks. They also struck me on my hips and lower back.

The interrogators constantly threatened me with the metal chair, tire and electric shocks. The tire is used to restrain prisoners while they torture them by beating on the soles of their feet. I was fortunate because they put me in the tire, but only as a threat. I was not beaten while in the tire.

After the interrogators hit me with the cable, they would beat me with their hands – hitting me on the stomach and on the back of my neck and slapping me in the face. My skin turned blue from bruising where they hit me with the cables, but there was no bleeding. At the end of day they told me that tomorrow would be worse. I could not sleep.

On the third day, the interrogation lasted about 18 hours. During these 18 hours, they beat me, insulted me and made me listen to other people screaming. I begged them to stop. They made me wait in the waiting room for one to two hours before resuming their brutal interrogation. While in the waiting room, I heard a lot of people screaming.

They wanted me to say that I went to Afghanistan. This was a surprise to me. I don't remember being asked about this in the United States. They kept beating me so I confessed falsely and told them I had been to Afghanistan. I was ready to confess to anything if it would stop the torture. They wanted me to say that I went to a training camp and read a list of names of training camps. I said one of them but did not even know where that camp was. I was so scared that I urinated on myself twice during the first days of my interrogation.

After the third day the beating was less severe. On the fourth day, the questions were about my relationship with other people, including Abdullah Almalki. They kept saying that I was a liar to everything that I answered. They continued to punch and hit me.

At the end of each day they would always say: "Tomorrow will be harder for you." So each night I could not sleep. I did not sleep for the first four days at all. I slept no more than two hours a day for about two months after that.

On or around October 17th, the beatings subsided. Their next tactic was to take me into a room, blindfolded, and have people talk about me. I could hear them saying things like: "he knows lots of people who are terrorists;" "we will get their numbers;" "he is a liar," "he has been out of the country for a long time." Then they would say: "let us be frank;" "let us be friends;" "tell us the truth." They would come near me and one of them would slap me in the face. They constantly used these mind games as an interrogation technique.

VIII. INITIAL INTERROGATION ENDS

The initial interrogation and beatings ended around October 20th. On October 23rd, I was taken from my cell and my beard was shaved. I was taken to another building, and there was the colonel in the hallway with some other men who seemed very nervous and agitated.

I did not know what was happening and they would not tell me. They then told me that they did not hurt me even though they beat me. I was told not to say anything about the beatings. Then I was taken into a room for a meeting with the Canadian Consul. The colonel was there, and three other Syrian officials including an interpreter. I cried a lot at that meeting. I could not say anything about the torture. I thought if I did, I would not get any more visits or I might be beaten again. The meeting lasted about ten minutes.

I received a second visit from the Canadian Consul on October 29th. Again, I had Syrian officials and an interrogator with me throughout the meeting.

About a month after I arrived they called me upstairs to sign and place my thumbprint on a document about seven pages long. I was not allowed to read it, but was forced to put my thumb print and signature on the bottom of each page. From what I remember it was handwritten. I was afraid that if I did not sign it the beatings would resume.

Another document was about three pages long, with questions like "Who are your friends?" and "How long have you been out of the country?" The last question was followed by empty lines. They answered the questions with their own handwriting except for the last one where I was forced to write that I had been to Afghanistan. I would have said or signed anything to avoid further beatings.

I received a third visit from the Canadian Consul on November 12th. Again I had Syrian officials and an interpreter with me throughout the meeting. During this meeting I asked for money so I could purchase clothing and supplies. After the meeting, they were angry that I made that request and screamed at me.

The consular visits were my lifeline, but I also found them very frustrating. These meetings were always controlled by the Syrians. There was always someone who spoke English present. There were seven consular visits in total, most of which I describe here, and one visit from members of parliament. After the visits I would bang my head and my fist on the wall in frustration. I needed the visits but I could not say anything during them.

I got new clothes after the December 10th consular visit. Until then, I had been wearing the same clothes since when I was on the jet from the United States.

I had a very hard time in December. On three different occasions, memories crowded my mind such that I thought I was going to lose control. I just screamed and screamed. I could not breathe well after these occasions, and felt very dizzy. One time when this happened a guard took me to wash my face.

The only times I left my grave-like cell were for interrogations and for the consular visits I received from the Canadian Embassy. Daily life in that place was hell. I was allowed to bathe once a week with cold water. I was not allowed to exercise. I must have lost about 40 pounds while I was at the Palestine branch. In early April 2003, I was taken from my cell and placed in an outdoor courtyard. This was the first time I had seen sunlight in six months!

Around April 23, 2003, I was taken from my cell and had my beard shaved. I was told to comb my hair and wash my face well. I was taken outside, put in a car, and driven to another building. I was taken into the building and given tea. The Syrian officials seemed very agitated and nervous. I was taken into a room to meet with the Canadian Ambassador to Syria and two Canadian Members of Parliament, Marlene Catterall and Sarkis Assadourian. I was accompanied by my interrogator and other Syrian officials. After I was taken from the room, I overheard officials talking about media coverage of my case.

In June 2003, I was taken outside into the sunshine twice. I asked to meet with an investigator. Eventually, when my request was granted, I asked the Syrian official to have me moved to a cell fit for human beings. He responded by saying that they were very busy because of the situation in Iraq and ordered me back to my cell.

The next month, I asked again for a meeting with an investigator and this request was eventually granted. I told him that I had nothing to do with al Qaeda. The Syrian official asked me why I was accused of this, why they sent a delegation, and why these people hated me so much. I didn't have an answer. At about this point in my imprisonment, I noticed that my skin was turning yellow and felt that I was on the brink of a nervous breakdown.

I received my seventh visit from the Canadian Consul on August 14, 2003. Once again, I was accompanied by Syrian officials and my interrogator. The head of Syrian military intelligence was also there. This time however, I decided to speak out. I had nothing to lose and decided that I would rather be tortured physically than remain in the "grave" and endure the ongoing psychological torture. My interrogator warned me, as usual, to "do like every time, do like every time." However, when asked about anything happening to me recently, I burst out yelling. I told the Canadian Consul, in English, in front of the Syrian officials, about my cell and the conditions that I was living in. The Consul asked if I had been tortured, and I replied "yes of

course, especially at the beginning.” After the meeting, I could see that my interrogator was very angry. From this day until I was released, I lived in fear of being physically tortured again.

On August 19, 2003, I was taken upstairs to see the investigator. I was given a paper and asked to write down what he dictated to me. If I protested, he would just kick me in the arm. I was threatened with the tire. I was forced to write that I went to a training camp in Afghanistan. They made me sign and put my thumb print on the last page.

IX. TRANSFER TO INVESTIGATION BRANCH

That same day, I was taken to another prison, which I learned later was the Investigation Branch. I was placed there in a 12 feet by 20 feet collective cell. There were about 50 people packed into this space. The door could barely be opened because it was so full of people. I spent the night there, where it was very hot. The other prisoners asked me who I was and where I had been. They were shocked to hear how long I had been in the grave.

X. TRANSFER TO SEDNAYA PRISON

The next day, I was blindfolded and driven to the Sednaya prison, which was like heaven for me. I was in a cell with other people. I could move around and talk with other prisoners. I could buy food to eat and gained some of my lost weight.

On or around September 19 or 20, I heard the other prisoners saying that another Canadian had arrived there. I looked up and saw a man, but I did not recognize him. His head was shaved, and he was very, very thin and pale. He was very weak. When I looked closer, I recognized him. It was Abdullah Almalki. He told me he had also been at the Palestine Branch, and that he had also been in a grave like I had been except he had been in it longer.

He told me he had been severely tortured with the tire and the cable. He was also hanged upside down. He had been tortured even worse than me.

XI. TRANSFER TO PALESTINE BRANCH

On September 28th, a guard called me a few times. I took my time since I thought that he would go away and come back and call me again as this was what usually happened. However, when I eventually approached the guard, he slapped me so hard that I felt dizzy. The guard then hit me on the back of my head.

I was taken out, blindfolded and put in a car. A half an hour later, I arrived at the investigations branch where I had been held before being transferred to Sednaya prison. Then, I was blindfolded again and this time chained and put in what felt like a bus. I was transferred back to the Palestine branch. They would not tell me what was happening. I was extremely scared that I was going back to that underground cell. Instead, I was put in one of the waiting rooms on the same floor where they interrogate and torture people. I could again hear the prisoners being tortured and screaming.

The same day I was called into an office to answer some questions. Those questions mostly related to what I would say if I returned to Canada. They did not tell me I would be released.

I was put back in the waiting room and kept there for one week, listening to all the prisoners screaming and being tortured. That week was just beyond human imagination - to hear people being tortured. The only description I can give you is that my heart was just going to go out of my chest.

XII. TRANSFER TO COURT

On Sunday, October 5, 2003, chains were put on my arms and wrists. I was taken out into a car and driven to the Supreme State Security Court. I was put in a room with a prosecutor. I asked for a lawyer and he said that I did not need one. I asked what was going on and he read from my confession. I tried to argue I was beaten and did not go to Afghanistan, but he did not listen. The prosecutor told me to stamp my finger print and sign a document he would not let me see. Then he told me that I would be released. I was never charged with an offense.

XIII. TRANSFER TO PALESTINE BRANCH

After the visit to court, I was taken back to the Palestine branch where I met the head of Syrian Military Intelligence and officials from the Canadian Embassy. I was put in an embassy car, taken to the Canadian embassy, and finally - after nearly a year of wrongful imprisonment and torture - I was released.

XIV. CONCLUSION

These past few years have been a nightmare for me. Since my return to Canada, I have lived in constant psychological pain. This pain manifests in various forms. I feel emotionally distant from my family, including my wife and children. I am still fragile. I have lost confidence in myself and am easily overwhelmed. I have lost the ability to multi-task, which is essential for my engineering profession. I can no longer concentrate for more than a short time. I have nightmares and recurring flashbacks, and constantly fear flying and being kidnapped again. My body is slowly healing, but the cognitive and psychological scars are still with me.

I am not the same person that I was, and I think that I never will be. Things that I once took for granted are now difficult for me. However, my eyes have opened in a way that they never were before. I am no longer just a simple telecommunications engineer. I now understand how fragile our human rights and freedoms are, and how easily they can be taken from us by the very same governments and institutions that have sworn to protect us. I also know that the only way I will ever be able to move on in my life and have a future is if I can find out why this happened to me, and help prevent it from happening to others.

In closing, I should like to thank you again for inviting me to share my experiences with you. I also want to again thank all of the people who worked for my release, especially my wife Monia, and human rights groups, all the people who wrote letters, and all of the journalists who covered my story. I also thank all the members of various governments that stood up for justice.

Finally, I would like to thank those members of the U.S. Congress who have asked for answers to the question of why I was rendered to Syria to be tortured.

I wish for no one to suffer the pain that I have suffered. I can only hope that, in sharing my experiences, the short- and long-term implications of torturing a human being will be better understood and that all governments will seek to stop torture.

Thank you for your time.

Mr. DELAHUNT. Thank you, Mr. Arar, for that very powerful testimony.

Mr. Roach, would you please proceed?

**STATEMENT OF KENT ROACH, ESQ., PRICHARD-WILSON
CHAIR, FACULTY OF LAW, UNIVERSITY OF TORONTO**

Mr. ROACH. I would like to extend my thanks to both committees for the invitation.

As you heard, I was a member of the research advisory committee for Justice O'Connor's report. Justice O'Connor's policy is to let his report speak for itself.

There are three volumes in the report. It is available on the Internet, and I do commend it to your attention.

I would like to say a little bit about what a commission of inquiry is in Canada. It is a very strong instrument of investigation and accountability. It enjoys de facto independence from the executive and legislative branch.

Justice O'Connor sits on the Ontario Court of Appeal, a sitting judge.

During the 2½ years of the inquiry's work, 21,000 documents were subpoenaed, 83 witnesses were examined and cross-examined, and 75 days of in-camera testimonies and 45 days of public hearing.

Justice O'Connor asked both the Governments of Syria and the United States to participate in the inquiry process, but they declined.

With respect to the main findings of Justice O'Connor, many of these have already been mentioned in the opening statements.

Justice O'Connor found that there was nothing in all of the evidence that he looked at to indicate that Mr. Arar had committed any offense or any activities that constituted a threat to the security of Canada. He underlined that this should dispel any taint or suspicion that surrounds Mr. Arar.

Justice O'Connor did say that Mr. Arar was a person of interest, but not a suspect in an RCMP terrorism investigation. Justice O'Connor found that the RCMP passed on inaccurate information to the United States that described not only Mr. Arar, but his wife, Dr. Monia Mazigh, as, "Islamic extremist individuals suspected of being linked to al-Qaeda."

Justice O'Connor concluded that there was no support for those damning and inflammatory conclusions.

Justice O'Connor found that there was nothing in the possession of Canadian officials from the United States, and there was much information sharing, that indicated any link between Mr. Arar and al-Qaeda. Justice O'Connor found that Mr. Arar was not given prompt consular assistance and that there was a violation of the Vienna Convention on consular assistance because of the delay in providing access to a Canadian consular official while Mr. Arar was detained in New York.

Justice O'Connor found that Canadian officials, on October 5, 2002, informed the FBI that Mr. Arar would not be charged and would be admitted back into Canada and that there were no links, and it was some time after that that the decision to remove Mr. Arar to Syria was made.

Justice O'Connor found that Mr. Arar was held incommunicado for his first 2 weeks in Syria, tortured, beaten with a black cable and held in the grave-like cell that Mr. Arar has just described to you.

In conclusion, I would like to talk about recommendations that Justice O'Connor made. He recognized the importance of information sharing between Canada and the United States, but stressed that the information must be accurate, must be precise and must be reliable.

He identified the danger of guilt by association in national security investigations. He identified the impossible position that a person is put in when they have to defend themselves against secret information that they do not know.

He criticized the Canadian Government for making national security confidentiality claims that were unwarranted and urged all governments to avoid the temptation to claim state secrets in order to protect a government from embarrassment.

And finally, he concluded that torture for any purpose is so fundamental a violation of human dignity that it can never be legally justified, whether a person is a terror suspect or, as Mr. Arar, was not a terrorist suspect, and, finally, that torture produced unreliable evidence. Any statements obtained under torture would be unreliable.

So it is my hope that both the terrible experience of Mr. Arar and the thorough investigation and report of Justice O'Connor will be of assistance to your two committees as you undertake this very important work.

Thank you.

[The prepared statement of Mr. Roach follows:]

PREPARED STATEMENT OF KENT ROACH, ESQ., PRICHARD-WILSON CHAIR, FACULTY OF LAW, UNIVERSITY OF TORONTO

I am a Professor of Law at the University of Toronto. I teach and research in the area of anti-terrorism law and policy. From 2004 to 2006, I served on a five person research advisory committee appointed by Justice Dennis O'Connor to assist him in his work on the Commission of Inquiry into the Activities of Canadian Officials in Relation to Maher Arar. It is Justice O'Connor's policy to let his report speak for itself. To that end, I will quote at times from passages in his reports. I will also provide my own commentary.

THE INQUIRY PROCESS

In February, 2004, the Canadian government appointed Justice O'Connor, a leading justice on the Ontario Court of Appeal, to head a public inquiry into the actions of Canadian officials in Relation to Maher Arar. The inquiry was asked to examine the actions of Canadian officials with respect to Mr. Arar's detention in the United States, his deportation to Syria via Jordan, his imprisonment in Syria and his eventual return to Canada. A public inquiry in Canada is a strong instrument for investigation and accountability. It has full power to subpoena relevant documents and enjoys de facto independence from the executive and legislative branches of government. The Canadian inquiry obviously did not have jurisdiction to assess the actions of American officials. It invited the governments of both the United States and Syria to participate in its process, but they both declined. This placed limitations on the ability of the Canadian inquiry to discover the truth about the actions of American officials in relation to Mr. Arar.

The inquiry conducted a thorough investigation of the actions of Canadian officials. It examined more than 21,500 government documents with 6,500 government documents entered as exhibits. The staff of the Commission, who were cleared to top-secret, saw the classified versions of all documents. The Commission heard from 83 witnesses over 75 days of in camera testimony and 45 days of public testimony.

In camera hearings were held because of the inquiry's mandate not to release information that would harm national security, national defence or international relations. Mr. Arar and his counsel were not present during the in camera hearings. Commission counsel were, however, instructed by Justice O'Connor to cross-examine various governmental officials. Mr. Arar was not asked to and did not testify at the hearings because of concerns that it would be unfair for him to testify without disclosure of all the relevant information. Justice O'Connor, however, concluded that he could discharge his mandate without Mr. Arar testifying.

There were disputes between the inquiry and the government of Canada over whether information could be made public without harming national security. Justice O'Connor was critical of the government's approach to national security confidentiality (NSC) claims. He commented that:

I am raising the issue of the Government's overly broad NSC claims in the hope that the experience in this inquiry may provide some guidance for other proceedings. . . . Although government agencies may be tempted to make NSC claims to shield certain information from public scrutiny and avoid potential embarrassment, that temptation should always be resisted.¹

The final dispute between the commission and the government over what information could be made public was resolved earlier this year by a court decision that authorized the release of the majority of disputed passages.²

Rendition and torture are done in secret. The experience of the Canadian commission suggests that governments may be tempted to make overbroad claims of secrecy to protect themselves from embarrassment and to hinder accountability processes. It also suggests, however, that much information about even contemporary national security activities can be made public without harming national security. In the end, the inquiry produced a public three volume report dealing with the circumstances of Mr. Arar's case. This report received much public attention in Canada and abroad. Finally, claims of secrecy can also put people in Mr. Arar's position in an impossible position in which they are unable to know what if any evidence is being used against them.

SOME FINDINGS OF THE COMMISSION OF INQUIRY

Justice O'Connor concluded: "I have heard evidence concerning all of the information collected about Mr. Arar in Canadian investigations, and there is nothing to indicate that Mr. Arar committed an offence or that his activities constitute a threat to the security of Canada."³ He stated that this conclusion "should remove any taint or suspicion about Mr. Arar that has resulted from the publicity surrounding his case."⁴

Justice O'Connor found that Mr. Arar was tortured in Syria by being repeatedly beaten by a black cable and threats of other torture. He was imprisoned in a cell seven feet high, six feet long and three feet wide for ten months and ten days.⁵ He also found that information obtained from Syria's from the interrogation of Mr. Arar was distributed within the Canadian government without adequate caution about its reliability as a product of torture and despite the fact that Canadian officials "should have proceeded on the assumption"⁶ from the time of their first consular visit with Mr. Arar in Syria on October 23, 2002 that he had been tortured during the initial stages of his imprisonment and his statements were the product of torture.

How did Mr. Arar find himself in a Syrian jail? The Commission found that Mr. Arar first came to the attention of the RCMP on October 12, 2001 when he had a three hour meeting with Mr. Abdullah Almalki who was the target of an RCMP terrorism investigation. The RCMP subsequently requested that both Canadian and American customs keep both Mr. Arar and his wife Dr. Monia Mazigh on lookouts, describing them as "Islamic Extremist individuals suspected of being linked to the

¹ Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar *Report of the Events Relating to Maher Arar Analysis and Recommendations* (Ottawa: Public Works and Government Services) at pp 304.

² *Canada v. Commission of Inquiry into the Actions of Canada Officials in Relation to Maher Arar* 2007 FC 766 at para 91.

³ Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar *Report of the Events Relating to Maher Arar Analysis and Recommendations* (Ottawa: Public Works and Government Services) at 9.

⁴ *Ibid* at 59.

⁵ *Ibid* at 56-57.

⁶ *Ibid* at 34.

Al Qaeda terrorist movement.”⁷ Justice O’Connor concluded that “The RCMP had no basis for this description, which had serious consequences for Mr. Arar in light of American attitudes and practices at the time.”⁸

The report details the extensive exchange of information between the RCMP and the FBI. For example, the RCMP gave the FBI three compact discs of information without caveats being imposed on the subsequent use or distribution of the information or the information being vetted by Canadian officials for relevance or personal information. This information included the above noted letter describing Mr. Arar and Dr. Mazigh as “Islamic Extremist individuals suspected of being linked to the Al Qaeda terrorist movement”.⁹ Justice O’Connor also found that other information given by the RCMP to American officials about Mr. Arar was inaccurate, including statements that Mr. Arar had refused to an interview request from the RCMP and had left Canada suddenly after the request. Justice O’Connor concluded that the cumulative effect of these inaccuracies “painted an incorrect and potentially inflammatory picture”¹⁰ of Mr. Arar.

Because of the lack of evidence from American officials, it was not possible for Justice O’Connor to conclude whether American officials had information about Mr. Arar that the Canadian officials did not have.¹¹ The CIA and FBI did not share with Canadian officials any information that linked Mr. Arar to al Qaeda despite extensive information sharing.¹² Justice O’Connor concluded that it was “very likely”¹³ that American officials relied on information provided by the RCMP about Mr. Arar in their decision to detain and remove him to Syria, but he could not say conclusively what information was relied upon. He could not exclude the possibility that American officials relied upon inaccurate and unfair information that Canadian officials gave them.

The Commission was able to examine the unclassified INS decision of October 7, 2002 that concluded that Mr. Arar was a member of al Qaeda and that removal to Syria would be consistent with Article 3 of the UN Convention Against Torture.¹⁴ The Commission heard evidence that such expedited removal orders on security grounds would have to be certified by the US Attorney General and that the Attorney’s General decision was not reviewable by an immigration judge.¹⁵ The Commission also saw notes taken by Canadian officials of a conversation between Secretary of State Colin Powell and Minister of Foreign Affairs Bill Graham. The notes stated that Mr. Powell indicated that “the Arar affair was triggered by enquiries by Canadian sources and that Arar would not have been on the US radar screen had he not been the subject of attention by Canadian agencies.”¹⁶

Mr. Arar was detained at a New York City airport on September 26, 2002. He was bound for Montreal on a trip that had started for him in Tunisia. The FBI informed the RCMP that Mr. Arar would be detained and deported from the United States. The RCMP sent questions to the FBI for Mr. Arar to answer. These questions contained some inaccurate information about Mr. Arar including false suggestions that Mr. Arar had refused to be interviewed by the RCMP and left Canada shortly thereafter. On October 3, 2002, the CIA faxed questions to the RCMP about Mr. Arar. These questions suggested that the CIA considered Mr. Arar to be a member of Al Qaeda.¹⁷ The RCMP’s reply “made it clear that Project A–O Canada had yet to establish definitive ties between Mr. Arar and al-Qaeda.”¹⁸ The RCMP “considered Mr. Arar to be, at best, a person of interest that the RCMP wished to interview as a witness. The RCMP did not have evidence to support a search warrant or a wiretap, let alone evidence needed to lay criminal charges.”¹⁹

⁷ Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar *Factual Background* Vol 1 (2006) at 62.

⁸ Ibid at 62.

⁹ Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar *Report of the Events Relating to Maher Arar Analysis and Recommendations* (Ottawa: Public Works and Government Services) at 13.

¹⁰ Ibid at 28.

¹¹ Ibid at 116.

¹² Ibid at 160 (addendum)

¹³ Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar *Report of the Events Relating to Maher Arar Analysis and Recommendations* (Ottawa: Public Works and Government Services) at 14.

¹⁴ Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar *Factual Background* Vol 1 (2006) at 62.

¹⁵ Ibid at 206–207.

¹⁶ Ibid at 484.

¹⁷ Ibid at 157 as supplemented by addendum

¹⁸ Ibid at 160.

¹⁹ Ibid at 113.

A Canadian consular official was shown an immigration document by Mr Arar during a visit on October 3 that alleged that he was a member of Al Qaeda.²⁰ The same Canadian consular official assured Mr. Arar's wife on October 8, 2002 that he would not be removed to Syria "since the American authorities knew he was a Canadian citizen traveling on a Canadian passport."²¹ The Commission heard evidence relating the removal of Mr. Arar to post 9/11 American practices of rendition, but also stated that the use of expedited removal under American immigration law and Mr. Arar's Canadian citizenship were "unique features"²². The subsequent Monterrey Protocol requires the United States to advise and consult the Canadian Department of Foreign Affairs if they plan to remove a Canadian citizen to a country other than Canada.²³ The Protocol is not a treaty and it does not provide that Canadian citizens will always be removed to Canada, a particular concern for the more than half million of Canadians with dual citizenship.

