

Hearing before the Senate Foreign Relations Committee on “Extraordinary Rendition,
Extraterritorial Detention, and Treatment of Detainees: Restoring Our Moral Credibility
and Strengthening Our Diplomatic Standing”

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Chairman Biden, Ranking Member Lugar, distinguished members of the Committee, and Committee staff, I am grateful for this opportunity to speak before you today.

Renditions are a vital counterterrorism tool—so vital, that they must be used sparingly so they can remain an effective part of the U.S. counterterrorism arsenal. Renditions are troubling because they can exact a high human and diplomatic price, but dangerous terrorists would go free if the program were abandoned. Unfortunately, this flawed instrument is often the only one available. Rather than stop renditions altogether, policymakers should increase the program’s transparency, strengthen oversight efforts, and embed within the process procedures that ensure more accord with the rule of law.

The renditions program is under attack today, in part due to legitimate faults of the program and in part because of preventable misunderstandings. Critics have blasted renditions as outsourcing torture because the recipient countries often have abysmal human rights records.¹ *New York Times* columnist Bob Herbert even declared that renditions stand “side by side with contract killings.”² Not surprisingly, calls to end or curtail renditions are growing.

The contrast to this ever-louder criticism is the quiet embrace that both Republican and Democratic administrations have given to the program. Former Director of Central Intelligence George Tenet testified that before September 11 the CIA and the FBI had rendered 70 terrorists (about 20 of whom went to the United States for trial), and newspaper reports dating from 2005 indicate that over 100 suspects have been rendered since then.³

¹ Jane Mayer, “Outsourcing Torture,” *New Yorker*, February 14, 2005.

² Bob Herbert, “Torture, American Style,” *New York Times*, February 11, 2005, p. 25.

³ Statement of Director Tenet before the Congressional 9/11 Joint Inquiry, (p. 11); Dana Priest, “CIA’s Assurances on Transferred Suspects Doubted,” *Washington Post*, March 17, 2005, p. A1; Douglas Jehl and David Johnston, “Rule Change Lets C.I.A. Freely Send Suspects Abroad,” *New York Times*, March 6, 2005, p. 1.

Typically a rendition occurs when the local government, in cooperation with U.S. officials, bundles a suspect on a plane and sends him to another country. In contrast to an extradition, the suspect does not go through the legal system of the country where he is arrested. More rarely, U.S. officials or their agents may pull a suspect off the streets without the cooperation of the host government, but in the vast majority of cases the local police or intelligence services make the initial arrest. Contrary to some conspiracy theories, the CIA does not help render suspects without the approval of White House officials and government lawyers.

Although several notable terrorists, including Ramzi Yousef who masterminded the first World Trade Center bombing, were rendered to face justice in the United States, the usual destination is a country in the Middle East—one article claims that Egypt, Morocco, Jordan, and Syria are all common destinations.⁴ Sending suspects to face justice in the United States is far less morally, legally, and diplomatically controversial than is rendering suspects to countries in the Middle East. The latter is the focus of my testimony.

My statement first outlines the advantages of the renditions program from a counterterrorism point of view. It then describes the very real costs and faults of the program, some of which are inherent to it and others of which can be reduced. The statement concludes by offering a set of recommendations for how to improve the program, with an emphasis on ways to improve oversight, reduce the abuses, and make the program more in accord with U.S. values—and thus more sustainable in the long-run.

Advantages of the Renditions Program

Counterterrorism officials find renditions attractive because they get terrorists off the streets. Although the world is not safe now that Ramzi Yousef is in a supermax prison in Colorado, it is safer. In 1998, the *Wall Street Journal* reported that CIA officers and the Albanian police closed down an Egyptian Islamic Jihad cell that planned to bomb the U.S. Embassy in Tirana. The suspects were sent to Egypt, where two were executed, and others jailed. Their interrogations also led to the arrests of numerous affiliates, dealing a crushing blow to the organization and removing them as a threat to U.S. facilities.⁵

Renditions can also produce considerable information even when they do not lead to a trial and lengthy imprisonment. Security forces can question suspects, examine their documents, and otherwise gather information that might be relevant to past or future attacks. “Pocket litter” often produces particularly important evidence. As Michael Scheuer, the former chief of the CIA’s Bin Ladin unit, has testified, one goal of renditions is “to seize hard copy or electronic documents in [the suspected terrorists’] possession when arrested. Americans were never expected to read those, and they could provide options for follow-on operations.”⁶

⁴ Mayer, “Outsourcing Torture.”

