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U.S. DEPARTMENT OF HOMELAND SECURITY INSPECTOR GENERAL REPORT OIG–08–18, 'THE REMOVAL OF A CANADIAN CITIZEN TO SYRIA'

JOINT HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

OF THE

COMMITTEE ON THE JUDICIARY

AND THE

SUBCOMMITTEE ON INTERNATIONAL ORGANIZATIONS, HUMAN RIGHTS, AND OVERSIGHT

OF THE

COMMITTEE ON FOREIGN AFFAIRS

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U.S. DEPARTMENT OF HOMELAND SECURITY INSPECTOR GENERAL REPORT OIG–08–18, 'THE REMOVAL OF A CANADIAN CITIZEN TO SYRIA'

THURSDAY, JUNE 5, 2008

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CONSTITUTION,
CIVIL RIGHTS, AND CIVIL LIBERTIES,
COMMITTEE ON THE JUDICIARY, AND THE

SUBCOMMITTEE ON
INTERNATIONAL ORGANIZATIONS,
HUMAN RIGHTS, AND OVERSIGHT,
COMMITTEE ON FOREIGN AFFAIRS
Washington, DC.

The Subcommittees met, pursuant to notice, at 10:42 a.m., in Room 2141, Rayburn House Office Building, the Honorable Jerrold Nadler (Chairman of the Subcommittee on the Constitution, Civil Rights, and Civil Liberties) presiding.

Present from the Subcommittee on the Constitution, Civil Rights, and Civil Liberties: Representatives Conyers, Nadler, Ellison, Watt, Franks, Issa, and King.

Present from the Subcommittee on International Organizations, Human Rights, and Oversight: Representatives Delahunt and Rohrabacher.

Staff present from the Subcommittee on the Constitution, Civil Rights, and Civil Liberties: David Lachman, Majority Chief of Staff; Heather Sawyer, Majority Counsel; Elliot Mincberg, Majority Counsel; Caroline Mays, Majority Professional Staff Member; Sean McLaughlin, Minority Chief of Staff and General Counsel; Paul Taylor, Minority Counsel; Crystal Jezierski, Minority Counsel; and Allison Halataei, Minority Counsel.

Staff present from the Subcommittee on International Organizations, Human Rights, and Oversight: Cliff Stammerman, Majority Staff Director; Natalie Coburn, Majority Professional Staff Member; Paul Berkowitz, Minority Professional Staff Member; and Elisa Perry, Majority Staff Associate.

Mr. NADLER. [Presiding.] This joint hearing of the Subcommittee on the Constitution, Civil Rights, and Civil Liberties and the Subcommittee on International Organizations, Human Rights, and Oversight will come to order. Without objection, the Chair is authorized to declare a recess of the hearing.

I will now recognize myself for a 5-minute opening statement.

Today's hearing will continue the Subcommittee's investigation into the matter of Maher Arar and this Administration's policy of what has been described as rendition to torture. Today, 4½ years after Chairman Conyers' initial request, the Inspector General's report on this matter is finally being released to the public in a redacted form. I especially want to commend the Chairman, Mr. Conyers, for his work on this and for his efforts to bring out the truth on this terrible incident.

I am pleased to be joined by our colleague, the gentleman from Massachusetts, Mr. Delahunt, the Chairman of the Subcommittee on International Organizations, Human Rights, and Oversight, who will be co-chairing this hearing. The gentleman has done an extraordinary job of investigating this matter and I am pleased to continue our partnership investigations.

We will now proceed, and I amend what I said a moment ago about the 5 minutes, to Members' opening statements. As has been the practice of the Subcommittee, I will recognize the Chairs and Ranking Members of the Subcommittees and of the full Committees to make opening statements. In the interests of proceeding to our witnesses and mindful of our busy schedules, I would ask that other Members submit their statements for the record. Without objection, all Members will have 5 legislative days to submit opening statements for inclusion in the record.

The Chair now recognizes himself for 5 minutes for an opening statement.

Today, 4½ years after Chairman Conyers' initial request for an investigation, we will begin to get the facts about the Administration's transfer of a Canadian citizen, Maher Arar, to Syria, a country listed by our State Department as engaging in torture. Specifically, we will examine the report of the Department of Homeland Security's Inspector General in the case.

Maher Arar, a Canadian citizen, was seized by our Government as he was changing planes at Kennedy Airport while returning from vacation in Tunisia to his home in Canada. Our Government detained and interrogated him for 2 weeks and then handed him over to the Syrians, who imprisoned him for 1 year and tortured him. We have been told by the Administration that the United States takes seriously its obligations under the Convention Against Torture, and under the laws of the United States, not to hand people over to governments that will torture them.

We have been specifically told by Attorneys General John Ashcroft and Alberto Gonzales, as well as by Secretary of State Condoleezza Rice, that in the case of Mr. Arar, the law was followed, that the United States obtained from the Syrians "assurances" that he would not be tortured. But as we now know from the Canadian government's commission of inquiry into this case, the Syrians did what our Government says they always do. They tortured him.

It has taken 4½ years since Chairman Conyers' original request in a December 16, 2003 letter asking the Inspector General to investigate this matter and to get some of the facts in the open. We finally have this redacted report. Today, the Inspector General's report with classified material blacked out is finally being made pub-

lic. Even in its redacted form, it is a deeply disturbing document. The facts it lays out raise serious questions not just of fact, but of law, that demand answers.

What does the report reveal? From the report, "the INS concluded that Arar was entitled to protection from torture and returning him to Syria would more likely than not result in torture."

"The assurances upon which INS based Arar's removal were ambiguous regarding the source or authority purporting to bind the Syrian government to protect Arar." In other words, the INS concluded he was probably going to be tortured and that the assurances provided that he would not be were ambiguous as to whether they were authoritative or what the source was.

"The validity of the assurances to protect Arar appears not to have been examined." In other words, it is reasonable to conclude that the INS knew or fully suspected that we were handing over Arar to probable torture. The government took steps to conceal Mr. Arar's whereabouts and to prevent him from contacting his family or from speaking with counsel.

The general counsel of the Department of Homeland Security insisted that the Inspector General sign an agreement reprinted in the report to give the department virtual veto power over what could be shared or made public, even setting conditions on the circumstances under which information could be shared with Congress. It was, to put it mildly, a case of allowing an Agency to set the rules for the investigation of its own conduct.

Now that this report is public, people will be able to read it and judge for themselves whether the delay and the secrecy was excessive, and whether that delay and secrecy was part of an effort to protect the security of the Nation, or part of an effort to protect the Administration from having immoral actions made public. People should read this report and decide for themselves.

We also need to consider whether the law was violated in this case. The Inspector General's report stated that he has been unable to determine whether or not laws were violated at least, in part, because key witnesses refused to cooperate with his investigation. But the report seems overly cautious in its conclusions. A fair reading of the facts revealed in the report indicates that the Administration knowingly violated the obligations this Nation has agreed to observe under the Convention Against Torture.

A fair reading reveals that the Administration knowingly violated our Nation's laws against conspiracy to commit torture. A fair reading reveals that the Administration knowingly violated our laws governing the treatment of persons passing through our ports of entry or who are detained on our soil. A fair reading would seem to indicate that Administration officials, including Secretary of State Condoleezza Rice and Attorneys General John Ashcroft and Alberto Gonzales materially misrepresented the facts and misled the Congress in their testimony on this issue.

We need to strengthen our laws to ensure that our Nation does not again become a party to torture by a country like Syria, which the Administration has identified as a country that tortures and is a state sponsor of terrorism. This case and the rendition policy generally gets more disturbing with each bit of information we obtain. The fact that it has taken more than 4 years to obtain even this

limited amount of information in the report is itself very disturbing.

I look forward to the testimony of our witnesses, and I can assure my colleagues that this is not the end of our investigation. I yield back the balance of my time.

[The prepared statement of Mr. Nadler follows:]

PREPARED STATEMENT OF THE HONORABLE JERROLD NADLER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK, AND CHAIRMAN, SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

Today, four and a half years after Chairman Conyers' initial request for an investigation, we will begin to get the facts about this Administration's transfer of a Canadian, Maher Arar, to Syria, a country listed by our State Department as engaging in torture.

Specifically, we will examine the report of the Department of Homeland Security's Inspector General on the case. Maher Arar, a Canadian citizen, was seized by our government as he was changing planes at Kennedy Airport while returning from vacation to his home in Canada. Our government detained and interrogated him for two weeks and then handed him over to the Syrians who imprisoned him for one year and tortured him.

We have been told by this Administration that the United States takes seriously its obligations under the Convention Against Torture, and under the laws of the United States, not to hand people over to governments that will torture them. We have been specifically told by Attorneys General John Ashcroft and Alberto Gonzales, as well as by Secretary of State Condolezza Rice, that, in the case of Mr. Arar, the law was followed, and that the United States obtained from the Syrians "assurances" that he would not be tortured.

But, as we now know from the Canadian Commission inquiry into this case, the Syrians did what our government has always said they do: they tortured him.

It has taken four and a half years, since Chairman Conyers' original request, in a December 16, 2003 letter asking the Inspector General to investigate this matter, to get some of the facts out in the open.

Today, the Inspector General's report, with classified material blacked out, is finally being made public. It is, even in its redacted form, a deeply disturbing document. The facts it lays out raise serious questions not just of fact, but of law, that demand answers.

What does the report reveal?

From the report: "The INS concluded that Arar was entitled to protection from torture and that returning him to Syria would *more likely than not* result in torture."

"The assurances upon which INS based Arar's removal were ambiguous regarding the source or authority purporting to bind the Syrian government to protect Arar."

"The validity of the assurances to protect Arar appears not to have been examined."

In other words, it is reasonable to conclude that the INS knew that we were handing over Arar to probable torture.

The government took steps to conceal Mr. Arar, and prevent him from contacting his family or speaking with counsel.