On October 5, a RCMP officer indicated in a conversation with a FBI official that Mr. Arar would not be denied entry or be charged criminally if he was removed to Canada. This officer testified that he did not suspect that rendition to Syria was an option and indeed was not familiar with the term at that time.²⁴ Nevertheless one of the reasons why the RCMP did not go to New York to interview Mr. Arar was a concern about being perceived that they had anything to do with his removal to Syria.²⁵

An overriding theme in Justice O'Connor's report is the importance of the accuracy of information that is produced and exchanged in investigations. He commented:

Inaccurate information can have grossly unfair consequences for individuals, and the more often it is repeated, the more credibility it seems to assume. Inaccurate information is particularly dangerous with respect to terrorism investigations in the post 9/11 environment. Officials and the public are understandably concerned about the threats of terrorism. However, it is essential that those responsible for collecting, recording and sharing information be aware of the potentially devastating consequences of not getting it right.²⁶

Justice O'Connor also considered evidence by a leading researcher on false confessions and expressed concerns about the reliability and accuracy of statements that are a product of torture or other abuses.²⁷

RECOMMENDATIONS MADE BY THE INQUIRY

Justice O'Connor made 23 recommendations.²⁸ He recommended that the RCMP should respect its mandate as a police force and the distinct mandate of CSIS with respect to the collection and analysis of intelligence. Many of the failures of Canadian officials in relation to Mr. Arar and his wife revolve around a misuse of intelligence without adequate attention to concerns about its reliability and accuracy and about the need for restrictions on the use of intelligence for law enforcement purposes including the immigration proceedings that resulted in Mr. Arar being removed from the United States and sent to Syria.

Justice O'Connor found that the RCMP investigators who passed on inaccurate information to American officials had "a lack of expertise and training in national security investigations"²⁹ including in dealing with foreign agencies and specifically with the CIA. He recommended that the RCMP receive more social context training especially with respect to Muslim and Arab communities and that they have clear policies prohibiting racial, ethnic or religious profiling.

Justice O'Connor recognized the importance of information sharing, but stressed that the information shared be relevant, accurate and reliable and consistent with relevant privacy laws. He found that the RCMP did not observe the critical distinction between suspects and persons of interest. He also noted that "the danger of guilt by association is particularly great in national security investigations, as the

²⁰ Ibid at 190.

²¹ Ibid at 201.

²² Ibid at 525.

²³ Ibid at 528.

²⁴ Ibid at 169.

²⁵ Ibid at 175-176.

²⁶ Ibid at 61-62.

²⁷ Ibid at 193.

²⁸ He also made additional recommendations in a second report for enhanced review of the national security activities of the RCMP and other agencies with which the Force interacts including enhanced and self-initiated review of information sharing practices.

²⁹ Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar *Analysis and Recommendations* (2006) at 323.

police often have a legitimate interest in collecting information about anyone associating with a suspect.³⁰ He went on to stress that the identification of someone as an “Islamic extremist” or “jihadist” “can open the door to a slipshod and casual process in which guilt is assigned by association. Such emotive labels can blur the distinction between a suspect and a person of interest . . . Labels, even inaccurate ones, have a way of sticking.”³¹

Justice O’Connor stressed the importance of placing caveats on information shared with other agencies to restrict the subsequent use of such information. Caveats are not necessarily an absolute barrier to the sharing of information, but require the originating agency to consent to subsequent use and distribution of information. He recommended that information should not be supplied to a foreign country where there is a credible risk that it will cause or contribute to torture.

Justice O’Connor recommended that the government of Canada should register a formal objection with the government of the United States and Syria over Mr. Arar’s treatment. He concluded that “the American authorities who handled Mr. Arar’s case treated Mr. Arar in a most regrettable manner.”³² The initial detention of Mr. Arar in New York for four days without contact from Canadian officials or a lawyer or his family violated the Vienna Convention on Consular Relations.³³ He also found that American officials likely did not respect caveats placed on information especially with regard to its use of information in the immigration proceedings. He recommended that Canada clarify the inaccuracies in the information that was shared with American officials.

He also recommended that Canada object to Syria for its conduct in torturing a Canadian citizen and holding him in degrading conditions and stressed that torture “for, any purpose, is so fundamental a violation of human dignity that it can never be legally justified.”³⁴ Torture, even with respect to a person who, unlike Mr. Arar, is a terrorist suspect or a threat to national security, cannot be legally justified. In addition, the information that is produced from torture is of suspect reliability.

Mr. DELAHUNT. Thank you, Mr. Roach.

I will now yield my time to the gentleman from Arizona, Mr. Flake, and then we will go to the ranking member of the subcommittee, Mr. Rohrabacher, and then I will go to Mr. Nadler.

Mr. Flake?

Mr. FLAKE. I thank the chairman for yielding me his time. I really appreciate it, having to catch a flight here soon.

I have been troubled by this practice for a while and certainly this case, the highest profile case, and I have mentioned to the chairman on a number of occasions that I would be glad to work on legislation in this regard. I know there is one piece of legislation out there, but we definitely need to address this practice.

I would just like to ask, Mr. Arar, with regard to—I know you have filed suit and there has been some contact there, but what has been the response? What have you gotten out of U.S. officials? What has officially been said about your case by U.S. officials?

Mr. ARAR. I think the government so far, in courts, has taken a very strong position. They have been fighting my case not to proceed.

We appealed the decision and the oral argument will be heard November 9, this coming month.

Mr. FLAKE. Before going to court, was there any communication or any dialogue or any response from the U.S.?

Mr. ARAR. No.

Mr. FLAKE. And no apology.

Mr. ARAR. No apology.

Mr. FLAKE. During your time in Syria—

³⁰ Ibid at 336.

³¹ Ibid at 337.

³² Ibid at 361.

³³ Ibid at 361.

³⁴ Ibid at 51.

Mr. ARAR. No explanation, no explanation whatsoever. Even our Government has asked the U.S. to come clean about what happened and the most fundamental question that has not been answered yet is why the United States Government decided to send me to Syria and not to Canada.

Mr. FLAKE. When you were in Syria—go ahead. I am sorry.

Mr. ARAR. Today, the Canadian Government, according to the findings, has not objected to me coming back to Canada.

Mr. FLAKE. When you were in Syria, you mentioned you met with the Canadian consul seven times there. Was there any attempt made to contact United States officials by the Canadians or any involvement at that time during your incarceration?

What was your understanding in terms of U.S. involvement? Had they washed their hands of it by then?

Mr. ARAR. I think they washed their hands of it by then, yes.

Mr. FLAKE. What, in your view, what does this do to U.S. credibility abroad to have this practice or see it play out in your case? You have been home now for a while and have been able to view this, I guess, or how the world views it.

What are your thoughts there?

Mr. ARAR. Well, I will tell you about my own experience. I decided to go live in the States for a while, because I wanted to learn the business culture so that I could start my company later on, and I never made the distinction between Canada as a society and the United States, both civilized nations, both offering and affording their people due process and respect for human rights.

That is why, when I was arrested and sent to Syria against my will, it really shocked me completely. I couldn't believe what was happening and, definitely, after I was released, I was taken to a better facility before I was released.

I had spoken to other prison mates about the situation and I could tell you, many people were surprised to find out that the American Government would do such a thing. For them, how could they believe that now the U.S. is going to help them establish democracy?

That was very, very clear in terms of credibility. The U.S. has no more credibility now, at least to some of the discussions I had.

Mr. FLAKE. Well, thank you. My time is about out.

I just want to offer my own apology to you for your experience, and I hope that we can use the experience that you have had to help change the practice.

I yield back.

Mr. ARAR. Thank you very much.

Mr. DELAHUNT. I now yield to the ranking member of the committee, Mr. Rohrabacher of California.

Mr. ROHRABACHER. Thank you very much, Mr. Chairman.

Mr. Arar, what date was it when you originally were taken into custody at JFK? Do you remember what date that was?

Mr. ARAR. September 26, 2002.

Mr. ROHRABACHER. September 26, all right. It just dawned on me earlier, when we were looking at this, that September—this is 1 year later, after 9/11.

Do you think that what you went through reflects the values of American and Canadian people or do you accept the fact that this

was a mistake? The Canadians have already apologized and a lot of Americans, but our Government has yet to apologize.

But do you accept that as a reflection that we, as a people, do not really go along with the type of treatment that you went through for someone who is an innocent person and someone who is not engaged in terrorism?

Mr. ARAR. Well, I can tell you, I lived in the States for almost 2 years, in Massachusetts, and the people I worked with, my former colleagues, they are very nice people. They had the same values that I had as a Canadian.

But even them, they were shocked after they learned that I was sent to Syria. They started sending letters to Senators and Congresspeople.

What is troubling about what happened to me, I would have believed this was an innocent mistake if this was not happening to others. There seems to be a pattern where other—the number we heard, hundreds of people are being sent to countries where they are tortured, and this is, again, regardless whether those people are true terrorists or not.

To send people to torture under any circumstances is wrong. We now know that most of the information the Americans had is inaccurate or false, but even if all this information was true, it does not justify sending me to Syria. I should have been sent back to Canada.

Mr. ROHRABACHER. I think that is a central—

Mr. ARAR. And what is troubling, even if we assume this was an innocent mistake, a civilized country like the United States, they should take action to try to remedy the situation. They should not take the position that they have been taking in courts to try to dismiss my case and using state secrets claims.

I call—the abuse—it is still ongoing, because they have not allowed me to pursue justice in courts. Normally, when any person is wronged, the best place to go is to courts. But, unfortunately, so far, I have not been able to establish trust in the system because of this.

So not only I was sent against my will then, but I am not being given the chance to clear my name in the States and to try to obtain justice.

Mr. ROHRABACHER. Many of us believe that we are in a state of war in the United States. I mean, we have, after all, suffered the reality of what happened perhaps just 1 year before you were taken into custody, where 3,000 of our citizens were slaughtered right in front of us and, by the way, those terrorists that slaughtered those 3,000 Americans, their intention was to slaughter 50,000 to 100,000 people, not 3,000.

It is just that they got the timing wrong in terms of when those planes landed in those buildings. And that does—when you are at war with people who are willing to slaughter those numbers of people, that does affect the way you do business.

And when you are trying to combat that type of terrorism, innocent people get hurt. You were one of those innocent people and the difference, I think, is not the difference between a free society and, let us say, an honorable society, it is not whether they have committed themselves to getting those terrorists, but what they do

when they make a mistake and whether they acknowledge that mistake.

And I would have to suggest to you that the primary injustice that has been done to you is that our country made a mistake and is not willing to own up to it now, not that after less than a year and 1 month after 9/11, that we made a serious error when trying to track down people who were connected to al-Qaeda, which was the terrorist network that had just slaughtered our people.

Now, you are a father, you have children.

Mr. ARAR. Yes.

Mr. ROHRABACHER. How many children do you have?

Mr. ARAR. Yes. I have two, a daughter and a son.

Mr. ROHRABACHER. And how old are they?

Mr. ARAR. My daughter is 10 years old and my son is 5 years old.

Mr. ROHRABACHER. I have three children and they are all—my life was blessed with triplets 3½ years ago, one boy and two girls. And I would hope that whatever our Government does, that your children are safe and my children are safe.

And I would hope that, number one, we are—I don't believe that we go out and our people who were involved in the rendition program went out and just, "Oh, we are going to go out and get somebody who is an ethnic Arab or is a Muslim and we are just going to use this person as an example as some sort of punishment against other Arabs who may have committed violent crimes against us."

I don't believe that is what it was. I think they made a mistake. They did not do a professional job. The Canadians who provided them the information about your case did not do their professional job, and we should own up to that.

But to the degree that we continue a program that will make sure that a terrorist doesn't explode a bomb in the city where your children are located or my children are located, I think it is important that we understand that that is the stake.

And I sympathize with your family, because your children just went through, I know, a horrendous situation where you now have—and I can understand the psychological scars that you bear, and I am sorry about that, but I want to make sure that we all know that the safety of America's children and families will not be furthered for us to step away from responsibilities of conducting operations, even knowing mistakes will be made within those operations.

So with that said, Mr. Chairman, I don't know what more I can say on this. I think that he has made his case.

By the way, the man that you were accused of, Mr. Almalki, is that his name?

Mr. ARAR. Yes, Mr. Almalki.

Mr. ROHRABACHER. Is he part of the al-Qaeda terrorist network or is he just someone that, again, was misidentified?

Mr. ARAR. Let's establish facts here. Mr. Almalki is back in Canada, sound and safe. He has not been charged with any crime in any country. In fact, all the people they tried to associate me with, they have not been charged with any crime in any country.

So this is a fact and this is despite 5 or 6 years of intensive international investigation.

So he is back in Canada. He is not charged with any crime. And I can tell you definitely that my relationship with him was overstated.

Mr. ROHRABACHER. And you don't believe that he is part of a terrorist network then. You think that is a mistaken——

Mr. ARAR. I can tell you that I do not know anyone who belongs to any terrorist group, whether it is al-Qaeda or other terrorist groups.

Mr. ROHRABACHER. Well, I accept that, and I am sorry that you weren't able to come here today. Again, that reflects an arrogance that I don't like to see in our Government, the fact that you are kept on the list. So you can't even come here and explain your story and that doesn't reflect a good attitude.

To the degree that I may disagree with you about what degrees and how far we should go in a rendition program or any other effort to make sure that terrorist don't blow up buildings in the United States or blow up a nuclear weapon or something like that or a chemical or biological weapon, to the degree that we are trying to do that, we may disagree as to how far we can carry that fight, but when we make a mistake in any endeavor, we should admit it, and our Government doesn't seem to have admitted that now and not letting you here adds insult to injury.

I think you should have been permitted to be taken off that list, given compensation, be permitted to come here and tell your story. In the meantime, those of us who do believe there is a fundamental difference between the terrorists and democratic peoples, that we will try to make it a better world, but sometimes, you know, when you are at war and mistakes happen, people die.

And as I told in my opening statement, we have friendly fire—people are killed by friendly fire all the time in every military operation we have. But if we never conducted those military operations, we might have put the whole people of the United States, including our children and your children in Canada even, in jeopardy.

So I thank you for your testimony. Your ordeal—look, I have visited some of the jails where communists kept their political prisoners in Hungary and elsewhere and what you were describing is just a gruesome reminder of that type of tyranny and mindset.

So I am sorry that you had to go through that and, hopefully, no innocent person will ever have to go through that.

So thank you very, very much, Mr. Chairman.

Mr. DELAHUNT. I thank the gentleman.

I am going to yield to my colleague from New York, but before I do, I think I should note for the record that it is my understanding that there is a similar inquiry, independent inquiry proceeding regarding the case of Mr. Almalki, and I have read reports that speculate that the conclusions will be similar to the conclusion in the case of Mr. Arar, because the reality is that the Canadians have owned up.

It is not on the Canadians. They have acknowledged their mistakes. It is this Nation and this Government, this administration that has failed.

With that, I yield to the gentleman from New York.

Mr. NADLER. I thank the gentleman.

Before I start, on behalf of our colleague, Mr. Watt from North Carolina, who had to leave, I would like to submit the statement for the record.

Mr. DELAHUNT. Without objection.

[The prepared statement of Mr. Watt follows:]

STATEMENT FOR THE RECORD

Rep. Mel Watt (NC-12)

Subcommittee on the Constitution and Subcommittee on International Organizations
Joint Oversight Hearing on Rendition to Torture: The Case of Maher Arar

October 17, 2007

2:00 PM

2172 Rayburn

American Torture Policy and Practice

George Daly

Speech Delivered to Charlotte, North Carolina Philosophy Club

September 27, 2007

The basic American rule about torture is: we don't do it. This rule was laid down in 1914 by the Supreme Court, in a case where a criminal suspect was interrogated for 36 straight hours with a bright light in his face, until he confessed. Justice Hugo Black wrote this for the Court:

The Constitution of the United States stands as a bar against the conviction of any individual in an American court by means of a coerced confession. There...are...certain...foreign...governments which convict individuals with testimony obtained by police organizations possessed of an unrestrained power to seize persons suspected of crimes against the state, hold them in secret custody, and wring from them confession by physical or

mental torture. So long as the Constitution remains the basic law of our Republic, America will not have that kind of government.

So coerced confessions are unlawful and cannot be used in Court, because America is not "that kind of government."

This rule of law applies to our homegrown terrorists such as Timothy McVeigh and Eric Rudolph. We can't torture confessions out of them; but it is not the rule for our foreign terrorists. Let me tell you how this difference came about, and how in my view the United States has become the kind of government that Justice Black warned us about.

In 1948 the communist Hungarian government arrested Joseph Cardinal Mindszenty, a Catholic prelate and vocal critic of Communism. Prior to his arrest he had told his supporters that he would never confess to anything if he were arrested, but two months after his arrest he was publicly tried and he retracted that statement. His confessions made during imprisonment were admitted into evidence and he was convicted. At his trial he did not appear to have been physically harmed during his imprisonment.

Mindszenty's trial jumpstarted a United States fear of what soon came to be called "brainwashing." How could such a stalwart anti-Communist have so quickly been made to cooperate, and without there being a single bruise on him?

The CIA immediately undertook to understand brainwashing, ostensibly so it could prepare American operatives to resist it if captured. After several unfortunate excursions into studying electrical shock techniques and LSD, the CIA figured out that brainwashing was "largely a process of isolating a human being . . . getting him under long stress in relation to interviewing and interrogation . . . without having to resort to any esoteric means." This method was dubbed DDD, for Debility, Dread and Dependency.

This is the basic DDD paradigm.

First, make the arrest as sudden and frightening as possible. Do it in the pre-dawn hours, when sleep is deepest. Hustle the suspect roughly to jail, have plenty of bright lights and noise, and then put him in a small windowless cell and take away his or her clothes.

Then, keep him or her in the cell for a long time, and/or use other forms of sensory deprivation. A Bulgarian favorite was to make the prisoner stand for hours in the dark in a waist-deep pool of water, too deep to sit down in. Just as effective is to make him stand for hours on end, at attention or with arms outstretched, or remain in a squat. Standing may not sound all that bad, but it is extremely effective. According to an early CIA manual, standing for 18 hours – that's from now until 2 o'clock tomorrow afternoon, with nothing to hold onto and no walking around permitted – produces "excruciating pain...the ankles and feet of the prisoner swell to twice their normal circumference . . . large blisters develop, which break and exude watery serum." Prolonged standing is also psychologically exhausting, because the longer you stand the more it hurts and the more you seem to be inflicting the pain on yourself by making the effort to keep standing. Add in sleep deprivation – wake the prisoner every hour with loud rock music– and add in various tricks such as conducting a lengthy interrogation, then returning the prisoner to sleep with the clock in the cell showing 8 o'clock p.m., then when he goes to sleep reset the clock to 6 o'clock a.m. and wake him and resume the interrogation with a different interrogator who acts as if a night has passed. Almost all prisoners subjected to this type treatment lose their grip on reality within a few days. The debility of losing control over your

environment leads to dread of more debility and then to dependency on the interrogators, who are the only humans the prisoner ever sees except for the silent guards. This was the basic Communist model. The Chinese Communists added on giving the prisoner only two minutes a day to use the latrine, a practice especially effective in breaking down women prisoners. Prisoners will confess to anything you want, and there won't be a bruise on them. This is how brainwashing was done.

These techniques did not remain merely the object of CIA study. They were extensively used to train US personnel to resist brainwashing, or as the Pentagon put it, to "inoculate" them. Our own soldiers and operatives, usually voluntarily and with the right to withdraw but with a career in jeopardy if they did withdraw from the program, are subjected to Communist brainwashing techniques, augmented by prolonged hooding, painful stress positions, racial and religious taunts and water boarding. That last technique involves strapping the prisoner to a board, putting a cellophane hood over his head, tilting his or her legs up, and then pouring in water. You can clench your mouth but you can't clench your nose, so you began to drown. This was "inoculation." It was not a small dose to protect against a larger future dose, it was actual torture. This "inoculation" seems a strange theory to me, about the same as giving you a large dose of heroin to teach you how to avoid heroin addiction. I vividly remember being inoculated against machine gun fire by being forced to crawl around underneath it at night while explosions went off all around me. Being actually shot by a machine gun was not necessary to teach me the lesson.

Beginning in the late 1950s the CIA and the military exported the DDD techniques to American allies in Southeast Asia and Latin America, almost all of them military dictatorships. They were used for interrogating captured suspects, not for inoculating soldiers. By 1971 over 100,000 foreign officers had been trained. A principal exporter of these techniques was Dan Mitrione, an Indiana police chief who joined the CIA's Office of Public Safety – an Orwellian title if ever there was one. Under his guidance Brazilian police developed "the fridge." According to Fred Morris, an American missionary with the United Methodist Church, this was a cube measuring 5 feet on a side equipped with heating and cooling units, speakers and strobe lights. Prisoners were locked inside and exposed to every combination of hot, cold, light, dark, and jet engine noise. A nervous breakdown was often the result. Mitrione also instructed the Brazilians in the use of electric shocks. Here is a victim's account of this torture:

An electrical discharge causes a sensation which is difficult to describe: a physical and psychological commotion . . . The tortured victim shouts with all his might, grasping for a footing somewhere to stand in the midst of that chaos of convulsions, shaking and sparks. He cannot lose himself or turn his attention away from that desperate sensation. For him in that moment any other form of combined torture – paddling, for example – would be a relief for it would allow him to divert his attention, touch ground and his own body which feels like it is escaping his grasp. Pain saves him, beating comes to the rescue."

The United States government does not admit that this happened or that it helped it along, but I can cite you to the sources. Mitrione himself was later kidnapped and tortured and killed by leftist guerillas. After his death Ron Zeigler, Nixon's press secretary, said he had been down there helping develop a democratic police force. Frank Sinatra staged a benefit for Mitrione. He said that Mitrione had given "the last full measure of devotion" to his country.

These torture techniques – though of course they weren't officially called that – were also taught to Latin American police at the School of the Americas at Fort Benning, Georgia – except that the school was closed down during the term of one American President. It was reopened in 1981.

Did the CIA or the military ever directly engage in torture? Understandably evidence of that, if it exists, gets closely guarded, yet some of it has surfaced. One notable instance was the CIA's treatment in the mid-1960s of Yuri Nosenko, a KGB colonel who defected and outed about twenty Soviet sleeper agents and told the CIA that the Russians had bugged the US Embassy in Moscow. The CIA was divided as to whether he was a double agent. So rather than neutralize him by giving him a new identity and a small business in Topeka and making sure he never got a passport, they subjected him to DDD. He was held in strict isolation for 90 days. Later he was held for 500 days in a bare cell with a light that was always on and without any reading material. Then he was put into a 10 foot by 10 foot steel box, where he had a nervous breakdown. Then he was starved and forced to stand while the guards beat on the steel walls for hour at a time. He was subjected to loud noises 23 hours a day. Later he was given LSD. He never confessed. Finally he was given \$150,000 and a new identity and released.

And what was the legality of these actions? Did they violate Hugo Black's ruling? No, because he was not being tried in a court of law.

In 1988 President Reagan signed the U.N. Convention Against Torture, which defines torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purpose as obtaining . . . information or a confession." Ratified treaties become the law of the land. The Convention Against Torture if ratified would clearly have made criminal the treatment of Nosenko. But before the treaty was ratified, numerous "understandings," as they are called, were attached to it. In all there were 19 of these "understandings." No other country attached more than four. Among the understandings added during the Reagan administration were that "torture" consisted only of "extremely cruel and inhuman" acts, such as systematic beatings and electrical currents to the genitals, but not, Reagan's lawyers opined, forced standing or sexual humiliation. Even then the violation had to be "specifically intended," that is, if extreme cruelty was used for the purpose of obtaining information rather than to cause pain, there was no violation. In effect only confessed sadism would violate the Treaty. The first Bush administration added the "understanding" that the acts causing severe mental suffering must be intended to cause "prolonged" mental harm; so extreme isolation was permitted if you thought the victim would come to his senses again in a few days. The Convention Against Torture was ratified in 1994, under President Clinton. The 19 reservations appear now to be a list of techniques the CIA was using and did not want to give up.

Our government has engaged in extensive torture since 9-11, though it denies that what it has done is torture, preferring to call it "an alternative set of procedures." Five days after 9-11, Vice President Cheney said: "We also have to work, though, sort of the dark side . . . It's going to be vital for us to use any means at our disposal . . . to achieve our objectives." What this meant, in my view, is that they were going to torture.