⁵ Rajiv Chandrasekaran and Peter Finn, “U.S. Behind Secret Transfer,” *Washington Post*, March 11, 2002, p. A1; Andrew Higgins and Christopher Cooper, “Cloak and Dagger: A CIA-Backed Team Used Brutal Means to Crack Terror Cell,” *Wall Street Journal*, November 20, 2001, p. A1.

⁶ Statement of Mr. Michael F. Scheuer, “‘Extraordinary Rendition in U.S. Counterterrorism Policy: The Impact on Transatlantic Relations,’” House Foreign Affairs Committee, April 17, 2007.”

Renditions are often the only option for interrogating a suspect and bringing him to justice when extradition is not politically or legally possible. In some countries the formal court system is not a true alternative because judges are sympathetic to terrorists or vulnerable to intimidation. Even more worrisome, given rock-bottom approval ratings of the United States in much of the world, a highly publicized extradition hearing could increase sympathy for the suspect and damage the government's popularity. Historically, the United States has shielded such cooperative but weak regimes from the adverse publicity associated with extraditions.

When Pakistan allowed Mir Amal Kansi, who murdered two CIA employees in Virginia in 1993, to be sent to the United States, several cities in Pakistan saw demonstrations. Many Pakistanis saw Kansi's actions as heroic. Pakistanis' approval of *jihadist* violence against the United States has grown since then.⁷ Imagine if Pakistan captured Bin Ladin tomorrow. Would the Musharraf government really want him to be tried in a Pakistani court or even have an extradition request go through the country's legal system? Pakistan would prefer to dodge this political bullet.

Some governments are hostile, not weak, and here renditions become vital. In the spring of 1998, intelligence officials plotted to render Bin Ladin from Taliban-controlled Afghanistan, an operation made necessary because the Afghan regime supported the terrorist leader. No standard legal measure would have worked in place of a rendition.

Although the value of renditions is clearest when the government is weak or hostile, even strong democratic governments have acquiesced in renditions. Several European countries, notably Italy and Germany, apparently cooperated with U.S. officials after 9/11 to render several suspects to the Middle East. As Scheuer notes, "Any operation in Europe was done with the cognizance, support and approval of the European security services involved."⁸ These governments chose a covert path because they recognized that their own legal systems would not be able to take these suspects off the street. Their own counterterrorism laws were weak and allowed individuals to recruit and organize with little impediment. In addition, their legal systems often were not able to incorporate their own intelligence agencies' information, let alone that of U.S. agencies.

U.S. officials may seek to transfer suspects from a Western ally to the Middle East because the Western ally's laws or inclinations prevent the close monitoring or aggressive interrogation of a terrorism suspect--in contrast to many Middle Eastern countries with poor human rights records and a long record of combating domestic radicals. Mohammed Haydar Zammar, a Syrian-born citizen of Germany, was arrested when he traveled from Germany to Morocco and then was secretly transferred for questioning in Syria. Zammar is believed to have been al-Qa'ida's top recruiter in Hamburg and to have helped form the Hamburg cell at the center of the September 11 attacks. He had refused to cooperate with German police in their investigation, and lacking enough evidence to charge him, they allowed him to leave for Morocco.⁹ As

⁷ Leslie Wayne, "Jury Recommends Death for Pakistani," *New York Times*, November 15, 1997, p. 1; John Burns, "Spiriting Off of Fugitive by U.S. Irks Pakistanis," *New York Times*, June 23, 1997, p. 9.

⁸ Statement of Mr. Michael F. Scheuer. See also Dana Priest, "Italy Knew about Plan to Grab Suspect," *Washington Post*, June 30, 2005, p. A1.

⁹ Peter Finn, "Al Qaeda Recruiter Reportedly Tortured," *The Washington Post*, January 31, 2003, p. A14.