The General Counsel of the Department of Homeland Security insisted that the Inspector General sign an agreement, reprinted in the report, to give the Department virtual veto power over what could be shared or made public, even setting conditions on the circumstances under which information could be shared with Congress. It was, to put it mildly, a case of allowing an agency to set the rules for an investigation of its own conduct.

Now that this report is public, people will be able to read it and judge for themselves whether the delay and the secrecy was excessive, and whether that delay and secrecy was part of an effort to protect the security of the nation or an effort to protect the Administration from having immoral actions made public.

People should read this report and decide for themselves.

We also need to consider whether the law was violated in this case. The Inspector General's report stated that he has been unable to determine whether or not laws were violated, at least in part because key witnesses refused to cooperate with his investigation. But the report seems overly cautious in its conclusions.

A fair reading of the facts revealed in the report indicates that the Administration knowingly violated the obligations this nation has agreed to observe under the Convention Against Torture.

The Administration knowingly violated our nation's laws against conspiracy to commit torture.

The Administration knowingly violated our laws governing the treatment of persons passing through our ports of entry, or who are detained on our soil.

Administration officials, including Secretary of State Condoleezza Rice and Attorney General John Ashcroft and Alberto Gonzales, materially misrepresented the facts and misled the Congress in their testimony on this case.

We need to strengthen our laws to ensure that our nation does not again become a party to torture by a country like Syria, which the Administration has identified as a country that tortures and is a state sponsor of terrorism.

This case, and the rendition policy, generally gets more disturbing with each bit of information we obtain, and the fact that it has taken more than four years to obtain even this limited amount of information in the report is itself very disturbing.

I look forward to the testimony of our witnesses, and I can assure my colleagues that this is not the end of our investigation.

I yield back the balance of my time.

Mr. NADLER. I would now recognize the distinguished Chairman of the full Committee on the Judiciary for 5 minutes, the distinguished Chairman from Michigan.

Mr. CONYERS. Thank you, Chairman Nadler. I never go before Subcommittee Chairmen when we have joint hearings. It is my custom to allow all you big guns on the Committee to go first, and I will come back a little later on. Thank you very much.

Mr. NADLER. I thank the gentleman.

The Chair now recognizes the distinguished Ranking Member of the Subcommittee on the Constitution, Civil Rights, and Civil Liberties, the gentleman from Arizona, Mr. Franks, for 5 minutes.

Mr. FRANKS. Thank you, Mr. Chairman.

Mr. Chairman, I just want to say in the preface of my remarks here that any injustice to anyone is an oversight on the part of everyone. I personally am disturbed by some of the things that occurred here. I guess the purpose of my remarks here today are to try to put in context America's role in all of that.

The Department of Homeland Security's Office of Inspector General investigated the case of Mr. Maher Arar, and on Tuesday, June 2, 2008, that office issued a 52-page extended unclassified report stating, "INS appropriately determined that Mr. Arar was inadmissible under relevant provisions of immigration law." It also stated that "ICE concurred with our recommendations, and that is those of the report, and has taken steps to implement them.

"It does not appear that any INS personnel whose activities we reviewed violated any then-existing law, regulation or policy with respect to the removal of Arar. We have received ICE's responses to the recommendations and consider both recommendations resolved and closed."

Mr. Chairman, I look forward to hearing more about the process that led to the IG's report and how and whether additional information about this case can be made public in unclassified form. The final report of the Canadian commission released in September, 2006, concluded that the Canadian officials provided U.S. authorities with inaccurate information regarding Mr. Arar that led to his transfer to Syria.

The Canadian report entitled Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, made clear that the Canadian government did have reason to be suspicious of Mr. Arar as he seemed to be close to Abdullah Almaki, who is be-

lieved to be a member of al-Qaida. As the Canadian commission stated in its report, "Canadian authorities properly considered Mr. Arar to be a person of interest in its investigation. While the meeting might have been innocent, there were aspects of it that reasonably raised investigators' antennae. Mr. Almaki and Mr. Arar were seen walking together in the rain and conversing for 20 minutes. Given that Mr. Almaki was a target of this investigation, it was reasonable for Canadian authorities to investigate Mr. Arar. Mr. Arar was properly a person of interest to the investigators who were aware that he had met with Mr. Almaki and that he had listed him as an emergency contact on his rental application, indicating that he might have close ties."

Mr. Chairman, 4 years later, Canadian officials would correct this information. But be that as it may, it appears that the situation which Mr. Arar ultimately found himself in 2002 was caused by Canadian officials who provided the U.S. with inaccurate negative information in 2002 regarding Mr. Arar and the threat he might pose to our national security. That inaccurate negative information went well beyond the facts that made Mr. Arar an appropriate person of interest.

The official Canadian commission concluded that the Royal Canadian Mounted Police provided American authorities with information about Mr. Arar that was inaccurate and portrayed him in an unfairly negative fashion. The report further concluded 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."

Some examples follow: the description of Mr. Arar as being a member of a group of Islamic extremist individuals suspected of being linked to the al-Qaida terrorist movement; several references to Mr. Arar as a suspect, principal target, or target or important figure; and the assertion that Mr. Arar had refused an interview with Canadian authorities.

So what we are left with the official Canadian investigation of this incident is that whatever decisions were made by American authorities, they were driven by inaccurate information provided by Canadian authorities that case Mr. Arar in a negative light that went far beyond what was warranted by the facts.

I truly and sincerely regret any injustice that may have occurred to Mr. Arar by any hands in any country, and I very much want to hear any additional information about this case that our witnesses can tell us today. I look forward to your testimony.

I yield back.

Mr. NADLER. I thank the gentleman.

I would now recognize for 5 minutes the distinguished Chairman of the Subcommittee on International Organizations, Human Rights, and Oversight, the co-Chairman of this hearing, the gentleman from Massachusetts, Mr. Delahunt.

Mr. DELAHUNT. Thank you, Chairman Nadler. I thank top-gun himself for deferring to big guns so that we could proceed.

First, I heard the opening statement of the Ranking Member, and I have great respect for him, and I know he is sincere in his statements. I would also remind those on the panel that myself, Mr. Rohrabacher, Mr. Nadler, and Mr. Franks, apologized publicly

to Mr. Arar at an earlier hearing which I chaired over in the Foreign Affairs Committee.

But I also would note that in the report by the Inspector General, it stated that the Joint Terrorism Task Force investigators at the time concluded that they had no interest in Arar as an investigative subject. That is the report that is before us today. Something happened afterwards. I would hope that Mr. Skinner would reconsider and reopen his efforts in terms of determining what happened because I have to acknowledge some disappointment with the new redacted report.

I still do not know the answer to two key questions. On what basis did our Government determine that it would be prejudicial to the interests of the United States to send Mr. Arar back to Canada? I am unaware of any designation in terms of Canada that they are a state sponsor of terrorism. Since when and under what circumstances would the United States's interests be prejudiced if Mr. Arar returned to Canada? I would suggest that is an offense to our friends, our neighbors, and our erstwhile ally Canada.

And another unanswered question is, what assurances did Syria give that Arar would not be tortured if he were to be sent there? What is the answer to that question? Well, as I indicated, in terms of the first question, I am baffled because there is no explanation in the report. I do not know whether the Office of Inspector General asked or perhaps you did, but there was no evidence to provide a justification that it would hurt the interests of the United States to send Mr. Arar back to Canada. I hope we can get to the bottom of that today.

On the second point, I read the following line from the redacted report and from your testimony, Mr. Skinner. "The assurances upon which INS based Arar's removal were ambiguous regarding the source or authority purporting to bind the Syrian government." How could it be that the Office of Inspector General found that the INS appropriately followed procedures to implement the Convention Against Torture when the assurances were ambiguous regarding the source or the authority?

Nor does the report even address my main concern about the assurances, which is how could any assurances from Syria be deemed reliable? This is, after all, the country that President Bush himself cited for its legacy of torture, oppression, misery and ruin, and that the State Department routinely condemns in its annual country reports for torture. And now we hear that the assurances received from this country were ambiguous to its source and authority. I find that incredulous.

How assurances from an unknown source within a government that routinely tortures, according to President Bush, are found sufficiently reliable for purposes of the Convention Against Torture, is simply beyond me.

I believe the difficulties faced with this report are symptomatic of a larger problem, which is the failure of the Bush administration to come to terms with its own mistakes. Now, the Canadian government has sent an outstanding example of how a healthy, viable democratic government should act when it commits a mistake, and our Government should follow their lead.

With that, I yield back.

[The prepared statement of Mr. Delahunt follows:]

PREPARED STATEMENT OF THE HONORABLE WILLIAM D. DELAHUNT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MASSACHUSETTS, AND CHAIRMAN, SUBCOMMITTEE ON INTERNATIONAL ORGANIZATIONS, HUMAN RIGHTS, AND OVERSIGHT

REMARKS PREPARED FOR DELIVERY

Opening Statement of Chairman Delahunt

Hearing on

U.S. Department of Homeland Security Inspector General

Report OIG-08-18: The Removal of a Canadian Citizen to Syria

June 5, 2008

Thank you Chairman Nadler.

This is the second hearing we have held jointly examining the case of Mr. Maher Arar. It is impérative that the public learns the truth about what happened to him. For justice demands no less.

This case is important because it illustrates how the policy of extraordinary rendition can go horribly askew. For those unfamiliar with the term "extraordinary rendition," I am referring to the practice by the Bush Administration and the prior Clinton Administration in which individuals suspected of links to Al-Qaeda and other terrorist organizations are seized and transferred to countries such as Syria, which according to the State Department, systematically utilize torture. To quote Michael Scheuer, who we welcome back today as a witness, "It's basically finding someone else to do your dirty work."

But what if we grab the wrong guy? What if we make a mistake? The rendition of Maher Arar was just such a mistake. A tragic mistake that

– befitting American justice and values – demands acknowledgement 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 US soil* - while awaiting a connecting flight on his way home to Canada. The Administration would have you believe that this was nothing more than an 'expedited removal." No one be fooled – this was no simple immigration matter.