The first major suspect to be captured after 9-11 was al-Shaykh al-Libi, No. 17 on the list of most wanted terrorists and the leader of the al Qaeda training camp where Richard Reid, the "Shoe Bomber," was trained. The Pakistani authorities captured al-Libi and turned him over to the FBI, who set about interrogating him by the book. The principal duty of the FBI is to get admissible evidence of crimes. I know of no instances of FBI torture of captives. The FBI uses rapport-building techniques to obtain confessions, and it has been very successful at it. The FBI obtained information from al-Libi that later helped convict the Shoe Bomber. But the CIA wanted control of al-Libi, and the White House agreed. The CIA promptly put duct tape over his mouth, chained him, put him in a box and sent him to Egypt, where without much doubt he was tortured.

One of the reasons the CIA didn't do the dirty work itself was that it might have been a crime to do so.

The reach of the Convention Against Torture had been limited, but because al-Libi had been captured in the course of armed conflict the Geneva Conventions applied. Common Article 3 of the Geneva Conventions outlaws torture and humiliating and degrading treatment. The United States War Crimes Act makes it a crime to violate the Geneva Conventions. CIA agents feared they might be prosecuted. But the solution to the problem turned out to be elegantly simple. The government found a lawyer who interpreted the Geneva Conventions not to apply to al Qaeda and the Taliban. His name was Alberto Gonzales, a graduate of my law school and Sydnor's. He opined that the Geneva Conventions were "obsolete" and "quaint" – his words – and unsuited for the so-called "new paradigm" of the War on Terror. The Geneva Conventions have been ratified by 190 nations. In October 2001 General Tommy Franks had ordered US troops to follow the Conventions in Afghanistan. But Gonzales reasoned that the Taliban and al Qaeda are not states and have not signed the Conventions, therefore they are not protected by them. This opinion was erroneous for many reasons, but most notably because the Conventions expressly provide that all signatory states are bound by them, and the US was a signatory state. Assistant Attorney General Jay Bybee, now an upper level federal Judge, further opined that in times of war the President can declare a treaty not to apply. This opinion is difficult to square with Article III of the Constitution, which provides that the "Constitution, and . . . the . . . laws of the United States, and all treaties" are the "supreme law of the land." Both the Gonzales and the Bybee rulings were later overturned by the Supreme Court in the *Hamdan* case, but not before President Bush had used them to say that the Taliban and al Qaeda are unprotected "enemy combatants" who can be treated in any fashion he orders. According to ABC News, in 2002 he specifically approved of subjecting al Qaeda and Taliban suspects to 40 hours of forced standing, to being left in 50 degree cells, and to waterboarding. Al-Libi was returned to Afghanistan and these techniques were applied to him. He finally broke down and talked.

In March 2002 Pakistani forces captured Abu Zubaydeh, the alleged al Qaeda logistics chief, and turned him over to the FBI. He was also soon taken over by the CIA. He had cooperated with the FBI. For example, he had identified a photograph of Khalid Sheik Mohammed, the alleged mastermind of 9-11, the bombing of the destroyer Cole, and other major terrorist attacks. But Abu Zubaydeh refused to talk under CIA interrogation. The CIA then wanted to use even harsher techniques on him, but now the legal impediment was that, despite the fact that the US had by then withdrawn from the International Criminal Court, that Court retained jurisdiction under certain circumstances to prosecute non-treaty states for Convention Against Torture violations. Now appears John Yoo, a Deputy Assistant Attorney General, who opined that to be torture an act must cause pain "of an intensity akin to that which accompanies serious physical injury, such as death or organ failure." In other words, you have to come close to killing a person for it to be torture. John Yoo also argued that the President has unreviewable power over enemy combatants. As the Dean of the Yale Law School pointed out, this opinion would excuse the President if he summarily executed enemy combatants, committed genocide or sanctioned slavery.

Then, in March 2003, Khalid Sheik Mohammed and his wife and children were captured and turned over to the CIA. Khalid Sheik Mohammed was waterboarded, he was confined to a cell not big enough to either stand up or lie down in, he was repeatedly doused with cold water, and he was given LSD and heroin and sodium pentothal. The Communist DDD techniques has been expanded to the limit of their cruelty. Khalid Sheik Mohammed confessed to 31 separate terrorist plots.

So what do we make of torture? Is it a price that the US should pay in order to protect us?

There is considerable evidence that torture does not produce good information. We all know that torture often produces false confessions. John McCain confessed in the Hanoi Hilton after being

tortured. He later said: "Every man has his breaking point. I had reached mine." Nobody believes any of the confessions that the Communists extracted. Khalid Sheik Mohammed has retracted many of his confessions. Al-Libi confessed that Iraq had provided training in "poisons and deadly gases" for al Qaeda – a claim repeated by Secretary Powell to the United Nations to justify our invasion of Iraq – and a claim we now know, to our sorrow and loss, to have been false.

But let's assume that a hypothetical CIA agent – let's call him Agent Jack Bauer – just happens to capture a terrorist and just happens to have reliable information that this very terrorist knows where a ticking biological bomb is set to explode sometime in the next 24 hours. Agent Bauer knows everything except the critical piece – where is the bomb? So he straps the prisoner down and puts a knife point over an eyeball and says, "All right, now we'll see just how much pain you can stand." For Agent Bauer, the terrorist always confesses and always gives good information. He is never a committed martyr, he is never as tough as Colonel Nosenko.

But what if the interrogation was conducted by an FBI Agent, who offered the prisoner a cup of strong coffee, told him he could stop to pray anytime he wanted to, told him he could have a lawyer, and then enquired if he had any friends who would likely be harmed when the bomb went off? That was the basic technique that was used, successfully, on l'Houssaine Kherchtou, a/k/a "Joe the Moroccan," a member of the al Qaeda cell that bombed the embassies. Patrick Fitzgerald, then an Assistant US Attorney in New York and later the Special Prosecutor of Scooter Libby, participated in this interrogation. Is Fitzgerald's FBI technique or Bauer's CIA technique more likely to get at the truth? And would you rather live in a country that practices the Fitzgerald method, or the Bauer method?

There is always the truly frightening possibility that, just once, torture may be necessary to save an entire city, that it's the life of one terrorist against the lives of thousands of us. Should we allow just that one torture? Torture is a slippery slope. At the top of the slope is the possibility that we may, just once, really need an Agent Bauer to protect us from disaster. Once the fear of that possibility grips you, it's hard to resist letting it expand, it's hard not to slide on down the slope. Violent solutions are intoxicating, they are a rush of power. At the bottom of the slope is the one form of torture that reliably yields good information, and that form is mass torture. Torture enough people and some of them will tell you the truth. During the Algerian War the French military arrested some thirty per cent or more of the adult males living in the Algiers Muslim quarter and tortured most of them with electric shock, waterboarding and beatings. Many died during the process, but the French got enough information to crack the Algiers underground. That sort of torture works, and once you let Agent Bauer loose, we are headed toward it.

Torture radicalizes our enemies. Abu Ghraib is the best recruiting device for terrorism that Osama bin Laden could ever have wished for. After Abu Ghraib became public and the Supreme Court held in the *Hamdan* case that the Geneva Conventions applied to al Qaeda and the Taliban, our military seems to have repented of Abu Ghraib. On September 6, 2006, in the morning, the Department of Defense published a new Field Manual for interrogations. It expressly banned the DDD techniques and substituted for them the Geneva Convention rules. The Field Manual said: "Use of torture is not only illegal but it is a poor technique that yields unreliable results." So did this put a stop to American torture? Unfortunately, no. That same afternoon President Bush held a press conference. First he spoke of the horrors of 9-11. Then he said new legislation was needed to deal with terrorists. Two weeks later he sent to the Congress what quickly became the Military Commissions Act of 2006. He sent it over there a week before the Congress was to recess for mid-term elections, and it passed by substantial majorities. This law set up military commissions that can base findings on coerced confessions and can hear evidence in secret. The Military Commissions Act prohibits torture - but

subject to the 19 exceptions and the requirement of specific intent. It revokes habeas corpus for all foreign nationals. This law puts all non-citizens held as terrorists beyond the law, and anything short of willful murder of them is now legal.

So here we are now, again waiting on the Supreme Court, which is going to review the Military Commissions Act. In effect we are waiting on Justice Kennedy, the swing vote, to rescue us from our intoxication with violence. Meanwhile we continue down the slippery slope toward imperial government.

Mr. NADLER. I thank you. Let me also say, before beginning my questioning of Mr. Arar, that I have to disagree with my distinguished friend from California.

This is not simply a case of a mistake in sending Mr. Arar to Syria or in getting the wrong person—it certainly was that, nor is it simply a mistake of refusing to acknowledge error after the fact, although it is certainly that, too.

The mistake here is cutting constitutional and legal corners, doing things that are prohibited by our laws, denying due process, winking at torture, hiding evidence and mistakes behind a wall of state secrets so as to prevent a proper inquiry, such as occurred in Canada.

The administration, by sending Mr. Arar to Syria, was outsourcing torture. They wanted him tortured, quite obviously. And maybe they got the wrong guy, but even if they had the right guy, we shouldn't be engaging in torture. We shouldn't be winking at torture.

We knew perfectly well that any assurances from the Syrian Government that they would not engage in torture were worthless. Our Government has said so many times.

You don't have to take my word for it. Look at the State Department reports annually.

So I think the mistake here was disobeying our obligations under the Convention against Torture, disobeying our obligations under the law to provide some due process under a dozen different laws, winking at torture, and now, after the fact, refusing to admit error and getting away with it by hiding behind a shield of state secrets and denying the right of the courts to do a proper inquiry.

So this is far more than just an error and making a mistake. It is a fundamental denial of due process. It is a fundamental subversion of our laws and our protections and our liberties, and this is the perfect example of what happens when you subvert our constitutional protections.

Now, Mr. Arar, let me ask you one preliminary question.

Were you ever in an al-Qaeda training camp in Pakistan or Afghanistan?

Mr. ARAR. No.

Mr. NADLER. Were you ever in Afghanistan or Pakistan?

Mr. ARAR. No.

Mr. NADLER. Given those facts, if the United States Government believed that you were, can you think of any reason why they might think so?

Mr. ARAR. Why they would think that I had been to Afghanistan?

Mr. NADLER. Yes, or that you had been in a training camp.

Mr. ARAR. Frankly, I don't remember being asked in the United States about that. The only time that this came up was in Syria, and I falsely confessed in Syria under torture.

Mr. NADLER. So if the American Government believed that you were in an al-Qaeda training camp in Afghanistan or Pakistan, in the absence of any other knowledge, it would be because such a false admission was tortured out of you in Syria.

Mr. ARAR. Yes.

Mr. NADLER. Thank you. Now, you were detained in a facility in my district. For that and then for everything else, I, again, apologize.

Now, what reasons were given for denying you access to a phone call for 5 days or access to an attorney?

Mr. ARAR. No reason whatsoever. All I know is I kept asking for a phone call and for access to a lawyer. I was always denied. And, frankly, even the brief 2-minute call I had with my mother-in-law, every time they served me a meal, I had to go and bug them and say, "I want to make a phone call," until they granted me that brief phone call.

Mr. NADLER. And so you were never given a reason for being denied access to a lawyer or to a phone call.

Mr. ARAR. No.

Mr. NADLER. How would you characterize your treatment at the hands of United States agents before you were turned over to Syria?

Mr. ARAR. Can you repeat the question, please?

Mr. NADLER. How would you characterize your treatment at the hands of U.S. agents while you were in U.S. custody?

Mr. ARAR. Well, first of all, it was quite shocking for me not to have allowed me access to a lawyer or even a basic phone call to let my family know where I was.

I disappeared for a complete week. My mom did not know where I was. My wife did not know where I was, whether I was alive or dead, and that alone was shocking to me, just a simple phone call to tell them about what was going on.

They didn't allow me proper access to a lawyer. Even when they sent me to MDC, they kept me in a maximum security prison, section of that detention center, where I was confined to solitary confinement. For almost over a week, they didn't allow me access to recreation, other than the fact that I was not given toothpaste or even basic things. They didn't even allow me to have a pen.

Every time I was transported inside that prison, they used to videotape me. Whenever I objected about my religious beliefs, they did not really care. For instance, during the 6-hour interview where I asked for my lawyer to be present, I asked them to be allowed to go back to my cell for my prayer, and they didn't allow me to do this.

So it is still actually shocking to me that—how come they have treated me like that?

Mr. NADLER. I see my time is about to expire. So I have just one question for you, one more question, and one question for Mr. Roach.

When you expressed fear about being sent to Syria and you told them that if you were sent to Syria, you expected to be tortured,

what was the response to your statement that you thought you would be tortured in Syria and what, if anything, were you told about our obligation under the Convention against Torture?

Mr. ARAR. I objected. I told them about my fears of being tortured both during the 6-hour interview on a Sunday and when they took me from MDC and read me the decision.

In the first interview, they did not really seem to care. In fact, I remember vividly, at the end, when it became very clear that was the direction where they were going, I told them this. I told them, "What are you going to tell my kids when they grow up if you ever decide to send me to Syria? Do you think my kids will like the United States like I do now?"

In fact, I told them, "I appeal to President Bush, I appeal to the American people." They did not seem to care. When they read me the decision, the final decision that they were going to send me to Syria, I told them, and I cried, and I said, "How come you do that? You know I am going to be tortured there. I told you this many times," and she read me—the person who was there read me part of that decision, where she basically said that the INS is not the office that deals with the torture convention.

Basically, for me, what that really meant is, "We really don't care. We are sending you to Syria for that specific purpose."

Mr. NADLER. Thank you.

Mr. Roach, I have one question, if I may.

You were intimately involved in the Canadian commission's need to balance the search for the facts in Mr. Arar's case and the need to protect sensitive national security information at the same time.

Now, in cases brought here against U.S. officials, the same concerns have been raised, in this case, in the discussion we are having in Congress now about immunizing telecommunications companies from perhaps disobeyed our laws with respect to wiretapping previously, and we are told that we have to immunize them because to defend them might reveal state secrets and so forth.

The same concerns have been raised. Is there anything you have learned that might provide some insight as we also work to achieving a balance between respect and protection of individual rights and legitimate national security as to how to do this?

Mr. ROACH. I think it is very important to be precise about the reasons for protecting secrets, because there are some very good reasons, ongoing investigations, vulnerable sources that, if their identity were revealed, could be killed or tortured themselves.

But I really think we have to move away from the broad generalities of national security, because one of the things that Justice O'Connor found in his report is that there is a temptation for governments to claim state secrets to protect themselves from embarrassment.

And as you can see from the three-volume report, that the government agreed to release and then there was litigation over the remaining part. But even during contemporary national security investigations, much can be made public without revealing this small legitimate core of state secrets that have to be kept secret.

Mr. NADLER. Well, let me ask you one further thing. In this case, we are told by our Government that Mr. Maher is a dangerous terrorist. I don't know if they have actually said it in so many words,

but they said he can't be admitted into this country, which is another way of saying he is a dangerous terrorist.

Presumably, the government has some evidence or reason to believe that, which they will not reveal to us, except under secret conditions, certainly will not reveal to the public and came into court and said you can't try the case because it will reveal sensitive state secrets.

Given what you know about the case, can you imagine that there is anything that might be relevant here that couldn't be revealed safely, that could not be revealed safely?

Mr. ROACH. Well, I mean, it is difficult to answer that question. That is the dilemma of secret information, that you are put into an impossible position.

What I can say, though, is that there was nothing—Justice O'Connor found there was nothing in Canadian possession that indicated any links. So I would hope that if there was a smoking gun in the United States, it would be shared with the Canadian Government, but there were no findings of that.

So I think it really does underline the incredible Catch-22 position that people are put in when the government says, "We have information that incriminates you, but nobody can see it, because it is secret."

Mr. NADLER. Thank you very much.

I yield back.

Mr. DELAHUNT. I yield to the gentleman from Arizona, the ranking member, Mr. Franks.

Mr. FRANKS. Well, thank you, Mr. Chairman. Mr. Chairman, I will be brief.

Mr. Arar, is there anything else, other than that you have already said, that you would like to have a chance to say that would just be something that you would like to pass along to us? Rather than me posing a question to you, is there anything you think that we are missing here or that we don't understand or just something in your own heart that you would like to relay?

Mr. ARAR. A follow-up on the previous question. I would like to emphasize the fact that our Minister of Public Safety went down to the States a couple of months ago and looked at the U.S. information and he clearly said, publicly said that there was nothing there that, according to his opinion, would justify placing me on a watch list.

Actually, if I remember correctly, he went further to say on any watch list, not only the American watch list.

So I am saying, instead of the U.S. officials hiding behind state secrets, whether we like it or not, this has the effect of a smear campaign on my already damaged reputation. Instead of doing this, I would hope that they would become more transparent and let my lawsuit proceed to discovery, and if they have any evidence or suspicions, then that will become—I will have a chance to defend myself.

But the way they are doing it right now, it is not a proper way of doing it. It is unfortunate. Normally, those kinds of actions are attributed to officials in dictatorships and not in countries like the United States of America.

Mr. NADLER. Would the gentleman yield for a moment?

Mr. FRANKS. Yes, I sure will.

Mr. NADLER. Thank you. I just want to say that especially in view of Mr. Roach's answer a moment ago and what you have just said, I was privy, I saw all the classified information yesterday, and I am not at liberty to reveal all the classified information, but I am at liberty to say that I fully concur with Justice O'Connor, with Senator Leahy, with Senator Specter, in saying that there is nothing there, there is nothing there that justifies the campaign of vilification against your name, sir, or that justifies, in my mind, denying you entry to this country or characterizing you as a terrorist in any way.

Mr. FRANKS. Thank you, Mr. Chairman.

Mr. NADLER. Thank you.

Mr. FRANKS. Mr. Arar, let me just repeat earlier comments that I regret terribly the things that happened to you, and I hope that this situation can be rectified in a way that will bring some sense of peace and a sense of justice to you and your family.

With that, let me direct my question here to Mr. Roach.

From what I understand, Mr. Roach, not only did Mr. Arar endure a terrible experience, but the official Canadian commission that investigated the matter concluded that Mr. Arar's horrible journey was caused by inaccurate information that was relayed to United States authorities by Canadian authorities.

I also understand that the following lawsuit, that Mr. Arar received an award of \$10 million from the Canadian Government for harm that befell him due to Canada's relaying inaccurate information about him.

Is that correct? And, also, was Mr. Arar compensated for attorney's fees and other expenses?

Mr. ROACH. Yes, that is correct.

Mr. FRANKS. Do you think that that has had any deterrent effect on the Canadian Government that this will be something that would perhaps cause them to scrutinize and more careful in their investigations in the future?

Mr. ROACH. Yes. There were 23 recommendations in the report. The government has accepted all of those 23 recommendations.

A central theme in the recommendations is the need to be accurate and precise about information that the police assemble. A lot of the problems here were that a person of interest was wrongly depicted as a suspect, words like "Islamic extremist" being thrown around with no support and with no care.

So there has been an acceptance of those recommendations. There has been an acceptance of the recommendation that the RCMP, which was the main agency in Canada involved, should stick to its law enforcement mandate, that the officers that were involved in the A-O Canada investigation did not have adequate training or expertise in national security investigations.

And, finally, it is very important that any information shared be screened for reliability and relevance, but also be restricted, restrict the use of information that is shared in subsequent legal proceedings.

So some of the irony here is that the RCMP put a caveat or a restriction on one piece of information that was delivered on October 4, saying, "We don't have—we have not been able to establish

any links between Mr. Arar and al-Qaeda,” but they did not put that caveat or restriction on the inaccurate information.

And I guess a question for American oversight bodies is actually whether the INS decision relied upon inaccurate Canadian information. Justice O'Connor found that it likely did, but because the American Government refused to participate in the inquiry, and we only saw the unclassified INS decision, that is a piece of accountability that remains yet to be done.

Mr. FRANKS. Well, thank you, Mr. Chairman. I guess, Mr. Chairman, I would only add that I hope Mr. Arar can take some affirmation in the fact that because he has proceeded through this case and continued to pursue justice on his own behalf, that perhaps he may prevent this tragedy from occurring to others in the future.

Thank you, sir.

Mr. DELAHUNT. I thank the gentleman.

I am going to yield to the vice chair of the committee, Mr. Carnahan, and then I will yield to patient Mr. Keith Ellison.

But before I do, I just want to make an observation. I hear from Mr. Roach and others their confidence in the process that was adopted by the Canadians, the establishment of an independent inquiry. I believe that this case cries out for that kind of attention, that kind of effort to, again, respond to many of the questions that I have now.

I received a letter from the Department of State that I am going to submit into the record. It is dated October 9, 2007. This is our Department of State. And it is signed by Mr. Jeffrey Bergner, who is the Assistant Secretary for Legislative Affairs.

And for the benefit of my colleagues, I want to just read one excerpt:

“The State Department is not responsible for planning or carrying out extrajudicial transfer operations nor has it been consulted in all cases carried out by other agencies.”

We have an obligation to unveil, if you will, the secrecy in a way that is consistent with national security as to what happened in this case, so that we can ensure that this never occurs again, if it all humanly possible.

And with that, I will yield to the gentleman from Missouri, Mr. Carnahan.

[The information referred to follows:]

United States Department of State

Washington, D.C. 20520

DEC 10 1992

Dear Mr. Chairman:

Thank you for your letter of July 2 regarding U.S. policies and practices on "extraordinary rendition" in connection with the joint inquiry being conducted by the House Committee on Foreign Affairs, Subcommittee on International Organizations, Human Rights, and Oversight, and the House Committee on the Judiciary, Subcommittee on the Constitution, Civil Rights, and Civil Liberties. We regret the delayed response.

At the outset, it should be noted that, while numerous allegations have appeared in the press and elsewhere about so-called "extraordinary renditions," that term has generally not been consistently or precisely defined or used. Your letter defines "extraordinary rendition" as "the extrajudicial transfer of a person from one state (i.e., country) to another" and "rendition" as the "transfer of a person from one state to another in the absence of an extradition treaty or other formal legal process." These definitions, which focus on the transfer of a person in the absence of an extradition treaty or court order, are broad enough to cover any transfer of a detained person by U.S. Armed Forces from an area of hostilities, transfers by U.S. intelligence agencies, or transfers of terrorist suspects by U.S. law enforcement agencies back to the United States to stand trial.

The State Department is not responsible for planning or carrying out extrajudicial transfer operations, nor has it been consulted in all cases carried out by other agencies. Accordingly, we recommend that to obtain the specific information you seek, in particular written materials regarding policies or guidelines for the conduct or approval of extrajudicial transfers, you contact the departments and agencies in the federal government responsible for the conduct of such transfers.

The Honorable

William D. Delahunt, Chairman,
Subcommittee on International Organizations,
Human Rights and Oversight,
Committee on Foreign Affairs,
House of Representatives.

On December 5, 2005, Secretary Rice described U.S. policy on renditions in some detail. (A copy of her remarks is enclosed.) The Secretary stated that “[f]or decades, the United States and other countries have used “renditions” to transport terrorist suspects from the country where they were captured to their home country or to other countries where they can be questioned, held, or brought to justice.” Secretary Rice emphasized that “rendition is a vital tool in combating international terrorism. Its use is not unique to the United States, or to the current administration.” She recalled that Ramzi Youssef was brought to the United States by rendition to be prosecuted for, among other things, the 1993 World Trade Center bombing and that Carlos the Jackal, who had participated in a number of terrorist attacks in Europe and the Middle East, was captured by French intelligence officials in Sudan in 1994 and rendered back to France, where he was prosecuted and convicted. The European Commission of Human Rights rejected Carlos the Jackal’s claim that his rendition from Sudan was unlawful.

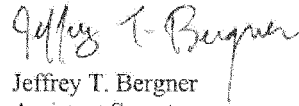
Secretary Rice explained several policy constraints on the issue of rendition that are important to highlight:

- “The United States has respected – and will continue to respect – the sovereignty of other countries.
- The United States does not transport, and has not transported, detainees from one country to another for the purpose of interrogation using torture.
- The United States does not use the airspace or the airports of any country for the purpose of transporting a detainee to a country where he or she will be tortured.
- The United States has not transported anyone, and will not transport anyone, to a country when we believe he will be tortured. Where appropriate, the United States seeks assurances that transferred persons will not be tortured.”