Zammar quickly discovered, the laws that protected him in Germany did not apply in Syria and Morocco. Probably for similar reasons, U.S. officials detained Maher Arar, a Canadian citizen born in Syria, when he was changing planes in Kennedy Airport. Arar was sent to Syria for questioning, where he was reportedly tortured repeatedly but released a year later with no charge.¹⁰

This problem is not unique to America's European allies. U.S. counterterrorism officials at times find it better to send suspects to the Middle East rather than bring them to the United States because of the high bar U.S. law sets for convicting suspected terrorists. Some cases against terrorists cannot meet the "beyond a reasonable doubt" legal standard. Hearsay, rumor, and circumstantial evidence are often the only available intelligence, and information can be maddeningly imprecise, incomplete, and at times contradictory. Many U.S. allies in the Middle East have a far lower standard of evidence and are willing to bend what rules they have in response to a U.S. request.

Even when evidence is plentiful and solid, it must be available for use in a court of law without revealing sources and methods. Jeopardizing a well placed informant would turn a conviction into a pyrrhic victory, making it harder to stop future attacks.

Ironically, the operational value of renditions has grown as the U.S. detention of enemy combatants in Guantanamo has become legally, politically, and diplomatically problematic. Renditions, when successful, are a behind-the-scenes program. They do not require new legal systems and codes. Also maintaining jails to hold suspected terrorists indefinitely is labor-intensive.¹¹ To be clear, this is a failure of U.S. policy: the United States has no established legal procedures for suspected terrorists who are not U.S. citizens beyond sending them through the U.S. court systems where they are essentially treated as U.S. citizens.

Interrogations abroad also have their advantages. Jordan has contended with Islamist terrorism for decades, and its officials know a remarkable amount about the motivations, worldview, and desires of *jihadists*--knowledge that countries like Sweden and Germany still lack and U.S. interrogators are only slowly gaining. Officials like those in Jordan are often able to sort through the confusing array of family names, nicknames, and aliases that are often particularly hard for analysts not fluent in Arabic. Saudi Arabia has used respected clerics to "deprogram" terrorists, convincing detainees that their actions are contrary to Islam and will lead them to Hell.¹² Some Middle Eastern countries also can persuade or coerce a suspect's relatives. In societies where family ties are paramount, this pressure can be decisive in convincing a suspect to talk.

A Flawed Instrument

Renditions often violate of the laws of the country in which they occur. Although violating other countries' laws to preserve U.S. security is at times necessary, the United States in general should keep to a policy of supporting the rule of law, particularly in allied countries.

¹⁰ Douglas Jehl and David Johnston, "Rule Change Lets C.I.A. Freely Send Suspects Abroad," *New York Times*, March 6, 2005, p. 1.

¹¹ Statement of Mr. Michael F. Scheuer.

¹² Dana Priest and Joe Stephens, "Secret World OF U.S. Interrogation," *Washington Post*, May 11, 2004, p. A1.

The most controversial aspect of renditions is sending suspects to third countries where human rights abuses are common. Under the Clinton administration, rendered suspects could only be sent to a country where they were wanted under the country's legal system. Moreover, Clinton administration officials claimed that they demanded that rendered suspects be treated as they would be under the U.S. legal system — a demand that Scheuer denies, instead claiming that U.S. officials like him demanded that subjects be treated fairly according to that country's own laws. The need to send someone to a country where they faced legal charges changed under the Bush administration, but the Bush administration also arranged for many of the high-level suspects to be held directly by the United States.¹³ President Bush has also stated that the United States receives a promise from the recipient country that they will not torture the suspect.¹⁴

A number of countries favored for renditions, such as Egypt, Jordan, Morocco, and particularly Syria are often brutal to prisoners.¹⁵ Though the U.S. government demands that foreign governments promise not to use torture, officials have little control over those arrested once they leave U.S. custody — one CIA officer called these promises a “farce.”¹⁶ Scheuer notes that he regularly told senior lawyers and policymakers that “Egypt was Egypt” and that in response they simply inserted a “legal nicety.”¹⁷

Sending anyone to face torture is a heavy moral burden, but this problem should weigh even more heavily on policymakers' shoulders because the United States will at times inevitably render the wrong people. The lower evidentiary standard that makes renditions attractive also makes mistakes more likely. German prosecutors are investigating the claims of Khaled al-Masri, a German citizen, who says that on New Year's Eve 2003 he was kidnapped while traveling in Macedonia, imprisoned and interrogated in Afghanistan. When his interrogators realized he had little to say, he was unceremoniously deposited in Albania's mountains.¹⁸ Al-Masri was lucky: he claims he

¹³ Statement of Mr. Michael F. Scheuer.