Mr. Arar was detained in New York, interrogated relentlessly and denied an opportunity to make a single phone call for 7 days. The INS and DOJ wanted him not just removed – but sent to Syria. So the Acting Attorney General Larry Thompson made a determination that it was "prejudicial to the interests of the United States" to send him back to Canada." Over Mr. Arar's 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. Now former Attorney General Gonzales has testified that diplomatic assurances were obtained from Syria that Mr. Arar would not be tortured. But I think it's not a surprise to anyone that he was still tortured --and kept in a grave-like cell for the majority of his year-long detention. In all this time, Mr. Arar 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 case – consistent with that critical democratic principle of accountability. The independently constituted "Arar Commission" spent two and a half years investigating the matter and produced an exhaustive factual report and policy review. Justice Dennis O'Connor, the Commissioner of the Inquiry, concluded, and I quote: - - "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 offence or that his activities constitute a threat to the security of Canada."

On this side of the border, Congress has also tried to get to the bottom of this matter. The then Ranking Member of the Judiciary Committee, Rep. John Conyers, requested an investigation by the Inspector General of the Department of Homeland Security. That was in December of 2003. Yet it was not until December 2007 – four years later -- that the report was completed. A report, mind you, that was classified -- no public report like that issued by the Arar Commission in Canada.

Today we are going to examine the process by which this report was prepared. The bottom line is that it took far too long for this report to be issued. And when issued, it was restricted by issues of classification and privilege. All that the public got was a simple recitation of facts.

I commend the Inspector General Skinner for his efforts in providing us today with a newly redacted version of the report. I understand this version will be publicly available after this hearing. I believe this is an

important step forward in providing some measure of public accountability. But even this new redacted version we have today contains large portions that are blacked out due to classification and privilege.
Well, the American people have a privilege as well -- A privilege to demand a full accounting from its government when it deviates from its responsibility to uphold American values. Here was a report that should have told us what went wrong – - it should have told us how we can make sure that no other person suffers as Mr. Arar has done. But those agencies or individuals who played a role in Mr. Arar's case seemed to have made it very difficult for the Inspector General's Office to get a comprehensive report out the door! And the OIG could have pushed back harder.

I hope that the Inspector General will re-open his investigation because it does not address two key questions: 1) on what basis did our government determine that it would be "prejudicial to the interests of the United States" to send Arar back to Canada; and 2) what assurances did Syria give that Arar would not be tortured if we were to be send him there?

On the first point, the report states "We do not know on what basis the Acting Attorney General deemed Arar's return to Canada as prejudicial to the interests of the United States." I am baffled by this statement. Why not? What happened? Did no one provide you with some kind of justification? Should you at least been able to see some classified evidence that could explain this decision? Did you ask for it?

Or perhaps you did but there was no evidence at all to provide? I hope we can get to the bottom of this today.

On the second point, I read the following line from the redacted report and from your testimony, Mr. Skinner: "The assurances upon which INS based Arar's removal were *ambiguous regarding the source or authority purporting to bind the Syrian government.*"

"Ambiguous regarding the source or authority"! How could it be that the OIG found that the INS appropriately followed procedures with respect to the Convention against Torture when the assurances were ambiguous regarding the source or authority? And, and I quote "the validity of the assurances to protect Arar appears not to have been examined" ? What kind of procedures permits assurances that aren't even examined?

Nor does this report even address my main concern about the assurances, which is -- how could any assurances from Syria be deemed reliable? This is after all -- 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 annual country reports for torture! And now we hear that the assurances received from this country were ambiguous as to source and authority! I find that incredulous! How assurances from an unknown source within a government that routinely tortures, according to President Bush, are found sufficiently reliable for purposes of the Convention against Torture is simply beyond me!

I believe the difficulties faced with this report are symptomatic of a larger problem – the failure of the Bush Administration to come to terms with its own mistakes. The Canadian Government has set an outstanding example of how a democratic government should act when it commits a mistake. Our government should follow their lead.

We have betrayed our core values in this matter. Values that American and Canadians share. Values that set us apart among the family of nations and gives us a claim to a moral authority inherent in great democracies. Until we acknowledge our mistake and attempt to make amends, we don't deserve to invoke that authority.
Thank you.

Mr. NADLER. I thank the gentleman.

I would now recognize for 5 minutes the distinguished Ranking minority Member of the Subcommittee on International Organizations, Human Rights, and Oversight, the gentleman from California, Mr. Rohrabacher.

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

I remember this hearing and this issue very well. I think it was very clear after going through the facts that Mr. Arar had suffered unjustly and was indeed an unintended victim of America's efforts to try to prevent another terrorist attack that would have cost the lives of thousands of Americans.

Although the goal was not, obviously, to waste our time and our resources, but also to act roughshod and immorally in a way that would result in the mistreatment of people like Mr. Arar, who would unfortunately suffer unintentionally as a part of this effort. The fact is that we know that every major effort at providing security for this country and the West will result in an unintended suffering by certain individuals because people make mistakes in trying to implement policy no matter how noble that policy.

When we do so, it is incumbent—and if I have any criticism of this Administration since 9/11, it has been that we have been unwilling to admit mistakes like this readily, and to offer our apologies and compensation to people like Mr. Arar. And there are a number of people like Mr. Arar obviously who are innocent and were caught up in this incredible effort that we have made to prevent another major terrorist attack on our country. So there is some criticism that I think is justified in that we did not admit right away when it became evident that the Canadians had given us false information.

That does not, however, mean that the tactics used against Mr. Arar had he been a terrorist are necessarily the wrong decisions that would have been made had he been a terrorist, which is an issue that we need to discuss at this hearing. I think it is something that we need as a people to determine how far we are willing to go with people who are terrorists—not mistakes, but people who are terrorists—in order to get information, and what is an effective method of doing so in order to prevent the massive death of our citizens who have been targeted by terrorist organizations that mean to terrorize the people of the United States by slaughtering the people of the United States.

There is, as I say, a debate, and I think this is a good and appropriate place for us to have that debate. But let us not pretend that this that we are talking about, the activities of an innocent or the suffering of an innocent person being the intentional outcome of American policy. The American policy's intent was designed to prevent another major terrorist attack on the people of the United States, and quite frankly, I think that policy has been successful. We have not suffered another 9/11, and people have to realize that has not been a gift from God. That has been a result of American policy.

Now, I believe that hearings like this, yes, we need to discuss these issues, but let me remind my colleagues—and I have used this example on a number of occasions—and that is prior to the invasion of Normandy on D-Day of June 6, 1944, the week prior to

that invasion American military opened up on Normandy and killed 9,000 Frenchmen. That is more Frenchmen than had been killed during the entire occupation by Nazi Germany in France.

Now, this would be the equivalent. If we constantly harp on those 9,000 people, that would be the equivalent of concentrating totally on Arar as an analysis of what we have done to try to prevent 9/11s. Should we have hung our head in shame that 9,000 Frenchmen died as we were preparing the landings at Normandy? Should there be a monument that American military and diplomatic personnel visiting that monument of shame to all those innocent people that were killed?

No, our intent was not to kill those innocent Frenchmen. Our intent was to liberate Europe from the Nazi domination, and that was just as noble a goal as the goal of trying to prevent another 9/11 that would result in the death of thousands of Americans. Our apology should be to those people who we are unintended victims because of mistakes made in the implementation of the policy. There will always be such mistakes. There will always be such victims no matter how noble the goal.

Again, if I cite any mistake of this Administration, it has been the unwillingness to admit certain mistakes and correct those things and to make it right as much as can be made right by people who have been dealt an injustice.

Thank you very much, Mr. Chairman.

Mr. NADLER. I thank the gentleman.

I would observe that the rules prohibit any demonstrations or holding of signs or anything, so I would ask that the person who was doing so a moment ago not do so and that no one do so.

I would now recognize for 5 minutes the distinguished Chairman of the full Committee, Mr. Conyers.

Mr. CONYERS. Thank you very much.

After hearing four impressive opening statements, I find I have very little to add. So I am going to ask that my statement, which I think you will find equally as impressive as the ones that you have heard, that you read it. The only one thing I am trying to find out between my present and former Inspector Generals is how in heaven's name that it takes 4½ years for me to get a redacted report on a subject like this. To have both of you here is very consoling to me.

Now, I am always happy to see my strong Members on the other side from Judiciary here—Steve King and Darrell Issa—because they are strong contributors to this. But I close with this observation, and I do not wear my religion on my sleeve, but how does my internationally renowned surfer from California know that God didn't have anything to do with this? I leave this maybe the subject of another hearing. [Laughter.]

But it intrigues me greatly.

I thank you very much, Mr. Chairman, and yield back my time.

Mr. NADLER. I thank the gentleman.

Without objection, the gentleman's statement will be inserted into the record.

[The prepared statement of Chairman Conyers follows:]

PREPARED STATEMENT OF THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN, AND CHAIRMAN, COMMITTEE ON THE JUDICIARY, AND MEMBER, SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

More than 4½ years ago, in December, 2003, I requested a thorough Inspector General review of the troubling case of Maher Arar, a Canadian citizen who was denied admission to the U.S. as he was returning home and was instead sent against his will to Syria, where he was imprisoned and reportedly tortured. It wasn't until last December, 4 years later, that I received that report from the Department of Homeland Security IG. And it wasn't until this week, despite my request in January, that even a heavily edited version of that report was made ready for release to the public. This disturbing chronology leads me to three questions that I hope our witnesses will address today.

First, why did it take so long to produce this report? The events described happened almost 6 years ago. Canada appointed a commission on this subject, and it released a report in 31 months.

Second, why have so many deletions of NON- classified material been made to the public version of this report? By our count, there are at least 24 such deletions in this 52-page report. By comparison, in the recent Justice Department IG 370 page report on the FBI and detainee interrogations, an extremely sensitive subject, there are ZERO deletions of non-classified material. For today's hearing, I will respect Mr. Skinner's request that I not disclose any such non-classified material. But these deletions, as well as what I consider over- classifications, continue to raise serious concerns.