Finally, it is important to emphasize that there have been significant changes to U.S. laws, policies, and procedures relating to the detention, treatment, and transfer of detained persons in the last several years that may address the concerns you have expressed. As noted above, we recommend that you contact the departments and agencies responsible for the conduct of extrajudicial transfers for more specific information on their policies and procedures.

We hope this information is helpful to you. Please do not hesitate to contact us if we can further assist you with this or any other matter.

Sincerely,



Jeffrey T. Bergner
Assistant Secretary
Legislative Affairs

Enclosure:

As Stated.



Remarks Upon Her Departure for Europe

Secretary Condoleezza Rice

As-Aired

Andrews Air Force Base

December 5, 2005



(7:15 a.m. EST)

Good morning. We have received inquiries from the European Union, the Council of Europe, and from several individual countries about media reports concerning U.S. conduct in the war on terror. I am going to respond now to those inquiries, as I depart today for Europe. And this will also essentially form the text of the letter that I will send to Secretary Straw, who wrote on behalf of the European Union as the European Union President.



The United States and many other countries are waging a war against terrorism. For our country this war often takes the form of conventional military operations in places like Afghanistan and Iraq. Sometimes this is a political struggle, a war of ideas. It is a struggle waged also by our law enforcement agencies. Often we engage the enemy through the cooperation of our intelligence services with their foreign counterparts.

We must track down terrorists who seek refuge in areas where governments cannot take effective action, including where the terrorists cannot in practice be reached by the ordinary processes of law. In such places terrorists have planned the killings of thousands of innocents – in New York City or Nairobi, in Bali or London, in Madrid or Beslan, in Casablanca or Istanbul. Just two weeks ago I also visited a hotel ballroom in Amman, viewing the silent, shattered aftermath of one of those attacks.

The United States, and those countries that share the commitment to defend their citizens, will use every lawful weapon to defeat these terrorists. Protecting citizens is the first and oldest duty of any government. Sometimes these efforts are misunderstood. I want to help all of you understand the hard choices involved, and some of the responsibilities that go with them.

One of the difficult issues in this new kind of conflict is what to do with captured individuals who we know or believe to be terrorists. The individuals come from many countries and are often captured far from their original homes. Among them are those who are effectively stateless, owing allegiance only to the extremist cause of transnational terrorism. Many are extremely dangerous. And some have information that may save lives, perhaps even thousands of lives.

The captured terrorists of the 21st century do not fit easily into traditional systems of criminal or military justice, which were designed for different needs. We have to adapt. Other governments are now also facing this challenge.

We consider the captured members of al-Qaida and its affiliates to be unlawful combatants who may be held, in accordance with the law of war, to keep them from killing innocents. We must treat them in accordance with our laws, which reflect the values of the American people. We must question them to gather potentially significant, life-saving, intelligence. We must bring terrorists to justice wherever possible.

For decades, the United States and other countries have used "renditions" to transport terrorist suspects from the country where they were captured to their home country or to other countries where they can be questioned, held, or brought to justice.

In some situations a terrorist suspect can be extradited according to traditional judicial procedures. But there have long been many other cases where, for some reason, the local government cannot detain or prosecute a suspect, and traditional extradition is not a good option. In those cases the local government can make the sovereign choice to cooperate in a rendition. Such renditions are permissible under international law and are consistent with the responsibilities of those governments to protect their citizens.

Rendition is a vital tool in combating transnational terrorism: its use is not unique to the United States, or to the current administration. Last year, then Director of Central Intelligence George Tenet recalled that our earlier counterterrorism successes included "the rendition of many dozens of terrorists prior to September 11, 2001."

— Ramzi Yousef masterminded the 1993 bombing of the World Trade Center and plotted to blow up airlines over the Pacific Ocean, killing a Japanese airline passenger in a test of one of his bombs. Once tracked down, a rendition brought him to the United States, where he now serves a life sentence.

— One of history's most infamous terrorists, best known as "Carlos the Jackal," had participated in murders in Europe and the Middle East. He was finally captured in Sudan in 1994. A rendition by the French government brought him to justice in France, where he is now imprisoned. Indeed, the European Commission of Human Rights rejected Carlos' claim that his rendition from Sudan was unlawful.

Renditions take terrorists out of action, and save lives.

In conducting such renditions, it is the policy of the United States, and I presume of any other democracies who use this procedure, to comply with its laws and comply with its treaty obligations, including those under the Convention Against Torture. Torture is a term that is defined by law. We rely on our law to govern our operations. The United States does not permit, tolerate, or condone torture under any circumstances. Moreover, in accordance with the policy of this administration:

— The United States has respected — and will continue to respect — the sovereignty of other countries.

— The United States does not transport, and has not transported, detainees from one country to another for the purpose of interrogation using torture.

— The United States does not use the airspace or the airports of any country for the purpose of transporting a detainee to a country where he or she will be tortured.

— The United States has not transported anyone, and will not transport anyone, to a country when we believe he will be tortured. Where appropriate, the United States seeks assurances that transferred persons will not be tortured.

International law allows a state to detain enemy combatants for the duration of hostilities. Detainees may only be held for an extended period if the intelligence or other evidence against them has been carefully evaluated and supports a determination that detention is lawful. The U.S. does not seek to hold anyone for a period beyond what is necessary to evaluate the intelligence or other evidence against them, prevent further acts of terrorism, or hold them for legal proceedings.

With respect to detainees, the United States Government complies with its Constitution, its laws, and its treaty obligations. Acts of physical or mental torture are expressly prohibited. The United States Government does not authorize or condone torture of detainees. Torture, and conspiracy to commit torture, are crimes under U.S. law, wherever they may occur in the world.

Violations of these and other detention standards have been investigated and punished. There have been cases of unlawful treatment of detainees, such as the abuse of a detainee by an intelligence agency contractor in Afghanistan or the horrible mistreatment of some prisoners at Abu Ghraib that sickened us all and which arose under the different legal framework that applies to armed conflict in Iraq. In such cases the United States has vigorously investigated, and where appropriate, prosecuted and punished those responsible. Some individuals have already been sentenced to lengthy terms in prison; others have been demoted or reprimanded.

As CIA Director Goss recently stated, our intelligence agencies have handled the gathering of intelligence from a very small number of extremely dangerous detainees, including the individuals who planned the 9/11 attacks in the United States, the attack on the U.S.S. Cole, and many other murders and attempted murders. It is the policy of the United States that this questioning is to be conducted within U.S. law and treaty obligations, without using torture. It is also U.S. policy that authorized interrogation will be consistent with U.S. obligations under the Convention Against Torture, which prohibit

cruel, inhuman, or degrading treatment. The intelligence so gathered has stopped terrorist attacks and saved innocent lives -- in Europe as well as in the United States and other countries. The United States has fully respected the sovereignty of other countries that cooperate in these matters.

Because this war on terrorism challenges traditional norms and precedents of previous conflicts, our citizens have been discussing and debating the proper legal standards that should apply. President Bush is working with the U.S. Congress to come up with good solutions. I want to emphasize a few key points.

-- The United States is a country of laws. My colleagues and I have sworn to support and defend the Constitution of the United States. We believe in the rule of law.

-- The United States Government must protect its citizens. We and our friends around the world have the responsibility to work together in finding practical ways to defend ourselves against ruthless enemies. And these terrorists are some of the most ruthless enemies we face.

-- We cannot discuss information that would compromise the success of intelligence, law enforcement, and military operations. We expect that other nations share this view.

Some governments choose to cooperate with the United States in intelligence, law enforcement, or military matters. That cooperation is a two-way street. We share intelligence that has helped protect European countries from attack, helping save European lives.

It is up to those governments and their citizens to decide if they wish to work with us to prevent terrorist attacks against their own country or other countries, and decide how much sensitive information they can make public. They have a sovereign right to make that choice.

Debate in and among democracies is natural and healthy. I hope that that debate also includes a healthy regard for the responsibilities of governments to protect their citizens.

Four years after September 11, most of our populations are asking us if we are doing all that we can to protect them. I know what it is like to face an inquiry into whether everything was done that could have been done. So now, before the next attack, we should all consider the hard choices that democratic governments must face. And we can all best meet this danger if we work together.

Thank you.
2005/1130 (FINAL)

Released on December 5, 2005

Mr. CARNAHAN. Thank you, Mr. Chairman, and I appreciate you calling this hearing and your remarks.

Mr. Arar, I want to thank you for sharing your tragic story with us here today.

When an American citizen is detained in a foreign country, we expect they will be treated fairly and with respect to law. Clearly, that standard was not upheld in this case and it brings to light another example of why our nation's image is so tarnished abroad.

Time and again, examples of human rights abuses are brought to our attention, whether it is here in this case or incidents at Abu Ghraib, Guantanamo Bay. If we are to promote democracy and the rule of law abroad, we must hold ourselves to the standards we expect of others.

We all understand the vital importance of pursuing those who would do harm to our country and our citizens, that we have to do it in a manner that is consistent with our American values. Torture is not an American value. It is not a value of anyone who cherishes human rights.

Mr. Arar, I want to thank you, also, for standing up so that what happened to you will never happen again. I think I want to add my voice to those who have also today acknowledged our Government's failures that have contributed to your ordeal, and I think it is incumbent upon us to learn from those mistakes and, also, help engage in the oversight and legislate in this body to put better protections in place.

I want to just ask a question directly to Mr. Arar.

I want to ask what it meant to you that Canada had convened the commission to examine your case and confirmed your innocence and their mistakes in your case, as did several other high ranking officials in the country.

Mr. ARAR. The launching of the inquiry and the eventual findings and apology from the Prime Minister meant a lot to me. As you know, after I came back, I was looking for important answers. Today, myself, my wife and my kids and my family, in general, have received most of those answers and that really meant a lot to me.

It allowed me to reestablish trust in the Canadian system, in a way.

Nevertheless, there is one fundamental question that I have been asking for the past couple of years, which is why the United States Government decided to send me to Syria rather than to Canada, and, unfortunately, I have not received a satisfactory answer for that question.

I do hope that this committee and other committees will be able to get to the bottom of what happened and provide me with this answer.

Mr. CARNAHAN. Thank you very much.

Mr. NADLER. The gentleman yields back.

The chair recognizes the gentleman from Minnesota, Mr. Keith Ellison.

Mr. ELLISON. Thank you, Mr. Chair. Also, let me thank both chairs for convening this important hearing and, also, thank both ranking members, as well.

Mr. Arar, I guess my first question to you is, you have said you would like to know why the United States might have transferred you to Syria as opposed to back to Canada. I think that really is a good question, because the United States has sanctions against Syria, and there is a lot of political dialogue very critical of Syria.

So I guess I am curious to know why, since we seem to be in somewhat of an unfriendly posture with regard to Syria, why they would feel this spirit of cooperation with respect to you.

Could you share your views on that subject, if you understand my question?

Mr. ARAR. Why Syria cooperated with the United States in my case?

Mr. ELLISON. No. Why would the United States cooperate with Syria on this issue with regard to you, but not be in a posture of cooperation in so many other areas? Do you understand? If you don't know, that is fine.

Mr. ARAR. I really believe this is a better question to ask of the officials that took the decision to send me to Syria.

Mr. ELLISON. I think you are right about that.

Mr. ARAR. You are asking me to speculate. I really don't know whether it is the political situation or other things. But I think this is the best question you can ask to not only the day-to-day officers who took the decision, but the Attorney General and whoever signed on the actual removal order, why did they decide to send me there and not to Canada.

Mr. ELLISON. That is, I think, something we would all like to know.

Mr. ARAR. But let me add one thing. If you look at my case in isolation of other cases, probably it is hard to try to find what the reason behind that would be.

But if you look at other cases where people have been rendered, not only to Syria, but to other countries, like Morocco and others, it clearly establishes a pattern where people are sent there for the actual purpose of torture.

Normally, using torture on United States soil is illegal and out of the so many public cases we have heard, most of those people who have been rendered have, in fact, been tortured.

Mr. ELLISON. Mr. Arar, I may ask you other questions that would probably best be directed to other parties, but I do appreciate and thank you for your effort to try to shed some light.

So another question you may or may not have the answer to, but I am curious to ask you: Are there other people who are currently being rendered in the other countries with the participation of the United States?

I mean, today, if we look at your case in isolation, we are all apologetic for what happened to you, I certainly am. But are there other outstanding cases such as yours right now or is this the end of it?

Mr. ARAR. Just days ago, the famous Stephen Grey, the British journalist, he published an article in which he claimed that those rendition flights are still ongoing.

We have heard testimony from previous U.S. officials that—and I am referring here to Mr. George Tenet—that there were hundreds, 70 or more of those cases. But thanks to the efforts of those

journalists, we are learning that not only 70, but maybe hundreds of those people have been rendered to secret locations in some cases.

Mr. ELLISON. So I join with my colleagues in offering a heartfelt apology to you, but I also have to thank you for doing more than simply sitting quiet and shutting up.

I mean, the fact that you are continuing to bring light to this is doing a great service for many other people.

Let me also ask you this. There is a gentleman who is in Guantanamo Bay, his name is Sami Al-Hajj. He is a former *Al Jazeera* journalist. I can't say what he did or didn't do, but there are other people who have reviewed his case carefully and seem to think that he has never done nothing more than be a journalist.

And my question is, Do you know of other—are you aware of other people who are in custody whose cases need to be brought to light?

Mr. ARAR. Well, all I know about those people is through the media, frankly.

Mr. ELLISON. Me, too.

Mr. ARAR. Articles in the *New York Times*, the *Washington Post* and others. I personally don't know about other cases. I can tell you, when I was in Syria, though, in one of those cells, there was a gentleman by the name of Haydar Zammar, who I later learned his story. He was, in effect, rendered from—who also—he is a Syrian-born German who was rendered from Morocco to Syria, apparently with the cooperation of the CIA.

I don't know what happened to him. Recently I heard he completely disappeared.

Mr. ELLISON. Mr. Arar—

Mr. ARAR. This is another case.

Mr. ELLISON. Mr. Arar, another question I have is that as members of the United States Congress, it is our sworn duty to defend the national security of America. And so my question to you is in that light.

Does it make our job to defend our country more difficult when news of renditions goes around the world? When news about your case and others proliferate around the world, does America win friends or win enemies?

Mr. ARAR. Well, let me say, first of all, that the United States, as a sovereign country, has the full right to defend itself against acts of aggression and terrorism.

Mr. ELLISON. Absolutely.

Mr. ARAR. But I really believe this should be done within the boundaries of law, whether it is domestic law or international law. And what kind of lesson are we sending to third world countries if we, as Governments in the West, we don't abide by our own laws and, on the other hand, we are asking them to become democratic?

I think it damages the credibility of the United States. There is no doubt about that. Any reasonable person would tell you that.

Mr. ELLISON. Well, let me ask you this. There are people out there who, my colleague from California pointed out, properly, who are killers and terrorists and who murdered Americans in 2001. That is a fact, that did happen.

But my question is, Are we in some way giving these people propaganda to use against us when these renditions are allowed to go forward? Are we giving people who would harm us ammunition to recruit against us?

Do you have any views you would like to share on that?

Mr. ARAR. As I said, the more you abide by the law, the more respect you get from your enemies, as well as your friends, most importantly, from your friends.

I reiterate that there is the technical aspect of things, but there is also the human side of things. What do we tell the kids and the children of the person who is rendered for torture a generation or two from now? What will happen? How will the United States Government and, by consequence, people will be viewed—will they still be respected as they used to be?

Mr. ELLISON. Mr. Arar, let me also ask you, we have American soldiers who we hold very dear. They are very precious to us and our country. But when the message goes out that we participate in torture or engage in rendition, do we put those soldiers at risk?

Can other people try to justify torture of perhaps our own precious soldiers when we engage in this kind of behavior?

Mr. ARAR. Well, if you blame others for using torture and being cruel to innocent people, I mean, they will point the fingers back at you and say, "Listen, you have also tortured innocent people." So that is very important to put in mind.

Mr. ELLISON. And, finally, my final question is—

Mr. DELAHUNT. Could the gentleman yield for a moment, because the ranking member has to leave at 4:00, and I will get back to you.

Mr. ELLISON. Certainly, I would be happy to yield to the ranking member.

Mr. DELAHUNT. I would like to give him that time.

Mr. Rohrabacher?

Mr. ROHRABACHER. Thank you very much, Mr. Chairman. Again, I appreciate this hearing, and I appreciated getting to know Mr. Arar personally, and I think he has presented his case very well today.

And thank you very much for letting us get to meet you, and I wish you and your family all the best.

Today the case is not—we are discussing your case, but we are also talking about rendition as a strategy in this war and also about what legal parameters that we will conduct ourselves within in this war against people who would commit mass murder against Americans and other people in Western democratic countries.

One of the underlying issue is whether or not people who are, as our friend, Mr. Nadler, described, whether or not people who are even non-U.S. citizens, do they have a right to due process, even though they are not citizens and they are suspected of terrorism.

In a war in which we are engaged in, certainly, criminal behavior always—we always believe in due process, et cetera. Due process is basically something that is designed in America to protect someone who is accused of a crime that has already happened.

One of the problems that we have got in this war against terrorism is that the strategy is to try to catch people before they murder hundreds of thousands of people, rather than wait until the

crime has already been committed, and structuring that within the due process laws that were set up—to be an aftermath after a crime has been committed will not save the lives of those tens of thousands of people.

Within that context, if you are operating that way in which due process is not being respected, because you are trying to protect those thousands of people whose lives will be lost, there are people like yourself who will be unjustly treated because there are mistakes that happen in every human endeavor like this, whether it is a military effort or an intelligence effort or even, as I say, Medicare in the United States.

So the bottom line is, I guess, in terms of the underlying issue at hand, if you do believe, as I believe, that due process is not, should not be extended in this war on terrorism, especially to non-U.S. citizens, it is incumbent on people like myself to agree with the chairman and the other people who have been involved in this hearing, that the United States should admit its mistakes, that we have to admit that we have a person here that our Government made a mistake.

And if we actually back down from that commitment, realizing that we don't believe that due process should happen, we are asking for more mistakes to happen.

So I think that a commitment to honesty and truth is vital in this effort against terrorism and not expanding the rights of suspected terrorists.

And one last note about torture and, of course, no one believes that anyone who is an innocent person like yourself should ever be incarcerated, much less suffer physical abuse. Let us note that those people who are terrorists, if we do believe the issue is due process, you are not the one that we should have here.

What we should have is a terrorist who had been planning to destroy a building or kill thousands of people at the hearing, saying, "I deserve due process," and make the decision based on that person rather than the exception to the rule.

Mr. DELAHUNT. Would the gentleman yield for a moment?

Mr. ROHRABACHER. Just one note and then I will finish my point.

We have a terrorist, Khalid Sheikh Mohammed, who has admitted was the terrorist mastermind of 9/11, the man who planned this attack that, as I say, he didn't want to kill just 3,000 people, he wanted to slaughter tens of thousands of Americans.

He was waterboarded. He was waterboarded. Now, that is not physical torture, where they are cutting his fingernails or toes off or whatever they do with torture. He was waterboarded, and he admitted, under waterboarding, to other activities that were terrorist activities that would have caused the death of many people.

Now, obviously, no one is suggesting that terrorism could be used against a man like yourself or any other person who is an innocent person. I am going to ask your witness here. You have children at home. Khalid Sheikh Mohammed was planning terrorist activities that might have killed your children.

Are you happy that we took him out and got that information?

Mr. ARAR. That is a question to me, right?

Mr. ROHRABACHER. Yes, it is.

Mr. ARAR. I really believe that existing domestic and international laws are sufficient to go after terrorists and prosecute them within the boundary of law.

There are enough laws to allow the police to prevent terrorist activities before they happen. There are enough surveillance techniques that could be used.

When we go and torture people, whether they are innocent or not or whether they are about to commit an act of terrorism, what we are doing, we are actually demeaning ourselves and not them.

And the other fact here that I would like to point everyone's attention is how do we really know that this was true. We are assuming that the information obtained through torture techniques is reliable. We are told by the CIA that they have prevented many attacks. How do we really know?

Mr. ROHRABACHER. Well, in the case of——

Mr. ARAR. Isn't that the same agency——

Mr. DELAHUNT. I am going to ask the gentleman——

Mr. ROHRABACHER. One last thing. In the case of Khalid Sheikh Mohammed, we do know that they were accurate and there are other cases——

Mr. DELAHUNT. Well, we don't know that they are accurate, and I would like to have the CIA come here and testify as to the truth, and maybe that is what we need, because I will be able to quote to you a series of statements by professionals that indicate that torture is counterproductive in the war on terror.

And one individual stands out, in my mind, and that is the former director of the CIA, who we served with, Porter Goss. He said that unequivocally. Military expert after military expert immersed in intelligence have publicly stated that torture leads us on "wild goose chases." That is a quote.

So I think that is the subject of an additional hearing. But I know that we are soon going to be cut off.

Let me just note, Mr. Arar, that you made the comment, I think it was that the United States would send individuals overseas with possibly the intent to elicit information through torture.

Let me inform you that if that is the case, that is a violation of United States law. There are existing Federal statutes which make it a crime, and if that be the intent of those that made a decision to have you removed to Syria because of their history of torture, then that is a Federal crime.

And let me ask Mr. Roach, and I know you have counsel with you, have you communicated with anybody in the Department of Justice seeking an investigation into how the decision was made to remove you to Syria over your objections and given the history, if you will, of Syria as related in our own country report?

And let me just read, briefly, this is from the United States Government, the Department of State, referring to Syria:

"Torture and abuse of detainees is reported to be common. Methods of torture abuse included electrical shocks, pulling out fingernails, burning genitalia, forcing objects into the rectum, beating, sometimes while the victim was suspended from the ceiling."

It has been documented that 38 types of torture and ill treatment were used against detainees. This is the reality that our own State Department reports to anyone that has access to this particular publication.

I would presume that all agencies within the Federal Government would have at least a minimal duty to examine this report prior to removing anyone to Syria. It amounts to a stain on our national honor to allow any individual to be removed to Syria, given our own report that goes on and on and on.

But let me pose a question to Mr. Roach or to your counsel: Have you or anyone in your behalf requested a criminal investigation into the decision to have you removed to Syria rather than to Canada?

Ms. LAHOOD. I think, as you are aware, Mr. Arar's civil case was brought against top level Department of Justice officials, former Attorney General John Ashcroft and former Deputy Attorney General Larry Thompson, as well as other U.S. officials.

We haven't had any indication that—considering the government's response in his civil suit, we haven't had any indication that criminal accountability is something they would consider, but, of course, we would welcome it.

Mr. DELAHUNT. Well, what I am asking, okay, is that has there been a correspondence or a communication based upon Federal laws and given the realities of Syria, as evidenced in the report that I just alluded to, has there been a request to the Department of Justice, not in terms of civil litigation, but possibly the appointment of a special prosecutor who would have access to this information to determine whether our laws, United States laws against torture have been violated?

Ms. LAHOOD. There has been no such request. We would be happy to make one and we would be happy, also, if Congress could undertake that investigation, as well.

Mr. DELAHUNT. Let me yield back to the gentleman from Minnesota, Mr. Ellison.

Mr. ELLISON. I would like to just point out, Mr. Chair, I appreciate you yielding back to me. I am grateful for you calling this hearing.

I do have a 4 o'clock appointment myself. I tried to graciously yield to the ranking member, and it didn't work out so well, but I guess trying to get back to the line of questions I was asking before.

Mr. Arar, I was asking about other pending cases that might be in existence, because, of course, as important as it is for us to apologize to you, I am also concerned about existing cases.

Mr. Roach, are you aware of other cases where people may have been rendered with the participation of our Government, whether they be in Guantanamo Bay or Canada or other parts of the world, any individuals who you could share information with us about?

Mr. ROACH. Like Mr. Arar, I rely mainly on media reports of these. There have been media reports, and I really think that that is a matter for American officials to undertake and to try to do a thorough investigation, as we tried to do a thorough investigation of Canadian officials.

And I should add that on the torture issue, Justice O'Connor's findings were that it came as a surprise to Canadian officials that Mr. Arar was being sent to Syria.

So although a commission of inquiry in Canada doesn't have jurisdiction to determine criminal law, I think it is important for you to know that Canadian officials did not know that Mr. Arar was going to be sent to Syria. American officials——

Mr. ELLISON. Mr. Roach, going back to a question asked earlier by Mr. Arar: Why, in your view, was Syria the location that Mr. Arar was sent to as opposed to Canada?

