



**Statement of Michael John Garcia
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Before

**The Committee on Foreign Affairs: Subcommittee on International Organizations,
Human Rights, and Oversight**

with

**The Committee on the Judiciary: Subcommittee on the Constitution, Civil Rights,
and Civil Liberties**

Joint Oversight Hearing

United States House of Representatives

October 18, 2007

on

“Rendition to Torture: The Case of Maher Arar”

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 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.

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.

³ Before 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).

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 decision to remove Mr. Arar to Syria rather than Canada, as he was a citizen of both countries.

⁶ Aliens 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.htm>].

⁸ Arar Commission, *Report of the Events Relating to Maher Arar - Analysis and Recommendations* (2006), at 156 (describing contents of Arar’s order of removal).

⁹ INA § 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).

¹⁰ INA § 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.

¹¹ INA § 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).

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

¹² Convention 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.

¹³ P.L. 105-277, § 2242 [hereinafter “FARRA”].

¹⁴ For 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.

¹⁵ See 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

¹⁶ 8 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”).

¹⁷ DeNeen L. Brown, *Canadian Sent to Middle East Files Suit*, WASH. POST, Nov. 25, 2003, at A25.

¹⁸ United 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.

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 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

¹⁹ FARRA, § 2242(a).

²⁰ *Id.*, § 2242(c).

²¹ 18 U.S.C. §§ 2340-2340B.

²² See Dana Priest, *CIA’s Assurances On Transferred Suspects Doubted*, WASH. POST, Mar. 17, 2005, at A1.

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.

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

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).