Third, and perhaps most important, what does the report tell us about the Arar case? Despite my concerns about what has been withheld, what has been RELEASED in this report tells us a lot that is very troubling. Among other things, the redacted report suggests that:

- In Mr. Arar's case, the government deviated significantly from the usual process when someone is found inadmissible to the U.S. "Most" such persons, according to the report, are returned to their country of embarkation (in this case, Switzerland) or citizenship (in this case, Canada). But Mr. Arar was involuntarily sent to Syria, where he was reportedly tortured.
- In fact, the IG states that INS concluded that it was "more likely than not" that Mr. Arar would be tortured if sent to Syria, and sent him there only after receiving "assurances" that he would not be tortured, as provided in the Convention Against Torture. But the report states that those assurances were "ambiguous" and their validity "appears not to have been examined."
- The report also strongly suggests that our government mistreated Mr. Arar in other ways. The IG specifically "question[s] the reasonableness of the length of time he was given" to "respond to the charges against him" and obtain counsel, and states that the notification to him of the interview to assess the torture issue was "questionable."

More information is needed on this issue, particularly since the IG has told us that he has just reopened the investigation. But what we all know already is very troubling, and I look forward to hearing from our witnesses today. With that, I yield back.

Mr. NADLER. As we ask questions of our witnesses, the Chair will recognize Members in the order of their seniority on the Subcommittee and the Committee, alternating between majority and minority and between the two Subcommittees, provided that the Member is present when his or her turn arises. Members who are not present when their turn begins will be recognized after the other Members have had the opportunity to ask their questions.

The Chair reserves the right to accommodate a Member who is unavoidably late or only able to be with us for a short time. The Chair will administer the 5-minute rule for both sides flexibly so that we can have a full examination of this issue.

I want to welcome our distinguished panel of witnesses today. Our first witness is Richard Skinner, the Inspector General for the Department of Homeland Security. Mr. Skinner was confirmed as

the Department of Homeland Security Inspector General on July 28, 2005. Between December 9, 2004 and July 27, 2005, he served as Acting Inspector General. He held the position of Deputy Inspector General, Department of Homeland Security, since March, 1, 2003—the date that the Office of Inspector General in the Department of Homeland Security was established.

Prior to his arrival at DHS, Mr. Skinner was with the Federal Emergency Management Agency, where he served as the Acting Inspector General from October, 2002 to February, 2003, and Deputy Inspector General from 1996 to 2002. From 1991 to 1996, Mr. Skinner served at FEMA OIG as the Assistant Inspector General for Audits. From 1988 to 1991, Mr. Skinner worked at the U.S. Department of State OIG. During his tenure at State, Mr. Skinner served as a senior inspector on more than a dozen foreign and domestic inspections. In 1991, Mr. Skinner was appointed by the IG to serve as the de facto Inspector General for the Arms Control and Disarmament Agency.

From 1972 to 1988, Mr. Skinner held a variety of audit management positions with the U.S. Department of Justice and the U.S. Department of Commerce. He began his Federal career in 1969 with the OIG of the U.S. Department of Agriculture. Mr. Skinner holds a bachelor of science degree in business administration from Fairmont State College and an MPA from George Washington University.

Clark Ervin is the director of the homeland security program at the Aspen Institute. From January, 2003 to December, 2004, he served as the first Inspector General of the Department of Homeland Security. Prior to his service at DHS, he served as the Inspector General of the United States Department of State from August, 2001 to January, 2003. His service in the George W. Bush administration was preceded by his service as the associate director of policy in the White House Office of National Service in the George H. W. Bush administration.

A native of Houston, Mr. Ervin served in the State government of Texas from 1995 to 2001, first as Assistant Scretary of State and then as the Deputy Attorney General. Mr. Ervin earned a BA degree cum laude in government from Harvard in 1980, and MA degree in politics, philosophy and economics from Oxford University in 1982 as a Rhodes Scholar, and a JD degree cum laude from Harvard Law School in 1985.

Our third witness is Scott Horton. Mr. Horton teaches international public and private law, national security law, and the law of armed conflict at Columbia Law School, and will spend the coming academic year as distinguished visiting professor at Hofstra Law School in Hampstead, New York. Mr. Horton is a member of the board of the National Institute of Military Justice, the Eurasia Group, and the American branch of the International Law Association, and is a member of the Council on Foreign Relations.

He was previously a partner at Patterson, Belknap, Webb and Tyler. He holds his JD degree from the University of Texas at Austin, and studied law at the Universities of Mainz and Munich in Germany before coming to Austin.

Before we begin, it is customary for the Committee to swear-in its witnesses. If you would please stand and raise your right hands to take the oath.

[Witnesses sworn.]

Thank you. Let the record reflect that the witnesses answered in the affirmative.

You may be seated.

I will now ask each witness to summarize his testimony in 5 minutes. There is a timer in front of you. It should indicate green. When there is 1 minute left, it should indicate yellow. And when the time has expired, it should indicate red. We would ask that when the red light goes on, you try to sum up the remaining part of your testimony, period.

I now recognize Mr. Skinner for 5 minutes.

TESTIMONY OF RICHARD L. SKINNER, OFFICE OF THE INSPECTOR GENERAL, U.S. DEPARTMENT OF HOMELAND SECURITY

Mr. SKINNER. Good morning, Chairman Nadler, Chairman Delahunt, Chairman Conyers, Ranking Members, and Members of the Subcommittees. I am pleased to be here today.

Prior to this hearing, I provided the appropriate congressional Committees and Subcommittees with copies of my unredacted classified report on the removal of the Canadian citizen, Maher Arar, to Syria. I also provided you with the redacted unclassified version of the report, as well as a formal statement for the record.

In so far as this is an open hearing, I am here today to discuss the redacted unclassified version of the report. I will be happy to talk further about the contents of the unredacted version at your convenience in a more secure environment.

Before I begin my opening remarks, there are a couple of comments I would like to make. First, I think it is important to note that we have reopened our review of the Mr. Arar matter. We recently received additional classified information that could be germane to our findings. We are in the process of validating the veracity of this information and if need be we will publish a supplement to our existing report.

Secondly, I would like to comment on the challenges we encountered while doing this work. It took us 4 years to produce our report. No doubt, that is a long time, but we diligently tried to the extent we could to tell the story and tell it accurately. As frustrating as this must have been for the Congress, it was equally if not more frustrating for me personally and the inspection team.

At the time we began our review in January, 2004, the department was still in its embryo stage of development. The cooperation we received was not as good as it could have been or should have been. I am pleased to say that we have since overcome those issues. Cooperation between the department and the OIG has improved dramatically.

To compound matters, we were hampered by the amount of time that had elapsed—16 months between the time Mr. Arar was removed to Syria and the time we began our review. While the memories of some of the people we interviewed were extremely

vivid, memories of others had faded to the point that they only vaguely remembered Arar's name.

Furthermore, we were unable to interview the principal INS decision-makers involved in the Arar matter, including a former INS commissioner, the former INS chief of staff, and the former INS general counsel. They have left Government service and declined our request for interviews. Many of the decisions concerning Arar were made during conversations between those individuals.

Nevertheless, even though the documentation of the events was sparse, we were able to compile enough written records to corroborate the information we obtained through the interviews and to reconstruct significant events of this case. To muddy the waters further, we had to contend with multiple components within DHS, classified information outside the purview of the department, and other Government agencies that did not have the same sense of urgency as our inspectors.

We also had to contend with a pending lawsuit filed by Mr. Arar's attorneys against the U.S. government and several individually named U.S. government officials. Both Government and private counsel expressed concern that our interviews of some witnesses might constitute a waiver of privileges that counsel would want to preserve in the litigation with Arar.

It has been almost 5½ years since Arar was removed from the United States. This hearing is a long time coming, and I want to thank the Members, and Chairman Conyers in particular, for supporting our efforts to get this right and for keeping the spotlight on this very important issue. It took time, but we are committed to conducting thorough reviews and in publishing accurate reports.

Let me now discuss the work itself. Mr. Arar was a dual citizen of Canada and Syria. He arrived at JFK International Airport on September 26, 2002 on a flight from Zurich, Switzerland. He presented a Canadian passport for admission to the United States as a non-immigrant in order to board a connecting flight to Montreal, Canada. Mr. Arar did not formally apply for admission to the United States, but because he did not have a transit visa, by operation of law, he was deemed to be an applicant for admission.

Mr. Arar was identified as a special interest alien who was suspected of affiliation with a terrorist organization. He was detained by inspectors for INS at JFK, questioned by Federal agents, and transferred to a nearby Federal detention center. INS determined Arar's inadmissibility to the U.S. on the grounds that he was a member of a foreign terrorist organization and was removed on Tuesday, October 8, 2002. INS flew him to Amman, Jordan, and he was later taken into custody by Syrian officials. After Arar returned to Canada in October, 2003, he alleged that he was beaten and tortured while in the custody of the Syrian government.

Our review examined the basis for determining that Mr. Arar was inadmissible to the United States, the rationale for designating Syria as Mr. Arar's country of removal, and how INS assessed Mr. Arar's eligibility for protection under the United Nations Convention Against Torture. We concluded that INS appropriately determined that Mr. Arar was inadmissible under relevant provisions of immigration law. INS officials analyzed derogatory information concerning Mr. Arar and sought clarification. INS elected

to remove Arar pursuant to section 235(c) of the Immigration and Nationality Act. By using a section 235(c) proceeding, INS could use classified information to substantiate the charge without any risk that the classified information would be disclosed in an open hearing in an immigration court.

Syria was designated as Mr. Arar's country of removal. INS could have attempted to remove Mr. Arar to Canada, his country of citizenship, or Switzerland, his point of embarkation into the United States. Further, Mr. Arar specifically requested to be returned to Canada and formally stated his opposition to returning to Syria. However, the Acting Attorney General ruled against removing Mr. Arar to Canada because that was determined to be prejudicial to the interests of the United States. Also, U.S. officials determined that they could choose any of the three countries as a destination to remove Mr. Arar.