¹⁴ President's Press Conference, White House, Office of the Press Secretary, March 16, 2005.

¹⁵ U.S. interpretations of the UN Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, which the U.S. ratified in 1994, in theory prohibit rendering suspects to countries where they might be tortured, but an exception is possible if there are credible assurances that the person will not be tortured. See Michael John Garcia, “Renditions: Constraints Imposed by Laws on Torture,” Congressional Research Service, updated April 5, 2006, p. 1. Garcia also notes that the State Department defines torture narrowly, well beyond what the U.S. legal system would consider cruel treatment (see note 32). A key uncertainty is whether the state in question regularly goes back on its diplomatic assurances. Some experts would note, however, that if assurances are needed, then you are already over the Convention Against Torture's standard. Hina Shamsi, e-mail correspondence, July 23, 2007.

¹⁶ Dana Priest, “CIA's Assurances on Transferred Suspects Doubted,” *Washington Post*, March 17, 2005, p. A1.

¹⁷ Michael Scheuer, “A Find Rendition,” *New York Times*, March 11, 2005.

¹⁸ Jeffrey Fleishman, “Man's Claims May Be a Look at Dark Side of War on Terror,” *Los Angeles Times*, April 12, 2005.

ended up in U.S. hands. Maher Arar, on the other hand, ended up in Syria where, according to a Canadian investigation, “he was interrogated and tortured.”¹⁹

Human rights abuses and arresting the wrong people are both a diplomatic problem and a broader practical one for intelligence officials. Such stories hurt America’s standing in the eyes of its allies and erode support for U.S. counterterrorism efforts, something even the best public diplomacy cannot undue. Many German elites, for example, have bitterly criticized the rendition of Zammar to Syria. Canada, Sweden, Germany, and Italy have or are now investigating U.S. renditions.²⁰ Weakened ties to friendly governments are felt later when they refuse to send troops to Iraq, resist trade overtures, or otherwise demonstrate their displeasure.

More broadly, successful counterterrorism depends in part on convincing the world that there is no moral equivalency between the terrorists and the government they oppose. When the United States muddies these waters, this distinction begins to blur. This is particularly problematic for U.S. attempts to woo fence-sitters in the Muslim world—the very hearts and minds that the United States most needs.

Not is all the information gained from renditions necessarily useful. U.S. officials are aware that the information received from suspects often comes from torture. Even when the means are gentler, the information is filtered through foreign intelligence services which, even when they are friendly, still are usually selective in what they pass on. Too much reliance on information from rendered suspects would lead to a faulty analysis.

Building a Better Program

The decision to render a suspect to a third country is seldom easy, but a more sustainable program that is less prone to mistakes can be fashioned.

One rule of thumb is that renditions are unnecessary when the local intelligence services and court system are good, such as in Britain and France. Similarly, a suspect should never be rendered from the United States. In contrast, renditions are more useful when the government in question is hostile, when the locals will not act, or when an extradition is too sensitive politically.

The trickiest cases are those like Arar, al-Masri, and others where the allies offended are close U.S. friends whose intelligence services and court systems, while far from ideal, are capable. In such cases, counterterrorism officials must judge whether the host government will properly gather intelligence and use its powers to prevent the suspect from fleeing. Inevitably, walking this line will lead to terrorists successfully fleeing when countries are not vigilant enough while other suspects (including some innocents) are nabbed to the outrage of our friends. When in doubt, the presumption should be to trust the allies’ legal system.

The United States should exercise greater care with regard to the country that receives a rendered suspect and modify the program to better comport more with the rule of law. In general, Washington should return to the practice of sending suspects to

¹⁹ For a description of the Arar case, see the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, Overview of Findings, *Report of the Events Relating to Maher Arar*, 2006. For the finding of torture, see pp. 53-58.