Mr. ROACH. Well, obviously, there is a degree of speculation, but it is clear that on October 5, an RCMP officer told an FBI officer that if Mr. Arar was returned to Canada, which was where he requested, he would not be arrested and he would be admitted to the country.

So I think that may be part of the puzzle, but there are many pieces that are really left for you to discover.

Mr. ELLISON. And, Mr. Roach, let me also ask, in your view, how does torture impact the American image and standing abroad? I mean, people obviously have studied this case. We are not the only people who know about it.

How do cases like Mr. Arar's case shape our image abroad?

Mr. ROACH. Well, it gives dictatorships excuses. If the United States is involved, dictatorships are more than happy to point to the American example, or the Canadian example, or the British example.

I also would just add, though, and this goes to the issue of torture of a terrorist suspect, all civilized justice systems will not admit confessions that are coerced. This is very, very old law that we just have never trusted the reliability of a confession that was obtained through torture.

And during our inquiry, we heard from an American expert, a leading expert, Professor Richard Ofshe, on false confessions and it really does confirm that when people are being tortured, there is a very real possibility that they will say whatever they think will stop the torture.

And so not only does it demean the image of democracies, but it may make it impossible to prosecute people who are actually terrorists. So I think it is important.

Mr. ELLISON. Mr. Roach, I just have one more question I want to ask you. Of course, this has been a tremendous afternoon. I want to, again, thank the chairman.

But my question is, What is the relationship between national security and the image of the nation abroad? For example, if our nation has suffered a loss of standing in the world, does that impact our national security, particularly if some people are allowed, through certain events, to whip up anti-American sentiment?

How does our national security get impacted by a poor standing in the world in association with torture?

Mr. ROACH. Right. I mean, your 9/11 Commission Report made what I think is a very compelling case that the United States needs to win hearts and minds and needs to show that it is committed to justice and democracy.

Mr. DELAHUNT. I thank the gentleman.

Mr. Roach and Mr. Arar, on behalf of both subcommittees, let me repeat our gratitude for your appearance here today and, to Mr. Arar, I think you can sense that we have incredible empathy to you, for your family and what you have gone through, and please accept the apologies that we have all made here today on behalf of the people whom we represent.

And I can assure you that that sentiment is true of most Americans and clearly the vast majority of members of this Congress and I believe that you have made a significant contribution to providing us an opportunity to reflect, to think through our own values, and your appearance today has added considerably in terms of the direction that I believe that most members want to go.

So, again, thank you. Thank you both.

I think we can just take a brief recess while the next panel comes forward.

[Recess.]

Mr. DELAHUNT. The committee will come to order.

Let me welcome a very distinguished panel. It always seems that the second panel has to have an abundance of patience, but I am sure that the testimony that you heard was illuminating and certainly put a human face on this issue.

Let me begin with the introductions and then we will proceed to your testimony.

First of all, let me begin with Fred Hitz. He is a lecturer and senior fellow at the Center for National Security Law at the University of Virginia Law School, a graduate of Harvard Law School, and he served in the CIA's clandestine service in Africa.

After subsequently working with the State, Defense and Energy Departments, he resumed his career at the CIA in 1978 as legislative counsel. He was then appointed the CIA's first Statutory Inspector General by President George Herbert Walker Bush. He served in that capacity from 1990 to 1998.

The Canada Institute of the Woodrow Wilson Center recently published his analysis of the Arar case and, of course, he has another very significant credential. He is from Milton, Massachusetts, which I represented in my previous career as district attorney and State's attorney, and I am sure he is also a member of Red Sox Nation and is fervently hoping that the Red Sox pull it out one more time.

Mr. Dan Benjamin is the director of the Center on United States and Europe and a senior fellow in foreign policy studies at the Brookings Institute. From 1994 to 1999, he served on the National Security Council staff under President Clinton, the last year as Director of Transnational Threats.

Prior to joining Brookings, Mr. Benjamin spent 6 years in the International Security Program at the Center for Strategic and International Studies. He has written two books, *The Age of Secret Torture* and *The Next Attack: The Failure of the War on Terror and a Strategy for Getting it Right*. He holds degrees from Harvard and Oxford.

Welcome, Mr. Benjamin.

Michael John Garcia is a legislative attorney with the American Law Division of the Congressional Research Service. His practice areas include immigration law, international law, and the laws of

war. He received his B.A. from Ohio State and his J.D. from Georgetown University.

Thank you, Mr. Garcia, for joining us today.

David Cole is a professor of law at Georgetown University Law Center. Prior to joining Georgetown, Mr. Cole worked as a staff attorney for the Center on Constitutional Rights, where he litigated a number of First Amendment cases.

He has published in a variety of areas, including civil rights, criminal justice and constitutional law. His books include, *Less Safe, Less Free, Why America is Losing the War on Terror*, and *Terrorism and the Constitution: Sacrifice and Civil Liberties for National Security*.

A graduate of Yale Law School, he has received numerous awards for his civil rights and civil liberties work.

Professor, Cole, thank you for joining us.

We will begin with Mr. Hitz. Please proceed.

STATEMENT OF FREDERICK P. HITZ, ESQ., LECTURER AND SENIOR FELLOW, CENTER FOR NATIONAL SECURITY LAW, UNIVERSITY OF VIRGINIA SCHOOL OF LAW

Mr. HITZ. I will summarize some thoughts from my statement, because the basic facts that are involved in the Arar case are well before us now.

I got into this issue rather serendipitously. As you pointed out, I was asked to do the American point of view in a *One Issue, Two Voices* publication that the Canada Institute publishes, and I have got this document and I believe you do, also, sir, and I would like to have it introduced into the record.

Mr. DELAHUNT. We will submit into the record, without objection.

[NOTE: The information referred to is not reprinted here but is available in committee records or may be accessed on the World Wide Web by going to: http://www.wilsoncenter.org/topics/pubs/Canada_6.pdf (accessed December 6, 2007).]

Mr. HITZ. Let me just cut to the chase in terms of the matter that I am interested in. As you have stated several times, Justice O'Connor has written an extraordinary report here. It is in the tradition of great Canadian reports of its kind. The McDonald commission did the report several years ago, for example, that established the Canadian Secret Intelligence Service. So he has upheld a very high standard.

But when I learned that Mr. Arar was removed to Syria by private aircraft to Amman and then by automobile to Damascus, I concluded that Mr. Arar's summary deportation, however we termed it at Kennedy, before INS, was tantamount to an extraordinary rendition and should be regarded as such.

Admitting, as Justice O'Connor finds, that the principal cause of the Arar tragedy is the mistake in intelligence provided United States authorities by the Canadian Government, nonetheless, the decision by United States authorities to deport Mr. Arar summarily to Syria, without consulting with the Canadian Government, was unwarranted, in my view, and has had the effect of "cooling" relations with Canadian border and intelligence authorities on intelligence sharing, as my co-author, Robert Henderson, stated in his account of the matter in the Canada Institute publication.

Actually, I take this issue further and oppose extraordinary renditions categorically. I recall when the practice of renditions began during the Clinton administration, after the 1993 World Trade bombings, when the United States was able to persuade Pakistan to turn Ramzi Yousef over to the FBI to face trial in New York and, subsequently, when the shooter at the CIA entry gate, Mir Amal Kansi, was turned over, again, by the Pakistanis to face trial in Fairfax County, Virginia. The term “rendition” then referred to a practice whereby United States intelligence and law enforcement authorities, often working together, “snatched” alleged terrorist suspects outside the United States, on the high seas and sometimes with the help of other sovereign nations, to stand trial for their crimes in U.S. courts.

This practice arose out of Congress’ decision to pass statutes in the 1980s with extraterritorial reach, making it a Federal crime to commit terrorist acts against U.S. citizens abroad.

The concept of renditions mutated after 9/11, when “the gloves were taken off” law enforcement and intelligence to refer to the situation where, instead of snatching the suspected terrorists for trial in the U.S., we delivered them to allied nations for interrogation under rules and circumstances that resulted in the use of interrogation methods beyond what would have been permitted to U.S. authorities.

In some instances, we sought to protect ourselves against blowback by writing a letter to the foreign liaison contact seeking assurances that the methods used would be congruent with international law, but the letter was exchanged at such a low level diplomatically and in such boilerplate language that it was really meaningless as a restraint on the practices of nations with poor human rights records.

I believe this is doing indirectly what U.S. officials would be prohibited from doing directly and is unwise, if not illegal.

If it is not currently considered to be an illegal practice, I believe the United States should make it so. I view it much as I do the Executive Order prohibition on political assassination. We should not be in the business of coercive, torturous interrogations, directly or indirectly.

Why, you may inquire, should we give up the practice of extraordinary renditions if we are not involved in illegal behavior ourselves and can profit from the fruits of the interrogation?

I would argue that the Arar case shows we cannot shield ourselves from responsibility for illegal interrogations where we supply the victim, whether we want to or not. I believe there should be only one standard for hostile interrogation of terror suspects, that of the Army field manual, new Army field manual based on the Geneva Conventions, as indicated by the Detainee Treatment Act which Congress passed in 2006.

It is unwise to hold the CIA and the intelligence community to a different standard than that of Common Article 3 of the Geneva Conventions, with its prohibition of “cruel and inhuman treatment.”

I believe the possibility of illegal coercive interrogations undercuts international intelligence cooperation in the war on terrorism

and adversely affects the morale of intelligence personnel who engage in it.

I was horrified at the thought that CIA operations officers felt so unprotected by their own government that they felt compelled to take out personal insurance against being sued for torturous acts, as reported in the press several months ago.

I feel certain that just as CIA operations officers were pleased when the Hughes Ryan Act of 1974 was passed, which required that all covert action operations had to be accompanied by a presidential finding that they were in the national security interest of the United States, so would they applaud a uniform governmental prohibition against interrogation practices directly or indirectly authorized by the U.S. Government that contravene the Geneva Conventions and the Detainee Treatment Act.

Thanks, Mr. Chairman.

[The prepared statement of Mr. Hitz follows:]

PREPARED STATEMENT OF FREDERICK P. HITZ, ESQ., LECTURER AND SENIOR FELLOW,
CENTER FOR NATIONAL SECURITY LAW, UNIVERSITY OF VIRGINIA SCHOOL OF LAW

My name is Frederick Hitz. I am a retired career intelligence officer having worked at the Central Intelligence Agency for over twenty years, retiring in 1998 after serving as the Agency's first statutory Inspector General. Since that time I have been teaching at the Woodrow Wilson School of Princeton University and at the University of Virginia in the Department of Politics and the School of Law.

Last year at this time I was asked to write the United States' voice for the publication "One Issue, Two Voices" on **Intelligence Sharing between Canada and the United States** in the aftermath of publication in September 2006 of Mr. Justice O'Connor's *Report of the Events Relating to Maher Arar*. ("One Issue, Two Voices" is an occasional publication of the Canada Institute of the Woodrow Wilson International Center for Scholars, headquartered here in Washington DC, that seeks to explore a Canadian and US viewpoint on a prominent issue of the day affecting both countries.) I am submitting for the Committee's record a copy of Issue Six of "One Issue, Two Voices," published in January 2007 that sets forth my views on the potential adverse impact of the Arar case on intelligence sharing between the US and Canada.

In reading the four volume O'Connor report I was bowled over by the extent of the tragedy that befell Mr. Arar. In straight-forward prose Justice O'Connor chronicles the mistakes that led to erroneous information that Mr. Arar was a member of Al Qaeda and how that intelligence was inappropriately provided to US authorities, such that Mr. Arar was placed on a watch list at US points of international entry. Mr. Justice O'Connor is unsparing in his criticism of the flawed Canadian process, making use of the services of a unit of the Royal Canadian Mounted Police (RCMP) that had had no previous experience on investigating and reporting on intelligence matters, to accumulate the dossier on Mr. Arar. I am certain this finding was crucial in the Canadian Government's decision to award Mr. Arar \$7 million in compensation for his ordeal. No less tragic in my view was the use to which US immigration authorities put this erroneous derogatory information on Mr. Arar, when he landed at Kennedy airport in September 2002 on his way home from Tunis to Toronto via Zurich and New York City.

Mr. Justice O'Connor acknowledges that since the United States refused to participate in his inquiry, he can only speculate, but he believes US immigration authorities relied on the mistaken Canadian intelligence to summarily deport Mr. Arar to Damascus, where he was incarcerated by the Syrian intelligence service and beaten repeatedly with an electric cable before the Syrians concluded some weeks later that he was not Al Qaeda. Importantly, in my view, Mr. Justice O'Connor notes that the Canadian government was never notified by US immigration authorities in New York that Mr. Arar was going to be removed to Syria, contrary to the usual working arrangements on such matters between the two countries.

Upon learning that Mr. Arar was removed to Syria, by private aircraft to Amman, Jordan and then by automobile to Damascus, I concluded that Mr. Arar's summary deportation was tantamount to an "extraordinary rendition" and should be regarded as such. Admitting, as Justice O'Connor finds, that the principle cause of the Arar tragedy is the mistaken intelligence provided US authorities by the Canadian Gov-

ernment, nonetheless the decision by US authorities to deport Mr. Arar summarily to Syria without consulting with the Canadian Government was unwarranted and has had the effect of “cooling” relations with Canadian border and intelligence authorities on intelligence sharing, as my co-author Robert Henderson stated in his account of the matter in “One Issue, Two Voices.”

Actually, I take this issue further and oppose “extraordinary renditions” categorically. I recall when the practice of “renditions” began during the Clinton Administration after the 1993 World Trade bombings when the US was able to persuade Pakistan to turn Ramzi Yousef over to the FBI to face trial in New York, and subsequently when the shooter at CIA, Mir Amal Kansi, was turned over, again by the Pakistanis, to face trial in Fairfax County, Virginia. “Rendition” then referred to a practice whereby US intelligence and law enforcement authorities, often working together, “snatched” alleged terrorist suspects outside the US, on the high seas and sometimes with the help of other sovereign nations to stand trial for their crimes in US Courts. This practice arose out of the Congress’s decision to pass statutes in the 1980s with extraterritorial reach, making it a federal crime to commit terrorist acts against US citizens abroad.

The concept of “renditions” mutated after 9/11 when the gloves were taken off law enforcement and intelligence, to refer to the situation where instead of “snatching” the suspected terrorist for trial in the US, we delivered them to allied nations for interrogation under rules and circumstances that resulted in the use of interrogation methods beyond what would have been permitted to US authorities. In some instances, we sought to protect ourselves against blow back by writing a letter to the foreign liaison contact seeking assurances that the methods used would be congruent with international law, but the letter was exchanged at such a low level diplomatically, and in such boilerplate language, that it was really meaningless as a restraint on the practices of nations with poor human rights records. I believe this is doing indirectly what US officials would be prohibited from doing directly and is unwise, if not illegal. If it is not currently considered to be an illegal practice, I believe the US should make it so. I view it much as I do the executive order prohibition on political assassination. We should not be in the business of coercive torturous interrogations directly or indirectly.

Why, you may inquire, should we give up the practice of “extraordinary renditions” if we are not involved in the illegal behavior ourselves and can profit from the fruits of the interrogation? I would argue that the Arar case shows we cannot shield ourselves from responsibility for illegal interrogations, where we supply the victim, whether we want to or not. I believe there should be only one standard for hostile interrogation of terror suspects, that of the Army Field Manual based on the Geneva Conventions, as indicated by the Detainee Treatment Act, passed by Congress in 2006.

It is unwise to hold the CIA and the Intelligence Community to a different standard than that of Common Article Three of the Geneva Conventions with its prohibition of “cruel and inhuman treatment.”

I believe the possibility of illegal coercive interrogations undercuts international intelligence cooperation in the war on terrorism; and adversely affects the morale of intelligence personnel who engage in it. I was horrified at the thought that CIA operations officers felt so unprotected by their own government that they felt compelled to take out personal insurance against being sued for torturous acts, as reported in the press several months ago.

I feel certain that just as CIA operations officers were pleased when the Hughes-Ryan Act of 1974 required that all covert action operations had to be accompanied by a presidential finding that they were in the national security interest of the United States, so would they applaud a uniform governmental prohibition against interrogation practices directly or indirectly authorized by the US Government that contravene the Geneva Conventions and the Detainee Treatment Act of 2006.

Thank you for your attention.

Mr. DELAHUNT. Thank you, Mr. Hitz.
Mr. Benjamin?

**STATEMENT OF MR. DANIEL BENJAMIN, DIRECTOR, CENTER
ON THE UNITED STATES AND EUROPE, SENIOR FELLOW,
FOREIGN POLICY STUDIES, THE BROOKINGS INSTITUTION**

Mr. BENJAMIN. Thank you very much, Chairman Delahunt, Chairman Nadler, for the opportunity to speak here 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 trouble the conscience of those who care about America's reputation and those who have been part of our nation's role as a champion of the rule of law.

I share these concerns. I will leave to others, however, the issues of morality and legality and instead address simply the question of efficacy. How is this affecting the international cooperation and the intelligence here, in particular, in the war on terror?

It would be hard to overstate the importance of this cooperation. 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 since 9/11.

I think few who have worked in government and counterterrorism would have imagined, after the events of September 11, 2001, that we would have done as well we have. One of the main reasons has been this international cooperation, an unsung success of the post-9/11 period.

National leaders abroad and policymakers share an acute understanding of the nature of the terrorist threat and the desire to maintain close cooperation with us. As a result of that understanding, countries that may publicly disparage our policies still work hand-in-glove with us on counterterrorism matters.

As recent cases, such as the disruption of the cell in Germany and the disruption of the Heathrow plot that aimed to destroy ten United States airliners in flight over the Atlantic, this cooperation has saved innumerable lives.

We should not take it for granted that this cooperation will last forever and, in fact, a recent National Intelligence Estimate on the terrorist threat to the U.S. homeland noted concern that this level of cooperation would wane as the memories of 9/11 fade.

But at least as much as the threat to the cooperation over the passage of time, at least as great as that threat is the growth of resentment over how the United States conducts its efforts against jihadist terror, and it is now an open question whether sufficient support for the global war on terror can be sustained in Europe and elsewhere if we stay on the course we have traveled in recent years.

I believe that maintaining solidarity over the long term is in our deepest national interest and will require an enormous amount of work because of the diminished sense of legitimacy that now attaches to U.S. policy.

Now, frankly, it is difficult to disaggregate the variance grievances that have brought us to this point, when we talk about the legal gray area of Guantanamo, Abu Ghraib, CIA black sites, they have all played a part. But the practice of rendition has been clearly at the core of the anger, particularly among our European allies.

The case of Maher Arar has gotten enormous discussion, but others have, as well. One involves Khalid El-Masri, the German citizen who was apprehended in Macedonia, apparently because he had been misidentified as a terrorist. He was taken to Afghanistan

and interrogated for at least 5 months under extremely unpleasant circumstances.

In that case, the German court has issued, I believe, 13 warrants for the arrest of individuals involved in that action who are believed to be in the employ of our Government.

The other case that has received great notoriety was that of Abu Omar, the Egyptian cleric who, in 2003, was taken off the streets of Milan, reportedly to Egypt. Subsequently, 25 individuals, CIA officials and contractors, it appears, have been indicted with connection with this apparent rendition.

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 elsewhere.

One need only imagine how we would feel about something parallel happening in here in the United States to understand this sense of outrage and violation.

What has surely exacerbated this anger has been the sense that torture is the inevitable concomitant to these movements and that these renditions have been effectively the outsourcing or off-shorting of torture, and the accounts of Maher Arar and Khalid El-Masri have driven that point home.

I don't need to review for this committee the deep slide in the polls that America's image has suffered.

Now, I confess I had a problem earlier because I didn't have a copy of my own statement, which is due to the lack of a functioning printer at my home.

And, of course, you are also familiar with the investigations by the Council of Europe and a number of different European Parliaments. There is a small cottage industry of airplane-watchers who track renditions at European airports. EU officials have also threatened serious punishments for any country that has embedded American counterterrorism efforts that were deemed to be in violation of international law.

These are the public facts. Let me give you some anecdotal information that may fill out the picture.

European officials have told me that their own efforts to repatriate individuals involved in radical activities to their countries of origin, particularly in the Maghreb, have increasingly come under criticism from their publics and could yet be halted. That would be a major setback.

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

Senior European officials, political leaders and prominent policy intellectuals have privately warned of serious damage that has been done not only to the counterterrorism effort, but to American leadership in the alliance.

And just as an aside, I will tell you that I was at lunch several months ago with a European ambassador here in Washington. I sat down and the first thing he said to me was "What are you going to do to restore America's reputation in the world?" I was flattered he thought I could do anything about it, but I acknowledged that we had a serious problem there.

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 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.

I make all these points, but acknowledge up front that, in fact, I believe that there is a suitable way to conduct a rendition program along the lines that were observed, along the guidelines that were observed in the late 1990s, when I served in the Clinton administration and had some involvement with the program.

Let me quickly just outline what those standards would be.

One, rendition should be undertaken to disrupt terrorist activity, not for intelligence 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. In other words, there will be some due process.

There can be no renditions to countries where the individual is likely to be tortured, and recipient countries of rendered individuals must give assurances that they will treat those individuals according to international norms and that 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.

No renditions will be carried out in which a person is seized in a country that observes, by agreed upon standard, the rule of law. For example, there will be no renditions off the streets of Europe.

We can discuss these standards further and whether it is, in fact, possible to have such a successful and, I would say, acceptable program in the question-and-answer, but let me just say, in closing, that our partners, especially in Europe, are hoping for a revalidation of America's moral character and mission.

The importance of our moral standing in the war on terror cannot be overstated. And I might add, parenthetically, that our actions in this regard have considerably undermined our efforts to win over any moderate Muslims and to prevent them and to create among them a bulwark against radicalism.

Our allies need to be convinced that the United States has not jumped the rails for good, forsaken the rule of law and made torture and other human rights violations an integral part of the struggle against terror.

This will be a task for Congress and also for the next President and how well it is done will bear directly on our national security.

Thank you for the opportunity to speak here today.

[The prepared statement of Mr. Benjamin follows:]

PREPARED STATEMENT OF MR. DANIEL BENJAMIN, DIRECTOR, CENTER ON THE UNITED STATES AND EUROPE, SENIOR FELLOW, FOREIGN POLICY STUDIES, THE BROOKINGS INSTITUTION

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.

Mr. DELAHUNT. Thank you.

Before I recognize Mr. Garcia, I just want to direct your attention to the poster with the picture of the Attorney General-designate and the headline reads, "Memo: Worse than a Sin."

I am unfamiliar with his testimony, but I like the headline and its references—well, let me read some excerpts from the story:

"And in a clear break with Gonzales, Mukasey repudiated a 2000 Bush administration memo on torture, calling the document 'worse than a sin.'

"We don't torture, it is not what this country is about. It is not what this country stands for. It is antithetical to everything this country stands for."

Those words, that rhetoric, are certainly welcome and I hope that if the Senate should confirm him as the Attorney General, we will match that rhetoric with deeds and with action.

It is my intention, after this hearing, to consult with my colleague, Mr. Nadler, about having high-level administration officials who are responsible for the Arar decision to, regarding Syria, come

before these panels and tell the American people the truth, what happened.

Mr. Garcia, would you proceed?

STATEMENT OF MICHAEL JOHN GARCIA, ESQ., LEGISLATIVE ATTORNEY, AMERICAN LAW DIVISION, CONGRESSIONAL RESEARCH SERVICE

Mr. GARCIA. Mr. Chairman, my name is Michael Garcia. I am a legislative attorney with the American Law Division of the Congressional Research Service.

I would like to thank you for inviting me to testify today regarding the domestic and international legal constraints upon the practice of extraordinary renditions.

The term “extraordinary rendition” does not have a clear definition under international or domestic law. Historically, it has been used to refer to the extrajudicial transfer of a person from one state to another, generally for the purposes of arrest, detention and/or prosecution.

Unlike extradition, persons subject to extraordinary rendition have no access to the judicial system of the rendering state by which they may challenge their transfer.

Although the removal of aliens under immigration law has traditionally been considered a practice distinct from rendition, it may have the same practical effects. Certain arriving aliens who are inadmissible under the Immigration and Nationality Act, or INA, may be subject to a streamlined removal process known as expedited removal.

INA Section 235(c) authorizes the Attorney General to order an alien removed without further administrative review if he determines that the alien is inadmissible on security related grounds, which include participation in certain terrorism related activity.