INS followed procedures for assessing Mr. Arar's eligibility for protection under the United Nations Convention Against Torture, CAT. INS supervisory asylum officers conducted a protection interview of Mr. Arar on Sunday, October 6, 2002, to ascertain whether Mr. Arar had a fear of returning to Canada, Syria or any other country for that matter. Although INS attempted to notify Mr. Arar's attorneys of the interview at their offices that day, and I believe it was a Sunday, we believe the timing and manner in which they were notified of the protection interview was highly questionable.

INS concluded that Arar was entitled to protection from torture and that returning him to Syria would more likely than not result in his torture. However, we concluded that assurances upon which INS based Arar's removal were ambiguous regarding the source or authority purporting to bind the Syrian government.

Based on this documentation we reviewed and the interviews we conducted, it does not appear that any INS person violated any then-existing law, regulation or policy in the removal of Mr. Arar. However, I believe it is important to note that we did not have the opportunity to interview all the individuals involved in this matter.

This concludes my opening statement. I will be happy to answer any questions you may have.

[The prepared statement of Mr. Skinner follows:]

PREPARED STATEMENT OF THE HONORABLE RICHARD L. SKINNER

STATEMENT OF RICHARD L. SKINNER

INSPECTOR GENERAL

U.S. DEPARTMENT OF HOMELAND SECURITY

BEFORE A

JOINT HEARING OF THE

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERITES
COMMITTEE ON THE JUDICIARY

AND THE

SUBCOMMITTEE ON INTERNATIONAL ORGANIZATIONS, HUMAN RIGHTS, AND OVERSIGHT
COMMITTEE ON FOREIGN AFFAIRS

U.S. HOUSE OF REPRESENTATIVES

JUNE 5, 2008

Good afternoon Chairman Nadler, Chairman Delahunt, and members of the subcommittees. Thank you for inviting me today to testify about our report on the removal of Maher Arar to Syria titled, *The Removal of a Canadian Citizen to Syria*.

I will begin my testimony with an outline of the events surrounding Mr. Arar's arrival to and removal from the United States in September and October 2002, and the results of our review relating to those events. Then I would like to address the joint memorandum between my office and the Department of Homeland Security's (DHS) Office of General Counsel and the Freedom of Information Act (FOIA) process we used to prepare the redacted version of our report.

I want to bring to your attention that we have reopened our review into the Mr. Arar matter because, less than a month ago, we received additional information that contradicts one of the conclusions in our report. As such, we are in the process of conducting additional interviews to determine the validity of this information to the extent we can. Should we determine that one or more of the conclusions in our report are incorrect, we will publish a supplement to the final report.

I. Chronology of events Concerning Mr. Arar's Arrival to and Removal from the United States

A. Timeline

Thursday, September 26, 2002

On Thursday, September 26, 2002, Mr. Arar arrived at John F. Kennedy International Airport (Kennedy Airport) in New York City aboard an American Airlines flight from Zurich, Switzerland.

After his arrival at the airport at 1:55 p.m., Mr. Arar, a dual citizen of Syria and Canada, presented a Canadian passport for admission to the United States as a nonimmigrant in order to transit through Kennedy Airport to catch a flight to Montreal, Canada, which was scheduled to depart at 5:05 p.m. that day. Mr. Arar did not formally apply for admission to the United States, but because he did not have a transit visa, by operation of law he was deemed to be an applicant for admission.

At 1:06 p.m. on Thursday, September 26, 2002, Immigration and Naturalization Service (INS) inspectors conducted a routine screening of the passenger manifest, provided by the Advance Passenger Information System, for Mr. Arar's inbound flight. The result of the screening showed that Mr. Arar was the subject of a lookout. Per instructions contained in the lookout, INS inspectors notified the Federal Bureau of Investigation's (FBI) New York Joint Terrorism Task Force (JTTF). JTTF investigators proceeded to Kennedy Airport to interview Mr. Arar. The INS inspector at the primary inspections station sent Mr. Arar to secondary inspections to confirm whether Mr. Arar was the subject of the lookout. INS inspectors in secondary inspections were able to make that confirmation.

Department of Justice (DOJ) and INS officials in Washington, DC became aware of Mr. Arar's arrival to the United States and apprehension on the evening of Thursday, September 26, 2002. That evening a meeting was held concerning Mr. Arar in the office of the INS Commissioner in Washington, DC, involving the Commissioner, the INS Chief of Staff, and INS attorneys.

After his apprehension at Kennedy Airport on Thursday, September 26, 2002, INS inspectors afforded Mr. Arar the opportunity to the call the Canadian consulate, but he elected not to call. At 3:00 p.m., JTTF agents interviewed Mr. Arar. The JTTF investigators concluded that Mr. Arar was of no investigative interest and directed the INS inspectors to take whatever actions INS deemed appropriate, although the JTTF investigators requested that INS continue to detain Mr. Arar because the investigators planned to re-interview him at 8:00 a.m. on Friday, September 27, 2002.

INS inspectors offered Mr. Arar the opportunity to withdraw his application for admission to the United States. Mr. Arar agreed to withdrawal his application for admission. INS inspectors prepared INS Form I-275 Withdrawal of Application for Admission/Consular Notification, which Mr. Arar signed. INS planned to return Mr. Arar to Zurich on Friday, September 27, 2002.

Friday, September 27, 2002

On Friday, September 27, 2002, INS inspectors, at the direction of the INS Eastern Regional Director, cancelled Mr. Arar's original withdrawal of application and planned return to Switzerland. INS inspectors, again at the direction of the INS Eastern Regional Director, offered Mr. Arar a new opportunity to withdraw if he agreed to return to Syria. When he refused, INS inspectors told Mr. Arar that if he did not agree to return to Syria, he would be charged as a terrorist and removed under section 235(c) of the Immigration and Nationality Act.

Saturday, September 28, 2002

On Saturday, September 28, 2002, Mr. Arar was transported from Kennedy Airport to the Federal Bureau of Prison's Metropolitan Detention Center in Brooklyn, New York.

Tuesday, October 1, 2002

On Tuesday, October 1, 2002, Mr. Arar was served with INS Form I-147, Notice of Temporary Inadmissibility. The form advised Mr. Arar that he would be removed from the United States under a section 235(c) proceeding. He was given five days to respond. Both the INS Assistant District Director for Inspections and Mr. Arar signed the form. Along with the form, Mr. Arar was provided a list of pro bono attorneys and a list of foreign consulates in New York City, including both the Canadian and Syrian consular offices.

Thursday, October 3, 2002

According to the complaint filed by Mr. Arar against the United States government, a Canadian consular official visited him at the Metropolitan Detention Center on Thursday, October 3, 2002.

Friday, October 4, 2002

On Friday, October 4, 2002, the INS Eastern Regional Director provided a memorandum to Mr. Arar requesting that he designate the country to which he wanted to be removed. Mr. Arar requested to be sent to Canada.

Saturday, October 5, 2002

During early October 2002, almost a week after his September 26, 2002, apprehension at Kennedy Airport, Mr. Arar's family contacted a private immigration attorney in New York City. The immigration attorney met with Mr. Arar on Saturday, October 5, 2002. Their meeting was held in an interview room at the Metropolitan Detention Center and lasted about one and half hours.

On Saturday evening, October 5, 2002, INS Headquarters notified the New York Asylum Office that it would conduct an interview on Sunday, October 6, 2002. The supervisory asylum officers were to interview Mr. Arar to determine whether he feared being returned to Syria, Canada, or any other country because he might be tortured.

Sunday, October 6, 2002

On Sunday, October 6, 2002, the operations order to remove Mr. Arar was prepared, and the country clearances were requested for the escort officers and flight crew and sent to the U.S. Embassies in Rome, Italy and Aman, Jordan.

On Sunday, October 6, 2002, at approximately 4:20 p.m., an INS attorney sent an email message to the INS Command Center directing it to notify Mr. Arar's attorneys of the interview. The INS Command Center completed the notification at about 5:00 p.m. Mr. Arar's immigration attorney was not in the office. An INS official left a voicemail message for the attorney. Mr. Arar's criminal attorney was in the office, but said that he could not make it to the interview. The criminal attorney asked that the interview be moved to Monday, October 7, 2002. The request was denied.

On Sunday, October 6, 2002, beginning at about 9:00 p.m., INS supervisory asylum officers conducted an interview of Mr. Arar at the Metropolitan Detention Center. The interview lasted until about 2:30 a.m. on Monday, October 7, 2002.

Mr. Arar did not respond to the I-147.

Monday, October 7, 2002

In a letter to the INS Eastern Regional Director, dated Monday, October 7, 2002, the Acting Attorney General disregarded Mr. Arar's request to return to Canada because he concluded that it would be "prejudicial in the interest of the United States." The Deputy Attorney General signed the letter because the Attorney General was out of the country at the time.

On Monday, October 7, 2002, the INS Eastern Regional Director signed the INS Form I-148, Final Notice of Inadmissibility, that ordered Mr. Arar's removal. Also, on Monday, October 7, 2002, the INS Commissioner signed the memorandum that authorized Mr. Arar's removal to Syria. The memorandum discussed Mr. Arar's inadmissibility under section 235(c), the order of removal made earlier by the INS Eastern Regional Director, and the Acting Attorney General's disapproval of Mr. Arar's request to be removed to Canada.

Tuesday, October 8, 2002

At approximately 4:30 a.m. on Tuesday, October 8, 2002, Mr. Arar was served with the I-148 while being transported to an airport in New Jersey. The I-148 specified the section 235(c) proceeding, his alleged association with Al-Qaeda, and his impending removal to Syria. An unclassified addendum was provided to Mr. Arar with the I-148, which Mr. Arar never saw before. The unclassified addendum discussed his alleged relationships with two suspected Al-Qaeda terrorists and concluded that because he was a member of Al-Qaeda he was inadmissible to the United States. The unclassified addendum mentioned a classified addendum, which Mr. Arar never saw.