²⁰ Dana Priest, “CIA’s Assurances on Transferred Suspects Doubted,” *Washington Post*, March 17, 2005, p. A1.

countries where they are wanted under that country's legal system in order to ensure that a legal procedure of some sort is eventually followed and that the individual will not simply "disappear" within the country's darkest prisons. Americans should not pretend that Middle Eastern states' legal systems will respect the defendants' rights as would a U.S. or European system, but having the accused appear at a trial at some point is vital. Reducing the likelihood of torture is particularly important. Although judging harsh treatment involves discerning shades of gray rather than black and white, the United States should avoid the worst offenders such as Damascus. Egypt and Jordan, while often brutal, are far less harsh than is a country like Syria, which should never be the recipient of a rendered suspect. In addition, the United States must redouble efforts to make sure that the assurances it receives regarding torture are honored by the governments in question, as the human rights records of countries like Egypt are poor. Renditions have many advantages that have nothing to do with torture's theoretical benefits.

This increased care regarding treatment and greater attention to the legal dimensions of renditions is particularly important today given that the program is tainted by its lack of transparency and association with torture. In the public mind, torture is the *purpose* of renditions—a perception even stronger among the publics of U.S. allies. The lack of debate and clear understanding of the program's parameters allow such speculation to flourish. Similarly, one prominent newspaper story claimed that a mistaken rendition occurred because of the "hunch" of an intelligence official.²¹ The lack of transparency about the program in general makes it difficult to say whether this report is false, describes a violation of standard procedures, or is indicative of a broader problem.

Essential for the legitimacy of this process is legal review. At the very least, a senior official in the Department of Justice who has some degree of separation from the executive branch officials involved in the program should be consulted to ensure that the intelligence used to finger the suspected terrorist is carefully vetted. To add more legitimacy, a small court appointed by the Chief Justice could be used to review the names and evidence—an idea that is currently being considered by members of Congress. As with the Foreign Intelligence Surveillance Court, the judges would be capable of rapid action, even though that would not usually be necessary as most of the names would be added to the list well in advance of any operation. To be clear, the criteria would *not* be equivalent to that used in finding a guilty verdict for U.S. courts, as intelligence is often limited and fragmentary. However, the legal review would ensure that at least some standards are maintained and that evidence is carefully vetted. As with the Foreign Intelligence Surveillance Court, the process is likely to make involved agencies especially careful when they propose that any name should be added to the target list.

The United States also needs to ensure that the renditions process regularly involves senior political leaders. This process, in many ways, speaks to the heart of the policy: the moral claims are conflicting, so the question becomes who compares them and how they do so. The burden should be on elected officials, not civil servants. Congressional leaders should be kept informed of both the criteria used to put individuals on the list for renditions and given briefings on the results of past actions to facilitate

²¹ Dana Priest, "Wrongful Imprisonment: Anatomy of a CIA Mistake," *Washington Post*, December 4, 2005.

oversight. Then the worst abuses common to the program can be curbed without jettisoning a vital counterterrorism instrument.

Having no well-defined process in advance of an operation risks either a slow response that allows the terrorist to escape or a rapid one that does not involve careful vetting of intelligence and thus increases the likelihood of costly mistakes. Much of the inevitable lawyering over the quality of the intelligence and the risks involved will act as a *de facto* vetting process. Moreover, although politicians will inevitably make the policy more cautious, this over the long-term will make it more sustainable as it ensures accountability to the people and a proper consideration of the broader diplomatic and strategic picture.

Because renditions lie in the gray area between the rule of law and the nation's security, an honest debate would serve our country well—and thus I particularly welcome hearings like these, even though the subject matter is grim. Liberal voices must answer the painful question of whether suspected terrorists who are not U.S. citizens should be allowed to flee without hindrance when we have some evidence of wrongdoing, but not enough to try them in U.S. courts. Conservatives, in turn, must be open about the moral problem of torture and the political consequences of angering our allies, even when it saves lives. Drawing on this debate, political leaders of both parties must build a consensus behind the general parameters of this program that will enable it to help protect our country in the years to come.