U.S. officials have claimed that Mr. Arar was removed from the United States pursuant to this authority on account of his alleged membership in al-Qaeda.

Aliens ordered removed under expedited removal procedures typically designate the country to which they will be removed. However, immigration authorities are not required to remove the alien to the designated country when doing so would be “prejudicial to the United States.”

In such cases, immigration authorities may remove the alien to an alternative country, including one where the alien is a subject, citizen or national. This authority may have been the basis behind the decision to remove Mr. Arar to Syria rather than Canada, as he was a citizen of both countries.

Now, the primary legal constraints on rendition are found in Article 3 of the U.N. Convention against Torture, or CAT, and its domestic implementing legislation, the Foreign Affairs Reform and Restructuring Act of 1998, or FARRA.

These legal requirements generally prohibit the transfer of persons to countries where there are substantial grounds for believing that they would face torture. Neither CAT nor FARRA prohibit the transfer of persons when they would face harsh treatment not rising to the level of torture. Those separate legal requirements may be applicable in those circumstances.

Immigration and extradition authorities have enacted regulations implementing CAT requirements, which bar the transfer of any person to a country where he would more likely than not face torture. Regulations permit transfers to a country that provides diplomatic assurances that the transferred person will not be tortured, so long as those assurances are deemed sufficiently reliable.

The United States reportedly received assurances from Syria that Mr. Arar would not be tortured prior to removing him there, though the nature of these assurances has not been publicly revealed.

The executive branch takes the position that CAT Article 3 only applies to transfers from the United States. It does not apply to the transfer of persons seized and rendered outside U.S. territory, though this position has been criticized by some commentators.

Under FARRA, however, the U.S. cannot expel, extradite or otherwise affect the involuntary return of any person to a country where he would face torture, regardless of whether or not that person is physically present in the United States. In other words, FARRA generally applies to renditions outside U.S. territory.

But FARRA also excludes from coverage certain categories of aliens, including those considered a danger to U.S. security, to the extent that such exclusion is consistent with CAT.

Accordingly, if CAT is interpreted as not applying extraterritorially, neither does FARRA with respect to specified categories of aliens.

Federal statute also makes it a criminal offense to conspire to commit torture against persons outside the U.S. Perhaps for this reason, the CIA reportedly obtains assurances that a person will not be tortured before transferring him to another country's custody.

Officials within the Bush administration have also publicly stated that, at least as a matter of policy, the United States will not send a person to a country when it is believed that he would be tortured.

Mr. Chairman, that concludes my prepared statement. I would be happy to answer any questions you or other members may have. [The prepared statement of Mr. Garcia follows:]

PREPARED STATEMENT OF MICHAEL JOHN GARCIA, ESQ., LEGISLATIVE ATTORNEY,
AMERICAN LAW DIVISION, CONGRESSIONAL RESEARCH SERVICE

Mr. Chairman and Members of the Subcommittees:

My name is Michael Garcia. I'm a Legislative Attorney with the American Law Division of the Congressional Research Service. I'd like to thank you for inviting me to testify today regarding the domestic and international legal constraints upon the practice of "extraordinary renditions."

The term "extraordinary rendition" does not have a precise definition under international or domestic law. The surrender of a fugitive from one State to another is generally referred to as *rendition*.¹ A distinct form of rendition is *extradition*, by which one State surrenders a person within its territorial jurisdiction to a requesting State via a formal legal process, typically established by treaty between the countries.² The terms "irregular rendition" and "extraordinary rendition" have been used to refer to the *extrajudicial* transfer of a person from one State to another, generally for the purpose of arrest, detention, and/or interrogation by the receiving State. Unlike extradition cases, persons subject to this type of rendition typically

¹ BLACK'S LAW DICTIONARY 1298-99 (7th ed. 1999).

² U.S. extradition procedures for transferring a person to another State are governed by the relevant treaty and the statutory requirements set forth at 18 U.S.C. §§ 3181-3196.

have no access to the judicial system of the sending State by which they may challenge their transfer.³ Sometimes persons are transferred from the territory of the rendering State itself, while other times they are seized by the rendering State in another country and immediately rendered, without ever setting foot in the territory of the rendering State. Sometimes transfers occur with the formal consent of the State where the fugitive is located; other times, they do not.⁴

The removal of aliens under immigration law has traditionally been considered a practice distinct from rendition.⁵ Unlike rendition, the legal justification for removing an alien from the United States via deportation or denial of entry is not so that he can answer charges against him in the receiving State; rather, it is because the United States has sovereign authority to determine which non-nationals may enter or remain within its borders, and the alien has failed to fulfill the legal criteria allowing non-citizens to enter, remain in, or pass in transit through the United States. Nonetheless, the term “extraordinary rendition” is occasionally used by some commentators to describe the transfer of aliens suspected of terrorist activity to third countries for the purposes of detention and interrogation, even though the transfer was conducted pursuant to immigration procedures.

There are different grounds for removal or exclusion under the Immigration and Nationality Act (INA). Arriving aliens who are deemed inadmissible may be subject to “expedited removal,” a streamlined removal process. INA § 235(c) authorizes the Attorney General to order an alien removed without further administrative review if he determines that the alien is inadmissible on security-related grounds, which include participation in certain terrorism-related activity.⁶ U.S. officials have claimed that Maher Arar was removed from the United States pursuant to this authority,⁷ apparently on account of his alleged membership in Al Qaeda.⁸

Aliens ordered removed under expedited removal procedures typically designate the country to which they will be removed.⁹ However, immigration authorities are not required to remove the alien to the designated country when the designated country will not accept the alien or removing the alien to that country would be “prejudicial to the United States.”¹⁰ In such cases, immigration authorities may remove the alien to an alternative country, including one where the alien is a subject, citizen, or national.¹¹ This authority may have been the legal basis behind the deci-

³Before the United States may extradite a person to another State, a hearing must be held before an authorized judge or magistrate, who must determine whether the person’s extradition would comply with the terms of the treaty between the United States and the requesting State. Even if the magistrate or judge finds extradition to be appropriate, a fugitive can still institute habeas corpus proceedings to obtain release from custody and thereby prevent his extradition, or the Secretary of State may decide not to authorize the extradition. Although these protections do not apply when an alien is being removed from the United States for immigration purposes, other procedural and humanitarian relief protections do pertain.

⁴*See* *United States v. Alvarez-Machain*, 504 U.S. 655, 669 (1992) (upholding court jurisdiction over a Mexican national brought to the United States via rendition, despite opposition from the Mexican government).

⁵*See* M. BASSIOUNI, *INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE* 183–248 (4th ed. 2002) (discussing deportation and exclusion as an alternative to extradition).

⁶Aliens falling under the scope of INA § 235(c) are also ineligible for most humanitarian forms of relief from removal (e.g., asylum). Nevertheless, they are still eligible for deferral of removal under the Convention Against Torture. 8 C.F.R. § 235.8(b)(4). *See also* 8 C.F.R. § 208.18(d). For further discussion, see CRS Report RL32276, *The U.N. Convention Against Torture: Overview of U.S. Implementation Policy Concerning the Removal of Aliens*, by Michael John Garcia, at 9–14. Arriving aliens who are inadmissible because they lack necessary documentation to enter the United States (or used fraud or misrepresentation to obtain such documentation) are subject to removal under INA § 235(b). 8 U.S.C. § 1225(b). If an alien in this category indicates an intention to apply for asylum, or expresses a fear of persecution or torture, or a fear of return to his or her country, the inspecting officer will refer the alien to an asylum officer for an interview. 8 C.F.R. § 235.3(b)(4). If the asylum officer determines that the alien’s fear is credible, removal will be conducted through normal proceedings and the alien’s claims for relief from removal will be considered under that system of review. 8 C.F.R. § 208.30.

⁷*E.g.*, U.S. Dept. of State, *U.S. Views Concerning Syrian Release of Mr. Maher Arar*, Oct. 6, 2003, available at <http://www.state.gov/r/pa/prs/ps/2003/24965.html>.

⁸Arar Commission, *Report of the Events Relating to Maher Arar—Analysis and Recommendations* (2006), at 156 (describing contents of Arar’s order of removal).

⁹INA § 241(b)(2), 8 U.S.C. § 1231(b)(2). Aliens placed in regular removal proceedings are generally removed to the country where they boarded the vessel that transferred them to the United States. INA § 241(b)(1), 8 U.S.C. § 1231(b)(1).

¹⁰INA § 241(b)(2)(C), 8 U.S.C. § 1231(b)(2)(C). An alien may also be removed to a non-designated country in other circumstances.

¹¹INA § 241(b)(2)(D), 8 U.S.C. § 1231(b)(2)(D). If the alien is not removed to a country where he is a subject, national, or citizen, the INA provides a list of additional countries where the alien may be removed. INA § 241(b)(2)(E), 8 U.S.C. § 1231(b)(2)(E).

sion to removal Mr. Arar to Syria rather than Canada, as he was a citizen of both countries.

Article 3 of the U.N. Convention Against Torture (CAT)¹² and its domestic implementing legislation, the Foreign Affairs Reform and Restructuring Act of 1998 (FARRA),¹³ generally prohibit the transfer of persons to countries where there are substantial grounds for believing that they would face torture. Neither CAT Article 3 nor its implementing legislation prohibit the transfer of persons to locations where they would face harsh treatment not rising to the level of torture, though separate legal requirements may limit the transfer in such cases.¹⁴ Immigration and extradition regulations implementing CAT requirements bar the transfer of *any* person to a country where he would “more likely than not” face torture.¹⁵ But they permit persons to be removed or extradited to a country that provides diplomatic assurances that the transferred person will not be tortured, at least so long as those assurances are deemed “sufficiently credible.”¹⁶ The United States reportedly received assurances from Syria that Mr. Arar would not be tortured prior to removing him there, though the nature of these assurances has not been publicly revealed.¹⁷

The Executive Branch takes the position that CAT Article 3 only applies to transfers *from* the United States, and does not apply to the transfer of persons seized and rendered outside U.S. territory, though this position has been criticized by some commentators.¹⁸ Under FARRA, however, the United States cannot “expel, extradite, or otherwise effect the involuntary return of any person” to a country where he would face torture, “regardless of whether the person is physically present in the United States.”¹⁹ In other words, FARRA generally applies to renditions outside U.S. territory. But FARRA excludes from coverage certain categories of aliens—including those considered a danger to U.S. security—to the extent that such exclusion is consistent with CAT.²⁰ Accordingly, if CAT is interpreted as not applying extraterritorially, neither does its implementing legislation with respect to specified categories of aliens.

Other federal laws also make it a criminal offense to conspire to commit torture against persons outside the United States.²¹ Perhaps for this reason, the CIA reportedly obtains assurances that a person will not be tortured before transferring him to another country’s custody.²² Officials within the Bush Administration have publicly stated that, at least as a matter of policy, the United States will not send

¹²Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), G.A. Res. 39/46, Annex, 39 U.N. GAOR Supp. No. 51, U.N. Doc. A/39/51 (1984). The U.S. ratified CAT in 1994, subject to certain declarations, understandings, and reservations.

¹³P.L. 105-277, § 2242 [hereinafter “FARRA”].

¹⁴For a discussion of other treaties and statutes potentially relevant to renditions, see CRS Report RL32890, *Renditions: Constraints Imposed by Laws on Torture*, by Michael John Garcia, at 20–25.

¹⁵See 8 C.F.R. §§ 208.16–18, 235.8, 1208.16–18 (relating to the removal of aliens); 22 C.F.R. § 95.2 (relating to extradition of persons). The use of diplomatic assurances by the United States in CAT-related removal decisions has been criticized by some commentators. In 2006, the Committee Against Torture, an advisory body established under CAT to monitor parties’ compliance with treaty obligations, made a non-binding recommendation that the United States:

should only rely on “diplomatic assurances” in regard to States which do not systematically violate the Convention’s provisions, and after a thorough examination of the merits of each individual case. The State party should establish and implement clear procedures for obtaining such assurances, with adequate judicial mechanisms for review, and effective post-return monitoring arrangements.

Conclusions and Recommendations of the Committee against Torture regarding the United States of America, Jul. 25, 2006 [hereinafter “Committee Recommendations”], at para. 21.

¹⁶8 C.F.R. § 208.18. See also 22 C.F.R. § 95.3(b) (describing authority of Secretary of State to surrender fugitive “subject to conditions”).

¹⁷DeNeen L. Brown, *Canadian Sent to Middle East Files Suit*, WASH. POST, Nov. 25, 2003, at A25.

¹⁸United States Written Response to Questions Asked by the Committee Against Torture, April 28, 2006, available at [http://www.state.gov/g/drl/rls/68554.htm]. As a general matter, the United States has taken the position that human rights treaties “apply to persons living in the territory of the United States, and not to any person with whom agents of our government deal in the international community.” JAG’S LEGAL CTR. & SCH., OPERATIONAL LAW HANDBOOK 50 (Maj. Derek I. Grimes ed., 2006), available at [http://www.fas.org/irp/doddir/army/law2006.pdf]. In 2006, the Committee Against Torture recommended that the United States “apply the *non-refoulement* guarantee [of CAT Article 3] to all detainees in its custody.” Committee Recommendations, supra note 16, at para. 20.

¹⁹FARRA, § 2242(a).

²⁰*Id.*, § 2242(c).

²¹18 U.S.C. §§ 2340–2340B.

²²See Dana Priest, *CIA’s Assurances On Transferred Suspects Doubted*, WASH. POST, Mar. 17, 2005, at A1.

a person to a country where it is believed that he will be tortured, and obtains assurances whenever appropriate.²³

Court challenges to the legality of the U.S. “extraordinary rendition” program have thus far proven unsuccessful for plaintiffs, though litigation in at least one case, *Arar v. Ashcroft*, remains ongoing. Mr. Arar filed suit in January 2004 against certain U.S. officials that he claims were responsible for rendering him to Syria, where he was allegedly tortured and interrogated for suspected terrorist activities with the acquiescence of the United States. On February 16, 2006, the U.S. District Court for the Eastern District of New York dismissed Arar’s civil case on a number of grounds, including that certain claims raised against U.S. officials implicated national security and foreign policy considerations, and the propriety of these considerations was most appropriately reserved to Congress and the Executive Branch.²⁴ A notice of appeal was subsequently filed with the Court of Appeals for the Second Circuit.

In 2005, Khaled El-Masri, a German citizen of Lebanese descent, filed suit against a former CIA director and others for their involvement in his alleged rendition from Macedonia to a detention center in Afghanistan, where he was subjected to harsh interrogation for several months on account of suspected terrorist activities. El-Masri claimed that after the CIA discovered that its suspicions were mistaken, it thereafter released him in Albania.²⁵ The federal district court dismissed El-Masri’s suit without evaluating its merits, finding that his claims could not be fairly litigated without disclosure of sensitive information protected by the state secrets privilege.²⁶ The district court’s ruling was affirmed by the Fourth Circuit Court of Appeals in 2007, and the Supreme Court subsequently denied plaintiff’s petition for writ of certiorari.²⁷

Mr. DELAHUNT. Thank you, Mr. Garcia.
Professor Cole?

**STATEMENT OF DAVID D. COLE, ESQ., PROFESSOR OF LAW,
GEORGETOWN UNIVERSITY LAW CENTER**

Mr. COLE. Thank you, Chairman Delahunt and Chairman Nadler, for inviting me to testify at this hearing and for holding this hearing.

I am going to address the legal aspects of rendition to torture and particularly the removal of Arar to Syria, but I want to start by echoing your remarks, Chairman Delahunt, in the introduction and comparing the way that Canada has dealt with Mr. Arar’s case to ours.

As we have heard, Canada held a major independent investigation headed up by a justice of the Supreme Court. They fully exonerated Mr. Arar. They held Canada accountable. They awarded Mr. Arar damages.

By contrast, we have refused to take him off the terrorist list, despite his exoneration by the very country whose information—inaccurate information—we initially relied upon. We have refused to cooperate with Canada in their investigation.

We have never offered any apology to a man we sent to torture. And the government argues, in the case in which I represent Mr. Arar on behalf of the Center for Constitutional Rights, that even

²³ Answering a question regarding renditions in a March 16, 2005 press conference, President Bush stated that prior to transferring persons to other States, the United States receives a “promise that they won’t be tortured . . . This country does not believe in torture.” White House, Office of the Press Secretary, President’s Press Conference, Mar. 16, 2005, *available at* <http://www.whitehouse.gov/news/releases/2005/03/20050316-3.html>.

²⁴ *Arar v. Ashcroft*, 414 F.Supp.2d 250 (E.D.N.Y. 2006).

²⁵ Don Van Natta Jr. & Souad Mekhennet, *German’s Claim of Kidnapping Brings Investigation of U.S. Link*, NY TIMES, Jan. 9, 2005, at 11.

²⁶ *El-Masri v. Tenet*, 437 F.Supp.2d 530 (E.D.Va. 2006).

²⁷ *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007), *cert. denied*, 75 U.S.L.W. 3663, 76 U.S.L.W. 3021 (U.S. Oct. 9, 2007) (No. 06-1613).

if he was sent to Syria for the purpose of being tortured, he has no rights and, therefore, there was no legal violation.

They make that argument in addition to their argument that state secrets bar the court from even adjudicating the case.

Mr. DELAHUNT. Could you just clarify why they say he has no rights?

Mr. COLE. They said he has no rights because he is a Canadian, not an American, and he was an unadmitted alien and, therefore, they claim even if they sent him to Syria to be tortured, no rights were violated.

They similarly argue that no rights were violated under the Torture Victim Protection Act, which prohibits anyone from subjecting a person to torture under color of foreign law. They argue that they were acting under color of Federal law, not acting under color of foreign law, even though they were cooperating with Syria in subjecting him to torture under color of Syrian law.

In any event, the difference in attitude between Canada and the United States harms us, I believe, in the long run and in the world at large. The world pays attention to cases like Mr. Arar's, much more so than we do. Some in the United States have heard of Mr. Arar's case, but everyone in Canada has, and our treatment of him and our refusal to look into the matter or apologize deeply affects how the rest of the world views us.

This is not just a mistake, as Congressman Rohrabacher said. It would be a mistake if we decided to send him to Canada, but took him to the wrong gate and he got on a plane going to Syria.

We made a conscious decision to send him to Syria and, as Mr. Arar asked, What possible reason could there be for sending him to Syria rather than to Canada other than to have him be tortured?

Nor can blame be shifted to Canada. Canada provided inaccurate information, that is true, but Canada didn't make the decision to render him to torture. We did.

I want to make three brief points. First, rendition violates domestic law. Second, it violates basic obligations of international law to which we have committed ourselves. And, third, diplomatic assurances are not a defense, especially in a case like Mr. Arar's.

As a matter of domestic law, rendition to torture violates due process, criminal law and the Torture Victim Protection Act. It violates due process because torture is the paradigmatic case of conduct that shocks the conscience and, therefore, violates substantive due process.

Turning someone over to another person or country to have that conscience shocking conduct perpetrated elsewhere doesn't make it any less a violation. And the courts have held that substantive due process does, in fact, protect unadmitted aliens, contrary to the administration's position.

It violates the Torture Victim Protection Act, because the United States officials acted in concert with Syria and they acted to subject Mr. Arar to torture under color of Syrian law, and the Torture Victim Protection Act makes civilly liable not only those who are the direct torturers, but those who are complicit in the torture.

It violates the Federal Torture Statute, because it is a crime not only to subject someone to torture outside the United States under

that statute, but also to conspire to subject someone to torture outside the United States.

It also violates international law, and particularly the Convention against Torture, which, as Mr. Garcia has said, absolutely prohibits the expulsion of an individual to any country where he faces a danger of being subjected to torture.

Arar was expelled in circumstances where he not only faced that danger, but where our officials intended that he be subject to that treatment.

Finally, let me talk about diplomatic assurances. Diplomatic assurances are generally insufficient to meet our obligations not to render to torture for two reasons. First, why trust the promise of a country that tortures?

The United States has said that countries that torture typically deny that they torture. If they lie about it, why should we trust their promise not to engage in that very conduct?

In particular, why should we believe Syria? We don't believe what Syria says about Lebanon, about Iran, about nuclear weapons, about support of terrorism. Why was their alleged assurance that it would not torture Arar acceptable?

And if we really wanted an assurance that Arar would not be tortured, why didn't we send him on his way to Canada?

Second, assurances, if they were ever to be effective, would require extensive and intensive monitoring. No such monitoring was done in this case or, as far as I am aware, in any case of rendition to torture.

Indeed, it may not be possible to monitor effectively given the nature of torture. It is done behind closed doors. It is often done without leaving any physical marks.

In conclusion, rendition to torture violates a wide range of domestic and international laws. It shouldn't be surprising given torture's status worldwide as one of the most strongly condemned acts that a state can perpetrate on a human being.

I think if we are going to go forward, Congress should, number one, clear up any ambiguities, if there are any, in the torture and rendition bans, because this administration has shown a proclivity to exploit any loophole that it can create.

Number two, Congress should issue a formal apology and reparations to Mr. Arar and, on that, it seemed to me that there was a bipartisan consensus today that this man deserves an apology and reparations.

Congress can do that. They did that with respect to the Japanese internment. They can do that with respect to Mr. Arar.

But most important, Congress should authorize an independent commission with full authority to investigate and report on U.S. rendition practices. We owe it to the victims, we owe it to the world, we owe it to ourselves.

As Senator John McCain said, "This is not about who they are, this is about who we are."

Thank you very much.

[The prepared statement of Mr. Cole follows:]

PREPARED STATEMENT OF DAVID D. COLE, ESQ., PROFESSOR OF LAW, GEORGETOWN
UNIVERSITY LAW CENTER

INTRODUCTION

Thank you for inviting me to testify on the legality of extraordinary rendition, the practice by which the United States transfers persons to third countries where they are more likely than not to be subjected to harsh interrogation practices, including torture, in the hope of thereby gaining “actionable intelligence.” As one U.S. official involved in the practice infamously described it, “We don’t kick the [expletive] out of them. We send them to other countries so they can kick the [expletive] out of them.”¹ This practice, which facilitates and condones the universally condemned practice of torture, is illegal under both domestic and international law. While the practice has been reported in the press, it has not yet been subject to a credible independent investigation by the United States. If the United States is to begin to recover its standing as a human rights standard-bearer, Congress must make clear that extraordinary renditions are impermissible, and must authorize an independent investigation of the administration’s rendition practice.

I am a professor of constitutional law, immigration law, and national security and civil liberties at Georgetown University Law Center. I have written widely on the legal issues raised by the tactics employed in the “war on terror,” including three books and several law review articles.² I am also a volunteer cooperating attorney for the Center for Constitutional Rights, a legal and educational non-profit organization in New York, and in that capacity I am co-counsel for Maher Arar, whose wrenching story you have heard today. Arar’s account demonstrates, more clearly than any legal discussion, why rendition is morally, ethically, and legally wrong.

Arar’s story also demonstrates how a democracy should respond when such a wrong has been done. Canada undertook an extensive high-level official investigation of Arar’s treatment, and Canada’s complicity in it. It issued a lengthy report fully exonerating Mr. Arar and harshly criticizing Canadian authorities. And it paid Arar a substantial damages award for its complicity in the wrongs that the United States and Syria inflicted on him. By contrast, the United States argues that Arar’s claims cannot even be heard in court, claiming that its interest in secrecy trumps even the prohibition on torture.

I will address the domestic and international laws that prohibit rendition. It should not be surprising that this practice is illegal under multiple sources of law. Few practices in the world today are as universally condemned as torture. It is prohibited by our Constitution, by federal statutes, by multiple international treaties, and by customary international law. Indeed, the prohibition against torture is considered so fundamental to the world legal order that it is one of the few norms classified as *jus cogens*, meaning that the world considers it absolute, admitting of no exceptions. Other *jus cogens* norms include the prohibitions on slavery, genocide, and extrajudicial executions. To ask whether it is permissible to transfer a person to a third country to be tortured is akin to asking whether it is legally permissible to transfer a person to be sold into slavery, to be summarily executed, or to be a victim of genocide. For all practical purposes, the question answers itself.