On Tuesday, October 8, 2002, Mr. Arar was transported by an INS special response team to Teterboro Airport in New Jersey, from which he was flown by private aircraft to Dulles International Airport near Washington, DC. At Dulles Airport, an INS special removal unit boarded the plane, then accompanied him to Aman, Jordon, where he arrived on Wednesday, October 9, 2002. Mr. Arar was later transferred to the custody of Syrian officials.

Mr. Arar's Return to Canada

Mr. Arar was released by Syrian authorities and returned to Canada in October 2003, about a year after his initial apprehension at Kennedy Airport. Mr. Arar alleged that he was beaten and tortured while in the custody of the Syrian government. Mr. Arar sued the governments of Canada and United States for the alleged wrongful removal to Syria. In February 2004, the Canadian Government appointed a special commission to conduct an inquiry regarding the involvement of Canadian government in the Mr. Arar matter. The commission completed its work in October 2005 and published a report detailing its findings and recommendations in September 2006. In August 2007, the commission released additional information that had been redacted from the report published in September 2006.

B. Results of Review

We determined that INS appropriately determined that Mr. Arar was inadmissible under relevant provisions of immigration law. INS officials analyzed derogatory information concerning Mr. Arar and sought clarification. INS elected to remove Arar pursuant to section 235(c) of the Immigration and Nationality Act. By using a section 235(c) proceeding, INS could use classified information to substantiate the charge without any risk that the classified information would be disclosed during an open hearing in an immigration court.

Syria was designated as Mr. Arar's country of removal. INS could have attempted to remove Mr. Arar to Canada, his country of citizenship, or Switzerland, his point of embarkation to the United States. Further, Mr. Arar specifically requested to be returned to Canada and formally stated his opposition to returning to Syria. However, the Acting Attorney General ruled against removing Mr. Arar to Canada because that was determined to be prejudicial to the interest of the United States. Also, U.S. officials determined that they could choose any of the three countries as a destination to remove Mr. Arar.

INS followed procedures for assessing Mr. Arar's eligibility for protection under the United Nations Convention Against Torture.[1] INS supervisory asylum officers conducted a protection interview of Arar on Sunday, October 6, 2002, to ascertain if Arar had a fear of returning to Canada, Syria, or any other country. Arar's attorneys were notified of the interview at their offices that day. We questioned the manner in which Arar's attorneys were notified of the protection interview. The INS concluded that Arar was entitled to protection from torture and that returning him to Syria would more likely than not result in his torture. The assurances upon which INS based Arar's removal were ambiguous regarding the source or authority purporting to bind the Syrian government.

C. Recommendations

We made two recommendations to the Assistant Secretary for ICE. One of the recommendations is classified. ICE concurred with the recommendations and has taken steps to implement them. We consider both recommendations resolved and closed.

It is notable that ICE concurred with the recommendations with the "understanding that the OIG concluded that INS did not violate any then-existing law, regulation, or policy with respect to the removal" of Mr. Arar. Based on the documentation we reviewed and the interviews we conducted, it does not appear that any INS person violated any then-existing law, regulation, or policy with respect to the removal of Mr. Arar. However, that should not be construed to mean that we have completely discounted that possibility, especially since we did not have the opportunity to interview all the individuals involved in the matter.

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[1] *United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* Article 3, June 26, 1987.

II. JOINT MEMORANDUM REGARDING TREATMENT OF PRIVILEGED INFORMATION

This review was initiated in January 2004 upon request of the then-ranking Member, Committee on the Judiciary, United States House of Representative. Shortly after our initiation of field work, Mr. Arar filed suit in federal district court in the Eastern District of New York against the Department of Homeland Security, the FBI, and a number of named and unnamed government officials. Among other matters, Mr. Arar claimed a violation of his rights under the Fifth Amendment. Significantly, Mr. Arar sued the government officials in their individual capacities, seeking to hold them personally liable for the wrongs he allegedly suffered, a so-called Bivens[2] action. Although his claims were dismissed, Mr. Arar appealed and the matter currently is pending in the Second Circuit.

Each of the named defendants sought legal representation from the Department of Justice on the grounds that each had acted in his official capacity, and that representation was in the best interests of the United States. See 28 C.F.R. § 50.15. Department of Justice representation for each of the named defendants was approved.

However, the pendency of the lawsuit dramatically affected the willingness of the Department and several individuals to cooperate in our review and stymied our ability to gain access to critical information. The existence of a lawsuit seeking to hold federal officials personally responsible for actions that were the subject of our work also caused us pause. In my personal experience spanning almost forty years and working in many different offices of Inspectors General, as well as the equally diverse experience of my staff, such a situation was extraordinarily rare. Concerns were raised that the cooperation with our inspection could imperil the vitality of certain legal privileges available to the defendants. Although we ultimately rejected that proposition, we believed the concerns were raised in good faith and not solely for the purpose of impeding our work. In a July 14, 2004, letter from the then-Inspector General to the then-ranking Member, we provided a status update and recounted our frustration at the unanticipated delays and obstacles in continuing our work.

In an effort to break the impasse, in December 2004, we negotiated a protocol with the Department that reflected our understanding of the law and inspection procedures, and provided the Department the reassurance it sought in light of the pending lawsuit. The protocol recited that the Department's sharing of information with the Office of Inspector General (OIG) did not constitute a waiver of any privilege for any purpose, that the OIG

[2] In Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), the Supreme Court established that federal employees can be sued *personally* for monetary damages for the alleged violation of constitutional rights stemming from their official acts. Relying on that decision, Mr. Arar sued a number of present and former federal employees for alleged violations of his Fifth Amendment rights, and if he were to prevail, the federal employees could be obligated to satisfy the judgment from their personal funds. However, in this matter, the Department of Justice has determined to provide legal representation to the individual defendants, and, if appropriate, may determine to satisfy any monetary judgment against them.

would not disclose privileged material to any entity other than Congress without permission from the Department, that the OIG's disclosure of privileged information to Congress would reflect the confidential nature of the communication and the Congress' willingness to honor the confidentiality, and that the Department would assume responsibility for justifying and defending the withholding of privileged information from any entity other than Congress. Finally, the protocol recited that the Department would encourage all current and former employees to cooperate fully with the OIG and that such cooperation would not imperil any Department legal privileges. We found this last provision particularly important as it signaled high-level Departmental support for our inquiry, and, since OIG's lack testimonial subpoena authority, we must rely on the voluntary cooperation of former employees with whom we wish to talk.

Consequently, although we initially resisted this memorandum because of its novelty, the situation we were facing was unique. Furthermore, it should be recognized that Department was in its infancy, with the attendant uncertainties and difficulties of any new operation, much less one of this magnitude and complexity. We came to recognize the value of the memorandum and endorsed it fully. Not only did it give the Department the comfort level it felt it needed, as noted, it reflected the Department's commitment to interpose no objection to the OIG's release of a final, unredacted report to the Congress, which we have done.

Further discussions with the Department were necessary to clarify details of the protocols, causing further delays and prompting the then-Ranking Member, on February 23, 2005, to write the Secretary requesting that he direct DHS staff to cooperate with the OIG's inquiry. However, it was not until July 2005 that we were able to proceed with our interviews. Our final report was provided to the Congressional requester and appropriate oversight committees in December 2007.

III. FOIA REDACTION PROCESS

A. General Process

As an independent and objective entity, the OIG conducts audits, investigations, inspections and other reviews of the Department to prevent and detect fraud, waste, and abuse in Department programs and operations, and to provide leadership, coordination, and recommendations to improve the economy, efficiency and effectiveness of Departmental operations. We report to both the Secretary and the Congress, seeking to keep both fully informed. We are keenly aware, as well, that as the OIG for Homeland Security, we must guard against the improper public release of information that might place our country at risk.

We have an outstanding record, second to none, in posting on our public website virtually all of our non-investigative reports and posting them with no or limited redactions. Investigative reports, because of ongoing criminal proceedings and significant privacy issues, present entirely different concerns and are not routinely posted, though we have

posted those that present issues of public concern, such as the shooting of an unarmed alien by two border patrol agents.

Generally, we presume that that our final report will be publicly posted in full, but there are times when we must withhold from public disclosure information because it is classified or otherwise protected from disclosure under the FOIA. Of course, a completely unredacted copy of our final product is provided to the appropriate Congressional oversight committees, who always have honored our requests that nonpublic information be safeguarded from release. We followed that same procedure with the inspection report that is the subject of today's hearing.

Ordinarily, we send our draft report to the affected components for their review and comments. This consultation, required under Government Auditing Standards and our own procedures, helps ensure the accuracy of our final product. In the same cover letter, we request that the component advise us, under separate cover, of any concerns regarding the public disclosure of any information in the draft report. Should a component provide appropriate justification for withholding certain information, then we will protect it from public disclosure.

Importantly, we thoroughly review a component's redaction request and always attempt to work with the component to resolve any disclosure concerns. Information is disclosed unless it properly falls within one or more of the nine exemptions identified in the FOIA. On occasion, we have received requests to withhold information when there is no legal basis to protect it, and in those instances we have released and posted it.

Generally speaking, classified reports are treated in a manner significantly different than unclassified reports. When a document has been properly classified under Executive Order 12958, as amended, as this report was, then we ordinarily only post an unclassified summary of the report on our website. The summary must be fully vetted by my office and the affected component to ensure no inadvertent leakage of classified information. Of course, the complete, unredacted report, along with the unclassified summary, are provided to our oversight committees, and, as in this case, the Congressional requester.

Issues addressed in classified reports, such as some of our Federal Information Security Management Act work, often do not raise issues of broader public concern. Therefore, by posting a summary, we have saved the extensive resources that would have been devoted to redacting the report, and devoted them, instead, to reviewing and posting hundreds of other reports that do not present classification issues. This process enables us to provide Congress with the information it needs to perform its important work, and posting unclassified summaries, rather than a disjointed, heavily redacted version of the report itself, allows the public to stay reasonably well informed about the operations of the Department, while ensuring the protection of sensitive information. When a FOIA request is received for the unredacted report, we undergo a thorough line-by-line review and release information according to law.

B. Chairman Conyers' January 10, 2008, letter to the Secretary

On January 10, 2008, the Chairman of the Committee on the Judiciary wrote the Secretary requesting that significantly more information from the OIG's report be made publicly available. The Chairman provided a copy of the letter to the Office of Inspector General. As discussed above, pursuant to our standard procedure, we had provided the Chairman and others with a complete copy of the unredacted report and publicly posted only a short summary because the report was classified.

The Chairman's letter noted that the entire report had been classified "Secret" and opined that significant portions of the report were over-classified. The Chairman requested a paragraph-by-paragraph explanation of the reasons for classifying each paragraph. The OIG exercised no original classification authority on any portion of the report, and therefore lacks any authority to declassify. The OIG, then, had no action with respect to this portion of the Chairman's letter.

The Chairman's letter also sought reasons for withholding of the unclassified portions of the report and again, sought a paragraph-by-paragraph justification. Since the vast majority of redactable unclassified items implicated privileged information connected with the ongoing litigation, the OIG looked to the Department to provide an initial response. This presumption was consistent both with standard procedures under the FOIA, which were applicable since the Chairman was intending to release the information publicly, as well as under the December 2004 Joint Memorandum with the Department discussed earlier.

Consequently, the OIG believed it had no responsibilities regarding the Chairman's January 2008 letter until the Department undertook its obligations to provide explanations for the material it did not wish to have publicly released. The OIG's view apparently was consistent with the Chairman's view, since he had directed his letter to the Secretary, not to the OIG. The OIG's view also apparently was consistent with the Department's understanding, since the Department provided no tasking to the OIG.

Following Department discussions with Committee staff, the decision was made for the first time to refer the matter to the OIG. During week of May 12, 2008, the Department sought a meeting with the OIG to identify those portions of the report it deemed privileged, as required by the December 2004 memorandum. It was not until the second of week of May 2008, that the Department sought consultation with the OIG. By the time of the meeting later that week, the OIG independently had reviewed the report and preliminarily identified items that would be exempt from public release under one or more provisions of the FOIA. However, consultation with both the Department, principally, and other entities was necessary before a publicly releasable report could be produced.

6 C.F.R's. 5.4, which governs FOIA processing in DHS provides, in relevant part:

"(c) *Consultations and referrals.* When a component receives a request for a record in its possession, it shall determine whether another component or another agency of the Federal Government, is better able to determine whether the record is exempt from disclosure under the FOIA and, if so, whether it should be disclosed as a matter of administrative discretion. If the receiving component determines that it is best able to process the request, then it shall do so. If the receiving component determines that it is not best able to process the record, then it shall either:

(1) Respond to the request regarding that record, after consulting with the component or agency best able to determine whether to disclose it and with any other component or agency that has a substantial interest in it; or

(2) Refer the responsibility for responding to the request regarding that record to the component best able to determine whether to disclose it, or to another agency that originated the record (but only if that agency is subject to the FOIA). Ordinarily, the component or agency that originated a record will be presumed to be best able to determine whether to disclose it.

(d) *Law Enforcement information.* Whenever a request is made for a record containing information that relates to an investigation or a possible violation of law and was originated by another component or agency, the receiving component shall either refer the responsibility for responding to the request regarding the information to that other component or agency or consult with that other component or agency.

(e) *Classified information.* Whenever a request is made for a record containing information that has been classified, or may be appropriate for classification, by another component or agency under Executive Order 12958 or any other executive order concerning the classification of records, the receiving component shall refer the responsibility for responding to the request regarding that information to the component or agency that classified the information, or which should consider the information for classification, or which has the primary interest in it, as appropriate. Whenever a record contains information that has been derivatively classified by a component because it contains information classified by another component or agency, the component shall refer the responsibility for responding to the request regarding that information to component or agency that classified the underlying information."

The OIG followed this process in redacting this report. Most of the unclassified information required consultation with one or more other entities who were in a better position than the OIG to determine whether the information could be publicly released.

Between May 15 – 30, 2008, the OIG undertook a series of consultations both within the Department and its components, including the Office of General Counsel, Immigration and Customs Enforcement, Citizenship and Immigration Services, Customs and Border Protection, with the Department of Justice, including the Office of Legal Counsel, the Office of Information and Privacy, the FBI, the Bureau of Prisons, with the Department of State, and others. Every line of the report was reviewed and justifications appropriate under the FOIA for withholding designated portions were obtained from those entities whose information was at issue. OIG independently analyzed the validity of each redaction request.

The OIG provided a redacted report to the Committee on June 2, 2008. As is evident, for each paragraph that has been withheld, there is an indication as to whether the material is classified or unclassified. For unclassified material that has been withheld, there is an identification of the FOIA exemption that justifies withholding as well as the entity with whom the OIG consulted in determining whether that redaction was appropriate. Even a casual reading of the report reveals that significant portions that could be redacted under the FOIA have been released, a testament both to the OIG's diligence and the good faith of the components and other entities with which we consulted.

C. Specifics of the Redactions

Under the FOIA, information must be released unless it fits within one of nine specific exemptions under subsection "(b)" of the Act. In processing this report, only a few exemptions have been used: (b)(1) classified information; (b)(2) (high) circumvention of agency regulations; (b)(5) information protectable during civil discovery, i.e., attorney-client information, attorney work product, deliberative process; and (b)(6)/(b)(7)(c) personal privacy. A more detailed discussion of each exemption is provided below:

1. Exemption (b)(1): Classified National security information

Exemption 1 of the FOIA protects from public disclosure national security information that has been properly classified in accordance with the requirements of a current executive order. At this time, Executive Order 12958, as amended, governs the classification of national security information and prescribes a uniform system for classifying, safeguarding, and declassifying national security information, including information relating to defense against transnational terrorism. Once information is properly classified, it is exempt from disclosure under Exemption 1, until such time that it becomes declassified by the original classification authority.

Thus, pursuant to Exemption 1, we are withholding all information that has been properly classified. The OIG did not originate any classified information, rather, during interviews and document reviews, we obtained information that had properly been designated as "Secret" according to the requirements of Executive Order 12958, as amended. The OIG does not have the authority to make a discretionary disclosure of this information because it is not one of the original classification authorities. We have

consulted with the classifying entities and determined that redaction continues to be appropriate. See 6 C.F.R. § 5.4(e).

2. Exemption (b)(2) (high): Circumvention of Agency Regulation

This exemption is cited infrequently in the report, though it is necessary to protect sensitive internal matters from public disclosure. FOIA case law has developed two different categories of information encompassed by Exemption 2: "low 2" protects internal matters of a relatively trivial nature, and has not been invoked in this review. So-called "high 2" protects more substantial internal matters, the disclosure of which would risk circumvention of a legal requirement. Pursuant to Exemption 2 ("high 2"), we are protecting certain internal matters that are inextricably entwined with information that reveals the source of certain classified matters. Public disclosure of this information would inhibit the OIG's future ability to collect intelligence information.

Also, pursuant to this exemption, we are protecting the internal basis and methodology for questions asked of Mr. Arar by INS attorneys prior to his deportation. Public disclosure of this methodology could equip members of the public with the ability to circumvent future deportation proceedings.

3. Exemption (b)(5): Information Protectable During Civil Discovery

Exemption 5 protects inter-agency and intra-agency documents that would not be available to a party in litigation with an agency. This exemption incorporates civil discovery privileges into the FOIA so that requesters are prevented from circumventing the discovery process by obtaining information under the FOIA that would not be available to them in litigation. This is the second most frequently used exemption for this report. It is being used to protect privileged deliberative process information, attorney-client information, and attorney work-product.

Here, the protection afforded by Exemption 5 is particularly important in light of the pending litigation in the Second Circuit. It would be wholly irresponsible and potentially jeopardize the defense in the pending litigation to release information that has been withheld from public disclosure under Exemption 5. Such a disclosure would automatically put the government defendants at a disadvantage in the ongoing litigation and it would violate the underlying purpose of Exemption 5 -- to protect against use of the FOIA to circumvent discovery privileges. Such a disclosure would have ramifications not only for the DHS OIG, but for every office of inspector general in the executive branch. Every department would be reticent, if not outright obstinate – and justifiably so, in our view – to provide its OIG with sensitive draft or deliberative materials. Yet, access to such materials is essential for an OIG to have a complete understanding of how policies, procedures and practices, have been developed and are being implemented. Furthermore, because of the ongoing litigation, we have been more deferential than we ordinarily might in evaluating and acceding to requests from other entities that information be withheld from public release.

To qualify for protection under Exemption 5, the protected information must be an inter-agency or intra-agency document and there must be an applicable discovery privilege. This report consists solely of inter-agency or intra-agency information, so the information itself meets the threshold requirement for Exemption 5. Additionally, we have appropriately invoked the following civil discovery privileges: deliberative process; attorney work-product; and attorney-client.

- *Deliberative Process Privilege*: This privilege allows the government to protect an agency's decision-making process from public disclosure and it is based on the underlying premise, recognized by Congress more than forty years ago, that "the exchange of ideas among agency personnel would not be completely frank if [agencies] were forced to 'operate in a fishbowl'." H.R. Rep. No. 1497, at 10, 89th Cong., 2d Sess. 10 (1966). See, e.g., First Eastern Corp. v. Mainwaring, 21 F. 3d 465, 468 (D.C. Cir. 1994) ("[T]he privilege 'rests most fundamentally on the belief that were agencies forced to operate in a fishbowl, …the frank exchange of ideas and opinions would cease and the quality of administrative decisions would consequently suffer'.")