As a matter of constitutional law, sending an individual to a third country for purposes of having him subjected to torture “shocks the conscience,” and accordingly violates substantive due process, just as torturing the individual directly would violate due process. Where federal officials are complicit in subjecting an individual to torture abroad, they also violate 18 U.S.C. § 2340A, and can be held criminally liable. And when officials are complicit in subjecting an individual to torture under color of foreign law, they can be held civilly liable under the Torture Victim Protection Act, 28 U.S.C. § 1350, note. Finally, where, as in Mr. Arar’s case, federal officials use immigration powers to remove an individual to a country where he faces a threat of torture, they have violated the Foreign Affairs Reform and Restructuring Act of 1998 (FARRA), which implements the Convention Against Torture, and pro-

¹Duncan Campbell, *September 11: Six Months On; U.S. Sends Suspect to Face Torture*, Guardian (London), Mar. 12, 2002, at 4 (quoting U.S. official).

²See, e.g., *Less Safe, Less Free: Why America Is Losing the War on Terror* (New Press, 2007) (with Jules Lobel); *Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism* (New Press, 2005, revised paperback ed.); *Terrorism and the Constitution: Sacrificing Civil Liberties in the Name of National Security* (3d ed. New Press, 2006); “The National Security Agency’s Domestic Spying Program: Framing the Debate,” 81 Indiana Law Journal 1355 (2006) (with Martin S. Lederman); “Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis,” 101Michigan Law Review 2565 (2003); “The New McCarthyism: Repeating History in the War on Terrorism,” 38 Harv. Civil Rights Civil Liberties Law Review 1 (2003).

hibits removal to a country where there are substantial grounds for believing the person would be in danger of being subjected to torture.

As a matter of international law, rendition to torture violates the Convention Against Torture, which prohibits signatory nations, including the United States, not only from directly inflicting torture, but also from sending individuals to other countries where they are more likely than not to be tortured. Rendition to torture also violates the International Covenant on Civil and Political Rights. Finally, rendition to torture violates customary international law, which as noted above, recognizes the bar on torture as a *jus cogens* norm, the most absolute prohibition known to international law.

U.S. officials often point to diplomatic assurances as a “defense” to claims that their extraordinary renditions violate prohibitions on torture. But relying on such assurances, from countries that have already shown themselves willing to violate solemn treaty obligations and *jus cogens* norms, does not resolve the problem. Such countries’ promises have already been shown to be unreliable, and the kind of monitoring that would need to be done to ensure that such promises are kept has never been done, and may be virtually impossible.

The fact that extraordinary rendition violates so many legal norms only underscores what should be self-evident. Just as it is patently illegal to torture a human being directly, so it is patently illegal to deliver him to a third country to have it do the dirty work. Outsourcing torture does not make it any less objectionable.

I. FEDERAL RESTRICTIONS ON RENDITIONS TO TORTURE

A. Due Process

Rendition to torture, like torture itself, violates due process. Had U.S. officials, instead of sending Maher Arar to Syria, simply tortured him in an interrogation room at JFK Airport, they would unquestionably have violated his Fifth Amendment rights. The fact that his rights were violated through joint action taking place in two countries does not render U.S. officials’ conduct permissible for two reasons: (1) the constitutional violation arose in the U.S., and (2) the Constitution bars U.S. officials from subjecting individuals to torture outside our borders, particularly when the officials willfully transported Arar overseas to evade constitutional restrictions.

Torture “shocks the conscience” and thereby violates substantive due process rights. Indeed, the case establishing the “shocks the conscience” standard, *Rochin v. California*,³ found that stomach pumping for drugs in a hospital violated due process precisely because it was “too close to the rack and screw.” Any physical coercion—or even the threat of physical coercion—violates substantive due process rights.⁴

The fact that victims of rendition tend to be foreign nationals, not U.S. citizens, does not deprive them of substantive due process protection against conscience-shocking treatment.⁵ In Maher Arar’s case, the constitutional violations arose while he was detained in the United States, so the case for applying constitutional protections is especially strong. But even where foreign nationals are abducted and rendered from countries outside the United States, and do not step foot in the United States, substantive due process may bar U.S. officials from delivering a person in federal custody to foreign officials for the purpose of inflicting torture. While the Supreme Court has sometimes declined to extend constitutional protections to foreign nationals outside our borders, in *Rasul v. Bush*, 542 U.S. 466 (2004), the Court more recently stated that constitutional rights extend at least to some foreign nationals outside U.S. The *Rasul* case principally addressed jurisdictional issues, but the Court squarely stated that:

Petitioners’ allegations—that, although they have engaged neither in combat nor in acts of terrorism against the United States, they have been held in Executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel

³ 342 U.S. 165, 172–73 (1952).

⁴ *Colorado v. Connelly*, 479 U.S. 157, 163 (1986) (“certain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned.”) (quoting *Miller v. Fenton*, 474 U.S. 104, 109 (1985)).

⁵ See *Correa v. Thornburgh*, 901 F.2d 1166, 1171 n.5 (2d Cir. 1990) (unadmitted foreign national is protected by substantive due process); *Ngo v. INS*, 192 F.3d 390, 396 (3d Cir. 1999) (excludable alien is “a ‘person’ for purposes of the Fifth Amendment” who “is thus entitled to substantive due process”) (citing *Wong Wing v. United States*, 163 U.S. 228, 238 (1896)); see also *Sierra v. INS*, 258 F.3d 1213, 1218 n.3 (10th Cir. 2001).

and without being charged with any wrongdoing—unquestionably describe ‘custody in violation of the Constitution or laws or treaties of the United States.’ 28 U.S.C. § 2241(c)(3). Cf. *U.S. v. Verdugo-Urquidez*, 494 U.S. 259, 277–278 (1990) (Kennedy, J., concurring), and cases cited therein.⁶

In *Verdugo-Urquidez*, the decision relied on by the Rasul Court, Justice Kennedy, who cast the deciding vote, concluded that fundamental constitutional rights extend to foreign nationals overseas when application of the right would not be “impracticable and anomalous.”⁷ He found that applying the Fourth Amendment in foreign countries would be impracticable, as there is no authority for federal courts to issue warrants with respect to foreign countries, and expectations of privacy may differ greatly from country to country. By contrast, there is nothing impracticable or anomalous about holding U.S. officials to the due process prohibition on torture when they conspire with others to subject an individual to such treatment. The prohibition on torture is universal (unlike the Fourth Amendment warrant requirement at issue in *Verdugo-Urquidez*). The concern that federal officials must be able to operate abroad in a legal and political framework very different from that of the U.S.—as in *Verdugo-Urquidez*—does not arise with respect to torture, because the prohibition of torture is universal.⁸

B. 18 U.S.C. § 2340A

Rendering an individual to a third country to subject him to torture also violates 18 U.S.C. § 2340A, which makes it a felony to subject an individual to torture outside the United States, or to conspire to do so. The reason Congress limited the criminal statute to torture inflicted *outside* the United States was that torture inflicted within the United States was already a crime under both federal and state assault, battery, and murder laws.⁹ Where federal officials send an individual to a country where he faces a risk of torture for the purpose of eliciting information, they have conspired to pursue an unlawful objective—torture abroad—and have committed an overt act in furtherance of the conspiracy—the rendition itself.¹⁰ As the Congressional Research Service concluded, “Clearly, it would violate U.S. criminal law and [Convention Against Torture] obligations for a U.S. official to conspire to commit torture via rendition, regardless of where such renditions would occur.”¹¹

Where federal officials do not intend to subject an individual to torture, criminal conspiracy liability will not lie. Officials are likely to maintain that by obtaining diplomatic assurances that an individual will not be tortured in the country to which he is transferred, they cannot be held liable for conspiracy to subject the individual to torture. However, the existence of assurances is not a bar to all prosecution; where circumstances demonstrate that the assurances were obtained as a form of cover, and that in fact the purpose of transferring the individual was to subject him to torture in the receiving country, the mere obtaining of diplomatic assurances would not be a barrier to liability. (Diplomatic assurances are discussed in further detail below.)

C. Torture Victim Protection Act

Federal officials who are complicit in subjecting an individual to torture abroad may also be civilly liable under the Torture Victim Protection Act (TVPA). That act states that an “[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation—(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual[.]”¹² Where federal officials act in concert with foreign officials to subject an individual to torture under color of a foreign nation’s law, they violate the TVPA.

⁶ 542 U.S. at 484 n.15.

⁷ *Verdugo-Urquidez*, 494 U.S. at 277–78.

⁸ The Supreme Court may provide further guidance on the question of constitutional protections enjoyed by foreign nationals outside our borders in *Boumediene v. Bush*, currently pending before the Court, which involves the question of whether Congress constitutionally stripped Guantanamo detainees of habeas corpus in the Military Commissions Act.

⁹ See S. Rep. No. 103–107, at 59.

¹⁰ David Weissbrodt and Amy Bergquist, *Extraordinary Rendition and the Torture Convention*, 46 Va. J. Int’l L. 585, 618–21 (2006).

¹¹ Congressional Research Service, *Renditions: Constraints Imposed by Laws on Torture* (updated April 5, 2006), at 12. The CRS Report goes on to state that it is less clear whether criminal sanctions would apply were a person transferred for harsh treatment not rising to the level of torture. *Id.*

¹² Pub. L. No. 102–256, 106 Stat. 73, 28 U.S.C. § 1350, note, § 2(a).

The TVPA authorizes claims for “secondary liability” against individuals who aid or abet, or conspire with, primary violators.¹³ But are federal officials who deliver an individual to another country in order to have him tortured acting “under color of law of any foreign nation?” The short answer is yes. Congress directed that the TVPA’s “color of law” requirement should be governed by jurisprudence interpreting the same term under 42 U.S.C. § 1983.¹⁴ Under that jurisprudence, a federal official’s participation in joint activity with a state actor is sufficient for § 1983 liability to attach. In other words, where federal and state officials act jointly to deprive an individual of his civil rights, the federal official can be held liable for his complicity in denying an individual’s civil rights under color of *state* law. By analogy, then, a federal official who participates in a joint enterprise with foreign officials to have an individual subjected to torture under color of *foreign* law is liable under the TVPA.

The district court in Arar’s case disagreed with this analysis, concluding that federal officials could be held liable under the TVPA only if they acted at the direction of the Syrian officials; otherwise, it reasoned, the federal officials were acting under federal law, not foreign law.¹⁵ But in a joint enterprise, it is surely possible for federal officials to act under color of *both* jurisdictions’ laws, and therefore to be liable for their part in subjecting an individual to torture under color of a foreign country’s law. Had private parties abducted Arar and transported him to Syria to be tortured by Syrian authorities, they would unquestionably be liable under the TVPA. There is no reason why abuses by U.S. officials should be exempt from liability under the TVPA when the same abuses by private parties are actionable.

Construing the TVPA, the U.S. Court of Appeals for the Second Circuit found that a “private individual acts under color of law within the meaning of § 1983 when he acts “together with state officials or with significant state aid.”¹⁶ Accordingly, where a federal official acts together with foreign officials or with significant aid from the foreign government to subject an individual to torture under color of foreign law, he is liable in damages under the TVPA.

D. Foreign Affairs Reform and Restructuring Act

The Foreign Affairs Reform and Restructuring Act of 1998 (FARRA) was enacted to implement Article 3 of the Convention Against Torture. It provides that

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.¹⁷

FARRA also directed executive agencies to adopt regulations to implement Article 3 of the Torture Convention, barring countries from sending individuals to countries where they face a risk of torture. The DHS, the Department of Justice, and the State Department have adopted such regulations. Those regulations absolutely prohibit the removal of all persons to countries where they would more likely than not be tortured.¹⁸ Thus, where federal officials exploit immigration authority to transfer an individual to another country to be tortured, they violate FARRA and its implementing regulations. FARRA, however, creates neither a private right of action for damages nor criminal liability.

¹³The TVPA extends “to lawsuits against persons who ordered, abetted, or assisted in the torture.” S. Rep. No. 249, 1991 WL 258662, at *8.

¹⁴S. Rep. No. 102–249 1991 WL 258662, at *8 (stating that courts should look to § 1983 in construing under color of law “in order to give the fullest coverage possible”).

¹⁵*Arar v. Ashcroft*, 414 F.Supp.2d 250, 287 (E.D.N.Y. 2006) (appeal pending).

¹⁶*Kadic v. Karadzic*, 70 F.3d 232, 245 (2d Cir. 1995) (citing *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 937 (1982)); see also *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 CIV. 8386 (KMW), 2002 WL 319887, at *13 (S.D.N.Y. Feb. 28, 2002) (finding corporate defendants acted under color of law because of a “substantial degree of cooperative action” with the Nigerian Government). There is “no reason why a joint conspiracy between federal and state officials should not carry the same consequences under § 1983 as does joint action by state officials and private persons.” *Kletschka v. Driver*, 411 F.2d 436, 448 (2d Cir. 1969). The § 1983 test is satisfied if “the state or its officials played a ‘significant’ role in the result.” *Id.* at 449.

¹⁷FARRA, § 2242(a), in Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 1–5–277 (1998).

¹⁸8 C.F.R. §§ 208.16–18, 1208.16–18; 8 C.F.R. § 235.8(b)(4).

II. INTERNATIONAL LAW RESTRICTIONS ON RENDITIONS TO TORTURE

A. *Convention Against Torture*

The U.N. Convention Against Torture and Other Cruel, Inhuman, and Degrading Treatment or Punishment (CAT), a treaty ratified by the United States in 1994, prohibits all forms of torture, and also prohibits the transfer of persons to countries where there is a substantial likelihood that they will be tortured. Article 3 provides that no state “shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”

While Article 3 is explicitly engaged by the decision to remove Maher Arar from the United States to Syria, some have raised questions about whether Article 3 applies where a country transfers an individual from another country to a third country. The Congressional Research Service has opined that the terms “expel, return, or extradite” in Article 3 of CAT may not cover a rendition from another country to a third country. When CIA officials render an individual from Afghanistan to Egypt, for example, the CRS reasons, the transfer may not amount as a formal matter to an expulsion, a return, or an extradition.¹⁹ This interpretation is predicated on a narrow reading of “expel” to mean an expulsion only from the acting state’s own borders.

However, expulsion could also be read more broadly, to include any forcible transfer of an individual out of the country in which he is residing, regardless of which state is involved in the transfer. Given the absolute nature of the ban on torture, and the sweeping ban on all forms of otherwise legal transfers to countries where there is a substantial likelihood of torture, such a reading of expulsion is more consistent with the purpose of the Convention. Indeed, it is inconceivable that the framers of the Convention meant to carve out a loophole affirmatively permitting informal transfers to torture while prohibiting all formal transfers; it is far more likely that they intended their language to be all-encompassing. Thus, to interpret the CAT prohibition not to apply to informal transfers would violate the intent of the treaty. The United States appears to have accepted the broader understanding of the Convention. In FARRA, it stated that it is against United States policy to “expel, extradite, or otherwise effect the involuntary return” of a person to a country where he faces a danger of torture, “regardless of whether the person is physically present in the United States.”

This broader understanding of the Torture Convention language is also supported by the fact that the drafters added the reference to “extradition” to the original draft of Article 3 to ensure that it would “cover all manners by which a person is physically transferred to another state.”²⁰

Finally, this broader interpretation is buttressed by the fact that even where human rights treaties do not expressly bar transfers to torture, but merely bar torture itself, they have been interpreted to prohibit all transfers to countries where individuals face a risk of torture. Thus, the European Convention on Human Rights prohibits torture, but contains no language barring the removal or transfer of individuals to other countries where they might be tortured. Nonetheless, the European Court of Human Rights has ruled that the Convention’s prohibition on torture implies a prohibition on any kind of transfer or forcible removal of an individual to a country where there are substantial grounds to believe that he will be tortured.²¹ If a human rights treaty that prohibits torture but is silent on forcible transfers nonetheless prohibits all forcible transfers to countries posing a risk of torture, surely a Convention that expressly prohibits both torture and forcible transfers should be interpreted just as broadly.

B. *International Covenant on Civil and Political Rights*

The International Covenant on Civil and Political Rights (ICCPR), which the United States ratified in 1992, prohibits torture and cruel, inhuman, and degrading treatment. Like the European Convention on Human Rights, it does not expressly prohibit forcible transfers, but the Human Rights Committee charged with interpreting the ICCPR has interpreted its prohibition on torture and cruel, inhuman,

¹⁹ CRS, *Renditions*, *supra*, at 13–14.

²⁰ J. Herman Burgers and Hans Danelius, *The United Nations Convention Against Torture: A Handbook on the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment* (1988), at 126. Burgers and Danelius were two of the original drafters of the Torture Convention, and their treatise is the definitive work on the subject.

²¹ *Cruz Varas v. Sweden*, 201 Eur. Ct. H.R. (ser. A) (1989); *Vilvarajah and Others v. United Kingdom*, 215 Eur. Ct. H.R. (ser. A) (1991); see Association of the Bar of the City of New York & Center for Human Rights and Global Justice, *Torture by Proxy: International and Domestic Law Applicable to “Extraordinary Renditions,”* (2004), at pp. 41–42.

and degrading treatment to include an obligation on states not to “expose individuals to the danger of torture or cruel, inhuman, or degrading treatment or punishment upon return to another country by way of their extradition, expulsion, or *refoulement*.”²² Thus, transferring an individual to a country where he faces a risk that he will be tortured violates the ICCPR. The ICCPR is not self-executing, and therefore does not give rise to a private cause of action, but it is nonetheless binding on the United States as a matter of international law.²³

III. DIPLOMATIC ASSURANCES

Government officials have asserted that the United States obtained assurances from Syria that it would not torture Mr. Arar, and that this demonstrates that his removal was not for the purpose of having him tortured. Other officials have claimed that such assurances have generally been obtained where there was a concern about the possibility of torture. Diplomatic assurances from countries with a demonstrated record of torture are insufficient to reduce the risk of torture, for two reasons—we have no reason to trust a country that repeatedly tortures, and second, we have no effective way of monitoring such assurances.

First, diplomatic assurances are obtained only where absent such assurances, there is a likelihood of torture. If there is no risk of torture, there would be no need for diplomatic assurances. The United States has thus never sought diplomatic assurances from Canada or the United Kingdom, for example. It seeks assurances only from countries where there is reason to believe that torture is practiced sufficiently frequently to bar transfer absent the assurances.

If the countries we seek assurances from routinely engage in torture in direct violation of their own explicit treaty promises, what justification is there for believing that they will honor a much less formal bilateral side agreement? In *Filartiga v. Pena-Irala*,²⁴ the brief filed by the United States explained that countries that engage in torture never admit that they do so.²⁵ Therefore, a country that routinely and repeatedly engages in torture will also routinely and repeatedly lie about that fact. If officials lie about the fact that they engage in torture when confronted about it, why is there any reason to believe they will not lie about the diplomatic assurances they give?

There are particular reasons not to trust diplomatic assurances from Syria. We generally don’t believe anything that the Syrian government tells us, whether about its interference in Lebanon, its attempt to develop nuclear weapons, or its role in Iraq. Indeed, it seems that about the *only* matter on which the United States has purported to trust Syria in years was its reported assurance not to torture Mr. Arar. Of course, had U.S. officials truly wanted to avoid the prospect of Mr. Arar being tortured, they had a much simpler and infinitely more reliable route—to deport him to Canada, where he had resided as a citizen for nearly two decades, and which, unlike Syria, has no record of torturing its suspects.

Second, for assurances to be truly reliable, particularly where the receiving state has a record of torture, substantial monitoring would be necessary. Absent extremely intrusive and costly monitoring, it is highly unlikely that any state can be held to its promises—particularly as states that engage in torture routinely lie about whether they do so. Torture is particularly challenging to monitor. Behind closed doors, it is difficult to know what happens in an interrogation room or prison cell. And states have learned to inflict torture in ways that do not leave physical marks. As far as we know, the United States made absolutely no attempt to monitor Mr. Arar’s treatment by the Syrians, or indeed to monitor the treatment of any person whom it rendered.

The Commissioner for Human Rights for the Council of Europe, Alvaro Gil-Robles, has made precisely such arguments, stating that:

The weakness inherent in the practice of diplomatic assurances lies in the fact that where there is a need for such assurances, there is clearly an acknowledged risk of torture or ill-treatment. Due to the absolute nature of the prohibi-

²² Human Rights Committee, General Comment 20, *Article 7*, UN Doc. A/47/40 (1992); see also Human Rights Committee, General Comment 31, *Nature of the General Legal Obligation on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004), at para. 12 (finding in Article 2 an obligation “not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by article[] . . . 7”).

²³ The Geneva Conventions also prohibit renditions to torture in military conflicts or occupations, but that is beyond the scope of this testimony.

²⁴ 630 F.2d 876 (2d Cir. 1980).

²⁵ Memorandum for the United States, *Filartiga v. Pena-Irala*, 630 F.2d 876. (2d Cir. 1980), reprinted in 19 I.L.M. 585 (1980).

tion on torture or inhuman or degrading treatment, formal assurances cannot suffice where a risk nevertheless remains . . . When assessing the reliability of diplomatic assurances, an essential criteria must be that the receiving state does not practice or condone torture or ill-treatment, and that it exercises effective control over the acts of non-state agents. In all other circumstances it is highly questionable whether assurances can be regarded as providing indisputable safeguards against torture and ill-treatment.²⁶

Mr. Gil-Robles' comments were inspired by the Swedish government's expulsion of two Egyptian asylum-seekers in December 2001 on the strength of diplomatic assurances obtained from the Egyptian authorities. Once in Egypt, the men were detained incommunicado and reportedly tortured.²⁷ In reviewing this case, the Committee Against Torture rejected the use of diplomatic assurances to guard against such a strong risk of torture, and noted that because of the assurances, the Swedish official in Egypt responsible for monitoring the treatment of the two Egyptians concealed evidence that they had been tortured.²⁸ For these reasons, the Special Rapporteur of the U.N. Commission on Human Rights has said that "post-return monitoring mechanisms do little to mitigate the risk of torture and have been proven ineffective in both safeguarding against torture and as a mechanism of accountability."²⁹

In short, because diplomatic assurances rely on trust in circumstances that provide no reason for trust, and because absent 24/7 monitoring the promises cannot be enforced, diplomatic assurances should be looked on with great skepticism. Where, as in Mr. Arar's case, there was a much simpler avenue available were officials truly interested in avoiding the risk of torture, they appear to be little more than window-dressing.

CONCLUSION

Rendition to torture is wrong as a moral matter, illegal as an international and federal legal matter, and likely counterproductive as a security matter. Our pursuit of this tactic has occasioned widespread criticism of the United States around the world, playing into our enemies' hands by giving them ideal recruitment propaganda. It should be plain to see that just as torture itself is wrong and illegal under all circumstances, so is transferring a human being to another country to have it engage in the very same wrong and illegal behavior. Congress should immediately authorize a full-scale independent investigation of the administration's extraordinary rendition policy.

Mr. DELAHUNT. Thank you for your testimony.

Mr. Cole, both you and Mr. Garcia indicated that if the facts could sustain a *prima facie* case, the torture of someone outside of the United States is a violation of our criminal law.

Am I stating that accurately, Mr. Garcia?

Mr. GARCIA. The criminal law attaches when a person specifically intends to cause torture out of the United States or, in this case, conspires—

Mr. DELAHUNT. Does it require a specific intent or can there be—and I would address this to you, too, Mr. Cole.

If it is apparent, if there is a rebuttable, but a presumption that sending—rendering someone to Syria is invariably going to implicate torture, given the history of the Department of State reports—under those circumstances, I mean, I just can't imagine how any

²⁶ Report by Mr. Alvaro Gil-Robles, Commissioner for Human Rights, on His Visit to Sweden, April 21–23, 2004, Council of Europe, CommDH (2004)13, 8.7.04.

²⁷ *Agiza v. Sweden* Communication No. 233/2003; see generally Human Rights Watch: "Empty Promises: Diplomatic Assurances No Safeguard Against Torture" April 2004; and "Still at Risk: Diplomatic Assurances No Safeguard Against Torture" April 2005; Report of the Special Rapporteur on Torture, Theo van Boven, to the General Assembly, 23.8.04, paragraph 37.

²⁸ Committee Against Torture, Communication No. 233/2003. May 20, 2005, U.N. Doc. CAT/C/34/D/233/2003, at ¶¶ 4.24, 8.1, 12.15, 13.4, 13.10.

²⁹ The Secretary-General, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, ¶ 46, submitted to the General Assembly, U.N. Doc. A/60/316 (Aug. 30, 2005); see generally Weissbrodt and Bergquist, *supra*, at 621–24.

individual can be rendered to Syria from the United States with the participation of Federal agencies and Federal officials.

No pun intended, but it is a very tortured explanation to say that we receive diplomatic assurances.

And, Professor Cole, you, I think, said it far better than I. I mean, the inconsistency is so gross that it is absurd on its face.

Mr. COLE. Well, I think about it this way. If we had a young African-American in Federal custody and the Ku Klux Klan had a record of torturing and lynching young African-American men and we turned over that young boy to the Ku Klux Klan, with a diplomatic assurance from the Ku Klux Klan that they wouldn't torture or lynch him, and they then went ahead and did it, I don't think anyone would suggest that somehow that alleviates the government official from putting that individual in that situation.

I think the same thing is true under criminal law, under constitutional law, and under the civil statute, the Torture Victim Protection Act.

Mr. DELAHUNT. Well, I know you were all present here when I posed the question to Mr. Roach and counsel for Mr. Arar, and now that I am aware that you are participating in his representation, let me pose the question to you: Has there been any consideration given to requesting the Department of Justice, the Attorney General, to either conduct, at first blush, an initial inquiry or to seek the appointment of a special counsel appointed by the Attorney General to investigate whether, on these facts, there has been a violation of the U.S. criminal code?

Mr. COLE. No, there hasn't, and I think it is a tremendous idea. I think the reason we didn't initially do it is that we brought suit against the Attorney General himself, because we had reason to believe that he was involved in this decision, that he and the Deputy Attorney General made a decision to have him sent to Syria.

So the notion that they are going to investigate themselves is highly unlikely. The notion that they are going to appoint an independent counsel is highly unlikely. And then the next Attorney General, as we all know, was Mr. Gonzales, who was the architect of many of these policies.

Now that we will have a new Attorney General, maybe there is some hope. But I think it is an excellent idea and we will pursue it.

Mr. DELAHUNT. Mr. Garcia, do you want to make any comment?

Mr. GARCIA. I think if a diplomatic assurance was obtained, it would be very difficult to prove criminal liability, and the reason is the Federal Torture Statute, among other things, prohibits persons from conspiring to commit torture outside the United States.

It is understood, under jurisprudence, that for there to be a conspiracy, there needs to be an agreement between the parties to commit the unlawful act.

Now, if a person can point to an agreement that they made with the party that says, "We don't want you to torture," then it seems to me it would be very hard to—

Mr. DELAHUNT. I understand your point, but I think I would like to have the parties under deposition or in front of a grand jury posing those questions.

A diplomatic assurance from Syria, it isn't worth the paper it is written on, if it is written.

Let me go to Mr. Hitz. I want to focus on this concept of diplomatic assurance. I mean, we were assured by the secretary of state, in a statement, that diplomatic assurances were secured.

In your experience with the CIA—and let me direct this to you, too, Mr. Benjamin.

In your experiences, how is—I mean, do you get on a phone and, in the case of Mr. Arar, I mean do we call Bashir Assad? Is there a formal exchange of correspondence?

Mr. HITZ. My understanding, Mr. Chairman, is that it happens at a very low level, that it happens perhaps at the level of the station chief or the intelligence official back in this country and one of his counterparts may be the receiving official in Damascus. It is not at the level of state-to-state.

But the important thing here is——

Mr. DELAHUNT. Let me interrupt.

Mr. HITZ. Yes, please.

Mr. DELAHUNT. When we speak about diplomatic assurance and the secretary of state goes before the American people and the American media and uses that term, it gives it a patina of credibility that it doesn't deserve.

Mr. HITZ. I don't think it deserves it. I think it happens, if it happens at all, at a very low level with a wink and a nod.

Mr. DELAHUNT. Mr. Benjamin, can you describe what a diplomatic assurance is in the context of this issue of extraordinary rendition?

Mr. BENJAMIN. I think that there has been a huge variety in practice. I am afraid that some of the issues remain classified, but I am aware of cases in which these were done at the highest levels and my sense is that there have been other cases in which this was not done at very high levels.

And I think that the critical issue here is the context against which these assurances are made. If they are made against a context in which there has been extensive discussions of how a program will be conducted and that it will be conducted explicitly without torture, then that is one, and if it is involved with a country like Syria, then I think that your judgment is exactly right, it is not worth the paper its written on.

A lot will really depend on the broader relationship between the countries. We have countries that have been involved in renditions that are very close American allies and that are very concerned about maintaining their relationship with the United States and, therefore, while, on occasion, others may have criticized them, they will take their responsibilities very seriously.

But I find it, *prima facie*, absurd that we would ever listen to the Syrians and, quite frankly, I believe before 2001, there had never been a rendition to Syria.

Mr. DELAHUNT. Before 2001, there had never been a rendition to Syria.

Mr. BENJAMIN. That is my recollection. And in the course of doing reporting for one of my books, I interviewed agency lawyers on this issue and they confirmed that for me.

Mr. HITZ. Mr. Chairman, could I interject on——

Mr. DELAHUNT. Please.

Mr. HITZ [continuing]. This issue of the consultation?

I think the key point, and I think Professor Cole hit it very well in his description of this remarkable three-volume plus recommendations report that Mr. Justice O'Connor has produced in Canada, and as Mr. Arar and Mr. Roach said in their testimony to us, that the report speculates on the fact that they had no assurance that the Canadian information was the only information they had with respect to Mr. Arar.

But they come down very hard on the issue of the failure to consult with the Canadian authorities before they made the decision to send him to Syria.

Now, the result of this has been—I think this is one of the things we have to take account of. Mr. Justice O'Connor was a very—his report, when you read it, is very positive. You can't throw the baby out with the bathwater. It is important that these countries continue to cooperate.

We will recalibrate the system. We will be much more sensitive about the information we pass to the United States and, yet, as a consequence of what took place, the head of the Royal Canadian Mounted Police, the RCMP, was relieved of his responsibilities and this ongoing cooperation that Mr. Justice O'Connor wanted to continue has cooled. It is just not working the way that you would want it to between countries that are as close as Canada and the United States, not only physically, but in the amount of trade that comes between us.

We have paid a price.

Mr. DELAHUNT. Well, that leads me to the common theme that you, Mr. Hitz, and Mr. Benjamin, and Mr. Cole, alluded to. This practice is hurting us in terms of dealing with terrorism directed against the United States.

If you step back and examine the shifting attitudes in world public opinion, and that obviously is reflected—please tell me if I am making a fair and accurate statement here—is reflected in intelligence agencies that we have had a cooperative and a collaborative relationship starting to back off.

Do you accept that as an accurate statement?

Mr. BENJAMIN. I would say that we have a number of partners outside of the Canadian case who feel that very, very important cooperation is imperiled. I think it is important to put yourself in the shoes of these other services, these intelligence services, who view their relationship with the United States as being a lifeline for them, because, quite frankly, our intelligence capabilities far outstrip theirs.

And so the intelligence officials are deeply worried that the next time there are a lot of headlines about something that we have done that smacks of torture, they will be facing parliamentary inquiries and a call for reduced cooperation.

That was why I believe, at the beginning of this year, perhaps it was last year, I am not exactly sure of the date, there were a number of different countries that were expressing great concerns about our practices and this was the top or a top issue in the discussions with Secretary Rice when she went over there.

And I think that for the time being, these governments are very concerned because their own services are often complicit on one way or another in that they have known about these practices and have winked at them or perhaps have even been involved.

But nonetheless, that is the weak link in the chain and they will come under great pressure to dissociate themselves.

Mr. DELAHUNT. Mr. Hitz?

Mr. HITZ. And I have to look at it, Mr. Chairman, from the standpoint of the working level, the ground level.

This case that was made reference to of the effort on the part of an Italian magistrate to try 12 CIA officers and contractors working for CIA and, it must be noted, a senior official of the Italian intelligence service, making the point that Mr. Benjamin made, that, doubtless, there had to be some sort of Italian approval before this Egyptian cleric was picked up off the streets of Milan.

But the fact of the matter is we are not going to honor those subpoenas and, as a former prosecutor, you know how angry that is going to make them over there. And so I would say with respect to the officials that were involved in this, they may not go to trial in Italy, but they will never travel to Europe again. And think what that does as a matter of practical efficacy for our officials working abroad.

CIA officials don't want to do this stuff. They don't want to be in the business.

Mr. DELAHUNT. It ruins the lives of CIA operatives.

Mr. HITZ. They know that the clever little lawyer that puts it down on a piece of paper—

Mr. DELAHUNT. He is not going to be around.

Mr. HITZ [continuing]. He is gone. They are going to be the ones that are going to the slammer or going to be dragged up before a foreign body. It has happened before. That is the reason they are taking out personal insurance. They know that when it comes to an alleged violation of law committed by them, the Justice Department is not going to defend them. They are going to be all by themselves. It stinks.

Mr. BENJAMIN. If I can just chime in here. I actually know the investigating magistrate, and I can testify that he is irate.

I believe the actual number of people who have been indicted is actually 25, which is probably a significant percentage of the operatives we have at our disposal at any given time.

Mr. HITZ. Maybe 12 and 12 contractors or something like that.

Mr. DELAHUNT. Jerry?

Mr. NADLER. Thank you. You know, if you consider the fact that if someone were simply kidnapped off the streets of New York or Washington by agents of a European government and spirited abroad, we would be pretty angry and we would certainly prosecute. You can see where they are coming from.

Mr. HITZ. Mr. Nadler, you remember the Letellier case.

Mr. NADLER. That is right.

Mr. HITZ. It happened on the streets of Washington.

Mr. NADLER. But that was during the administration that was pretty sympathetic to the people who were doing it, actually. That is right. It happened on the streets of Washington, but that was the Pinochet regime and, as I recall, it was still Nixon or Ford as

President, and they weren't really interested in prosecuting an agent in the Pinochet regime.

Let me come back. Professor Cole, you made some recommendations. You say that we should clarify the law. I agree, although I think it is pretty clear. We should apologize, clearly.

We should authorize an independent commission. But if we authorize an independent commission, how would they get information? The administration would stonewall them with claimed state secrets, would do everything that they have done to Congress. We can't get the information.

Why would they get any information? How would they be able to operate?

Mr. COLE. Well, I think there was a lot of classified information in the 9-11 Commission's investigation. They held in-camera hearings. It wasn't as if—there were struggles over which information was—

Mr. NADLER. But do you think an independent commission would be any more successful in getting from the administration information they don't want to give than Congress is, even if they have the power of subpoena, which the administration ignores?

Mr. COLE. I think it focuses the attention. Congress has a lot of things to be concerned about. An independent commission, if it were focused on this case or focused on rendition generally, would have the ability that the 9-11 Commission had.

We had a congressional inquiry into what happened prior to 9/11. It was a very serious inquiry by Congress, but then we followed it up with the 9-11 Commission and the 9-11 Commission was able to spend more time, was able to get more information because of a sustained focus on the issue, and I think that is true in the rendition area, as well.

Mr. NADLER. Not just rendition. I am thinking of all the different deprivations of liberty and contraventions of law that we have seen in the areas of the Bill of Rights and of liberty generally. It may be. I have thought of that before.

Let me ask you a different question. A special prosecutor, very interesting idea, I wrote a letter to Attorney General Gonzales 1½ years ago when the information first came out about the violations of the FISA Act.

FISA is a criminal statute. It says that anybody who wiretaps outside the four corners of this statute, anyone acting under color of law, which means only a government official, because you can't act under the color of law if you are not a government official, anyone who, under color of law, wiretaps outside the four corners of this statute, 5 years in jail, \$10,000 fine.

Now, we then had the admission that the President, every 45 days, was signing an Executive Order to ignore the law, to ignore this criminal statute.

I wrote a letter to the Attorney General and said this is *prima facie* evidence, an admission that the President is committing a felony every 45 days, that you, as Attorney General, are conspiring with him, along with other people. There is a criminal conspiracy going on here. You can't investigate yourself, obviously. So under the statute, you are duty bound to appoint a special prosecutor.

And, of course, I have never received a reply to this letter nor have they appointed a special prosecutor.

Why do you think we would have any better luck getting the administration to appoint a special prosecutor in this area to investigate its allegedly criminal activities, which I think are criminal here, than we did there?

Mr. COLE. Well, you may not. But, again, you have a new Attorney General coming in. You have——

Mr. NADLER. So we should try the FISA letter again.

Mr. COLE. Yes, you might as well, although I think that they have taken an official position in the FISA context that their conduct was not illegal, that it was consistent with the statute. It is not a position that I think any expert has——

Mr. NADLER. Well, they took the position that their conduct was not illegal because under Article 2, the President's power preceded FISA and because of the AUMF, two claims that the Supreme Court, in a different context, knocked down.

Mr. COLE. That is right. But nonetheless, I mean, you are asking an Attorney General to investigate essentially himself for a program that he created and that he has made a public argument to Congress is not a crime, is, indeed, lawful and constitutionally authorized.

Here, there has never been an argument, a public justification for what was done. You have a new Attorney General.

I am quite skeptical that any Attorney General in this administration is going to undertake a serious inquiry into these matters. But here is an area where we have bipartisan consensus that there was an abuse committed. We have the precedent of Canada conducting a major investigation, ultimately writing a 1,000-page report.

There is some momentum here, and it seems to me it would be worth trying to——

Mr. NADLER. I agree. There is nothing to lose except the piece of paper that you write the letter on and more credibility than the administration.

Let me ask you a different question.

Mr. DELAHUNT. If the gentleman would yield.

Mr. NADLER. Sure.

Mr. DELAHUNT. But I think there are ways, if we stay focused on this discreet issues of rendition. What I would suggest is that we convene a hearing and invite the ambassador from Syria to appear in public for a briefing and that we inquire from the Syrian ambassador——

Mr. NADLER. To the nature of the assurances that were given.

Mr. DELAHUNT [continuing]. As to the nature of the assurances and what happened to Mr. Arar.

Mr. NADLER. Good idea. Let me go further, because I am very interested. I mean, what happened here is a travesty, obviously, and it is not the only case, you know, the El-Masri case and various others.

I am really focused on the question of how you bring to heel an administration that is contemptuous of law in the way that we have seen here and in other ways.

Almost anything we get into here, I mean, you are facing the state secrets doctrine. They have morphed the state secrets from an evidentiary privilege into a general—broader to actions.

What would you think, Professor Cole and Mr. Garcia, of legislation that would toll the statute of limitations on any crime, the investigation or, for that matter, civil action, the investigation or prosecution or suit of which was delayed by the state secrets statute, as long as the state secret remains in force?

Mr. COLE. I think that would be one way of responding to the state secrets problem. I think it is not the only way. I think, for example, it doesn't seem, to me, obvious that secrecy trumps all other values.

The state secrets privilege is a judicial Federal common law creation of the court. It is subject to whatever amendments or—

Mr. NADLER. I will tell you we are drafting a statute, which we will be introducing a bill, to define and limit the state secrets—

Mr. COLE. I think that is absolutely necessary, because as you suggest, it has become—it went from a way to protect secret information to a kind of nuclear option for the government, where it can just get rid of any lawsuit challenging—

Mr. NADLER. Every case.

Mr. COLE [continuing]. Its own illegibility by declaring it a secret.

Mr. NADLER. Well, after the experiences of the 1990s, we permitted the independent prosecutor statute to lapse because everybody had bad experiences with it.

What would you think of a new special prosecutor statute limited to allegations of abuse of power by the executive that abuse liberty or a coordinate branch of government?

In other words, impeachment power, which is impractical, given the development of political parties, the impeachment power—use of the impeachment power, as envisioned by the framers I think is really impractical, because it didn't envision political parties. It would automatically defend whoever the President is.

But the impeachment power is intended as a limitation on the executive's abuse of power that would threaten liberty or threaten the function of the other branches.

What do you think of the idea of perhaps having an independent prosecutor statute that is not dependent on the executive, that would be triggered, but only with respect to these kinds of allegations of improper acts by the executive against liberty or against a coordinate branch of government or rendition, things like that?

Mr. COLE. I think it makes a good deal of sense. The bottom line is that there is a conflict of interest whenever the Attorney General is asked to investigate himself or high level Justice Department or executive officials who are accused of criminal activity. That is a serious problem in a democracy.

And the independent counsel statute was an attempt to address that. I think what happened was the independent counsel statute became a kind of political weapon and got out of control. But if you limit it in the way that you suggest to the most serious offenses, then it is less susceptible to abuse as a political weapon and it is more justified.

Mr. NADLER. Thank you. Let me ask Mr. Garcia, getting back to the more core area of this hearing.

You testified that the right to summarily remove someone from our country upon arrival, even someone who is not seeking to remain in the U.S., just transferring planes at Kennedy, which technically may not have been—Mr. Arar might technically not have entered the country. He didn't go through customs or whatever the test is there.

But you testified that the right to summarily remove someone from our country upon arrival or someone who is not seeking to enter is based on our sovereign authority to determine who can enter the U.S.

Setting aside the fact that Mr. Arar had no desire to enter or remain in the United States, but was only transiting to his home in Canada, are you contending that sovereign authority commits us to send someone, regardless of the risk that he might be—to somewhere we have good reason to know that he might be tortured?

Mr. GARCIA. I am sorry. I couldn't hear the last part.

Mr. NADLER. Are you contending that our sovereign authority would enable us, would give us the right in terms of exercising sovereign authority to not let him come into this country, would give us the right to send him to someplace where we have good reason to believe that he would be tortured?

Mr. GARCIA. I think that the Convention against Torture and Federal statute would prohibit something like that in most circumstances.

I think the question about sovereign authority superseding that, I am not sure I understand. The United States has imposed laws upon itself limiting its exercise of sovereign authority in certain circumstances so that it cannot transfer persons to countries where they would face torture.

Mr. NADLER. So that when the government says in its lawsuit or, rather, against Mr. Arar's lawsuit, as I heard Professor Cole say, that Mr. Arar has no rights, you would disagree with that?

Mr. GARCIA. The question I believe that was at issue in Arar was what sort of constitutional rights Mr. Arar possessed, which is a separate question from—

Mr. NADLER. Does he have rights other than constitutional?

Mr. GARCIA. Well, again, under the Convention against Torture and its implementing legislation and regulations, we could not transfer him to a place where it was more likely than not that—

Mr. NADLER. But only because the Convention against Torture.

Mr. GARCIA. Right. You could make an argument that the due process clause would attach—

Mr. NADLER. Let's go to a case where there is no Convention against Torture. Could we decide to export him from the country by taking him out in a helicopter and saying goodbye over the Atlantic Ocean, with a 3,000 feet depth?

Mr. GARCIA. I think that is a little different and I think the—

Mr. NADLER. Why is that different? What would prevent this? What would make that illegal?

Mr. GARCIA. There is established jurisprudence that seems to understand that if a person reaches the interior of the United States, they are accorded a greater degree of constitutional—

Mr. NADLER. Someone who has not entered. It is a summary removal. We are summarily removing him right to the Atlantic Ocean, where he may not have a very high life expectancy, the sharks are there, but what would prevent us legally from doing that?

Mr. GARCIA. Well, while it is understood that persons who are at the border receive very few constitutional protections, there is some protection recognized against, for instance, acts of gross physical abuse by the United States.

So in that circumstance, if that person is right at the border and we were, in your hypothetical, to ship him off to the sea, it would seem like there would be a constitutional protection against that.

And there would also be procedural due process rights that attach in certain circumstances—

Mr. DELAHUNT. If the gentleman would yield for a moment.

Mr. NADLER. Sure.

Mr. DELAHUNT. In your statement, on page three, and, again, this is a removal procedure under the immigration statute, not dealing specifically with CAT, you indicate that aliens who are removed under expedited removal procedures typically designate the country to which they will be removed.

So I presume, in the vast majority of cases, they will be removed to the country that they request to be removed to. However, immigration authorities are not required to remove the alien to the designated country when the designated country will not accept.

Mr. Garcia then goes on to write “or removing the alien to that country would be prejudicial to the United States.”

I presume that is the jurisprudence that you are referring to, the precedent.

Mr. GARCIA. That is actual language within the INA that says that.

Mr. DELAHUNT. That is why I go back to Arar for a moment and for the administration to say that this was an expedited removal and reading your statement and your reference to the appropriate position, I mean, that is a mockery of our law and it is a mockery of customs and practices by the INS.

I mean, prejudicial to the United States to remove him to Canada, what would the prejudice be?

Mr. NADLER. Let me just say, the prejudice would be—and I think various people have sort of said this—the prejudice would be that the Canadians had indicated he couldn’t be held, he would be released and he would be a free man, and our officials didn’t think he should be a free man. That is the prejudice.

Mr. DELAHUNT. If the gentleman would continue to yield.

Mr. NADLER. Yes, sir.

Mr. DELAHUNT. I am going to turn the gavel over to you.

Mr. NADLER. Well, I think we are about to adjourn anyway, because I am finished with my questions.

Mr. DELAHUNT. Then I will recognize the chairman of the Constitution Subcommittee.

Mr. NADLER. Thank you. Mr. Chairman, if I may have a moment before we recess to recognize a cherished member of our staff, Susanna Gutierrez. Susanna will be retiring next Wednesday after many years of service to the subcommittee and to Congress.

She is a valued colleague and will be missed and I want to say to her thank you, Susanna, wish you all the best in your retirement.

Mr. DELAHUNT. I happen to serve on the Judiciary Committee and I can corroborate everything that Chairman Nadler said. Best of luck, Susanna.

[Applause.]

And our thanks to this very distinguished panel. I have a suspicion that we will be seeing all of you again at different phases, because as I indicated in my opening statement, this is not the end of the examination of what happened to Maher Arar.

Thank you.

[Whereupon, at 5:28 p.m., the subcommittees were adjourned.]

A P P E N D I X

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December 11, 2007

Congressman William D. Delahunt
Chairman, Subcommittee on International
Organizations, Human Rights and Oversight
Committee on Foreign Affairs
2454 Rayburn House Office Building
Washington, DC 20515

Congressman Jerrold Nadler
Chairman, Subcommittee on the Constitution,
Civil Rights, and Civil Liberties
Committee on the Judiciary
2334 Rayburn House Office Building
Washington, DC 20515

Dear Congressmen Delahunt and Nadler:

I am one of the attorneys representing Mr. Maher Arar in his case against United States officials for rendering him to Syria, and I represented Mr. Arar when he testified via videoconference at the October 18, 2007 Joint Hearing of the Subcommittees you chair, *Rendition to Torture: The Case of Maher Arar*. Thank you for holding this very important Hearing, and for extending your sincere apologies to Mr. Arar. I am writing to follow up on a question Chairman Delahunt asked at the Hearing regarding whether there had been a request to the Department of Justice to appoint a special prosecutor to investigate Mr. Arar's case, to which I responded that there had been no such request. Counsel for Mr. Arar has not made any such request, as we assumed it would be futile.

However, unbeknownst to Mr. Arar or his counsel, the World Organization for Human Rights USA (now called Human Rights USA) made a request in 2006 to then-Attorney General Gonzales to appoint an independent counsel to investigate extraordinary renditions, and the legal memorandum in support of the request discussed Mr. Arar's case, among others. *See* Letter from Morton Sklar to Alberto Gonzales (July 13, 2006), and the accompanying legal memorandum, attached hereto as Attachment A. In 2004, the same organization submitted a criminal complaint to then-Attorney General John Ashcroft seeking the investigation and prosecution of U.S. officials implicated in the torture of detainees, including against Mr. Ashcroft for his role in rendering Mr. Arar to torture in Syria. *See* Letter from Morton Sklar to John Ashcroft (June 26, 2004), attached hereto as Attachment B. I have been informed by Human Rights USA that other than a cursory response acknowledging receipt of its 2004 complaint, it has never received any

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response from the Department of Justice.

I respectfully request that my letter along with the attachments be included in the Congressional Record as an appendix to the October 18, 2007 Hearing submissions. We look forward to your pursuing this matter, and are available to provide any assistance to your efforts to expose the truth, hold accountable those who are responsible, and prevent what happened to Mr. Arar from happening again.

Sincerely,

A handwritten signature in cursive script that reads "Maria C. LaHood". The signature is written in dark ink and is positioned above the printed name.

Maria C. LaHood

Encls.

[NOTE: The attachments referred to in the previous letter are not reprinted here but are available in committee records or may be accessed at the following addresss on the World Wide Web: <http://www.foreignaffairs.house.gov/110/101807ftr.pdf>]