  For information to be protected under this privilege, it must be predecisional and deliberative. Deliberative material includes recommendations, opinions, and drafts. Information reflecting predecisional communications retains its predecisional character even after an agency has reached a final decision, unless the information was expressly incorporated as the basis for the decision, or adopted as a statement of agency policy.

- *Attorney Work-Product Privilege*: This broad-sweeping privilege protects information prepared by an attorney in contemplation of litigation. Its purpose is to protect from public scrutiny an attorney's theory of the case or trial strategy. The Supreme Court first recognized this privilege more than sixty years ago when it held that an attorney must "work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel" and be free to "assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference." Hickman v. Taylor, 329 U.S. 495, 510-11 (1947). Over thirty-five years later, the Supreme Court held that materials qualifying as attorney work-product are entitled to perpetual Exemption 5 protection. FTC v. Grolier, Inc., 462 U.S. 19 (1983). Furthermore, information meeting this requirement may be withheld in its entirety because there is no requirement to segregate and release factual material. Finally, courts have also held that the work-product protection extends to those working as agents on behalf of the litigating attorney.

- *Attorney-Client Privilege*: This privilege protects confidential communications between an attorney and his or her client relating to the legal matter for which the client has sought legal advice. The purpose of this privilege is to encourage open and frank communication between an attorney and his or her client. Courts have

> consistently held that federal entities may enter into privileged attorney-client relationships with their lawyers. The Supreme Court has held that this privilege "recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client." Upjohn Co. v. United States, 449 U.S. 383, 389 (1981). Furthermore, "[w]here the client is an organization, the privilege extends to those communications between attorneys and all agents or employees of the organization who are authorized to act or speak for the organization in relation to the subject matter of the communication." Mead Data Central, Inc. v. Department of the Air Force, 566 F.2d 242, 253 n.24 (D.C. Cir. 1977).

In this report, we applied the attorney-client privilege to confidential communications between Department of Justice attorneys, including INS attorneys, and their client agencies. The OIG does not have the authority to disclose this privileged information because the privilege can be waived only by the client that owns it, and not by the advising attorney. In this case, the OIG served neither as the client, nor the attorney, and thus we are prohibited as a matter of law from making a discretionary disclosure to the public.

4. Exemption (b)(6) & (b)(7)(c): Personal Privacy

These exemptions, often cited in tandem, authorizes the withholding of information whose disclosure could constitute an invasion of personal privacy. The only material exempted under these provisions are the names of the OIG employees who prepared the inspection report. Because of the controversial nature of this report, these individuals, career civil servants, could be subjected to harassment or other unwarranted attention. As the Inspector General, I speak on behalf of my office and ask that questions be posed to me, instead.

Chairman Nadler, Chairman Delahunt, this concludes my prepared remarks. I would be happy to answer any questions that you or the Committee Members may have.

Thank you.

Mr. NADLER. I thank the gentleman.

Our next witness is Mr. Ervin, who is recognized for 5 minutes for his statement.

TESTIMONY OF CLARK KENT ERVIN, DIRECTOR, HOMELAND SECURITY PROGRAM, THE ASPEN INSTITUTE

Mr. ERVIN. Thank you, Mr. Chairman, Ranking Members, and Members for inviting me to testify today at this important hearing. As you know, I was the Inspector General of the Department of Homeland Security from its inception in January, 2003 to December, 2004. I was in this position, then, when Chairman Conyers asked me in December, 2003 to undertake an investigation of the circumstances under which Mr. Arar was rendered to Syria.

Upon receipt of this request, my office and I promptly began to investigate this matter, and we worked diligently to try to obtain the necessary documents from DHS, and, if I recall correctly, the Department of Justice as well, where the necessary documents were DOJ's to release.

As I explained to you in my July, 2004 update letter, while my staff and I had by then obtained access to a number of classified documents, we were stymied in our efforts to complement the review of those documents with a review of other documents and interviews with present and former Government officials.

Those efforts were blocked by the assertion of certain privileges, namely attorney-client, attorney-work product, and certain predecisional privileges. It was my view then, expressed in the update letter, and it remains my view now, that such privileges must yield to the broad authority of the Inspector General under section 6(a)(1) of the Inspector General Act. And in any event, I understand that there is considerable legal support for the proposition that providing information to an Inspector General does not constitute a waiver of privileges that can be asserted by an Agency in litigation with a third party.

Unfortunately, because of this legal dispute, we were not able to complete our investigation of this matter prior to my forced departure from office. Since leaving DHS at the end of 2004, I have followed the Arar case with great interest through the news media. Like many, I had been anxiously awaiting the release of my successor's report on this matter. Like many, I was disappointed that the initial public version of the report, released nearly 4 years after the start of the investigation, said so little, citing legal privileges.

Had I still been in office, I would have asserted the Inspector General's statutory authority to trump such privileges and exercised that authority by disclosing information relevant to the process the INS used to make the determination to remove Mr. Arar. I believe that could have been done in a way without disclosing legitimately asserted privileges, as opposed to matter that was merely embarrassing to our Government. It seems to me that at a minimum the public version of this report should have explained exactly what privileges were asserted, the rationale for their assertion, and why the Inspector General felt compelled to acquiesce in their assertion.

I did not see the initial classified version of the report, of course, but I understand that the Inspector General refused to publicly re-

lease those individual paragraphs of the initial classified version that were themselves unclassified, or at least summaries of them. It is my view that those paragraphs should have been publicly released, especially if they are not duplicative of the contents of the rather spare unclassified initial version of the report and therefore could have amplified it. At a minimum, there should have been, I believe, a detailed explanation of why these paragraphs should not, in the Inspector General's judgment, not DHS's or DOJ's, be publicly disclosed.

I further understand that Chairman Conyers considered some of the classified paragraphs in the initial classified version of the report to be classified unnecessarily and that accordingly he requested a paragraph-by-paragraph explanation for such classification. I support the notion that while certainly there is no right to disclose information that is classified even if one believes that the information at issue should not be classified, the classifying entity has an obligation to provide an explanation for the view that such information should be classified.

I drafted this testimony on Tuesday and submitted it that day, which was the deadline for all witnesses to do so. I learned yesterday afternoon that the Inspector General has now substantially revised the classified version of the report and submitted from it a much more informative unclassified version. I had an opportunity rather quickly this morning to review this revised document.

Paragraphs in the initial classified version that were themselves unclassified are revealed in this new unclassified version, and there is at least a statutory citation for those paragraphs that remain classified. I commend the Inspector General for taking this further step, and I am also very pleased to learn just now that the investigation will be reopened and this report may be further supplemented depending upon the outcome of that further investigation.

Many thanks for this opportunity to testify, and I look forward to any questions and learning more about the report that was released today.

[The prepared statement of Mr. Ervin follows:]

PREPARED STATEMENT OF CLARK KENT ERVIN

Thank you very much Chairman Conyers, for inviting me to testify today at this important hearing. As you know, I was the Inspector General of the Department of Homeland Security (DHS) from its inception in January 2003 to December 2004. I was in this position, then, when you asked me in December, 2003, to undertake an investigation of the circumstances under which Maher Arar, a citizen of Canada and Syria, was "rendered" to Syria by the United States government.

Upon receipt of your request, my office and I promptly began to investigate this matter and we worked diligently to try to obtain the necessary documents from DHS, and, if I recall correctly, the Department of Justice (DOJ) as well, where the necessary documents were DOJ's to release. (Of course, as the Inspector General of DHS only, I did not have the authority to require DOJ to release any documents to me.)

As I explained to you in my July 2004 "update letter," while my staff and I by then had obtained access to a number of classified documents (and we noted that, in our judgment, such documents were properly so classified), we were stymied in our efforts to complement the review of those documents with a review of other documents and interviews with present and former government officials. Those efforts were blocked by the assertion of certain privileges, namely, attorney-client, attorney work product, and pre-decisional privileges. It was my view then, expressed in the update letter, and it remains my view now, that such privileges must yield to the

broad authority of the Inspector General under Section 6(a)(1) of the Inspector General Act. And, in any event, there is considerable legal support for the proposition that providing information to an Inspector General does not constitute a waiver of privileges that can be asserted by an agency in litigation with a third party.

Unfortunately, because of this legal dispute, we were not able to complete our investigation of this matter prior to my forced departure from office by virtue of the expiration of my recess appointment and the continued refusal of then Senate Homeland Security Chairman Collins and Ranking Member Lieberman to allow the full committee to consider my nomination as DHS' Inspector General.

Since leaving DHS at the end of 2004, I have followed the Arar case with great interest through the news media. Like many, I had been anxiously awaiting the release of my successor's report on this matter. Like many, I am disappointed that the public version of the report, issued nearly four years after the start of the investigation, said so little, citing legal privileges. Had I still been in office, I would have asserted the Inspector General's statutory authority to trump such privileges and exercised that authority by disclosing information relevant to the process the Immigration and Naturalization Service used to make the determination to remove Mr. Arar, given especially the conviction that such disclosure would not constitute a waiver of those privileges in any third party litigation. It seems to me that, at a minimum, the public version of this report should have explained exactly what privileges were asserted; the rationale for their assertion; and why the Inspector General felt compelled to acquiesce in their assertion.

I have not seen the classified version of the report, of course. But, I understand that the Inspector General has objected to the public release of those individual paragraphs of the classified version that are themselves unclassified (or, at least, summaries of those paragraphs). It would be my view that those paragraphs should be publicly released, especially if they are not duplicative of the contents of the unclassified version of the report and they could, therefore, amplify it. At a minimum, there should be a detailed explanation of why these paragraphs should not, in the Inspector General's judgment (not DHS' or DOJ's), be publicly disclosed.

I further understand that you, Mr. Chairman, consider some of the classified paragraphs to be classified unnecessarily and that, accordingly, you have requested a paragraph-by-paragraph explanation for any classification. I would support the notion that, while there is no right to disclose information that is classified even if one believes that the information at issue is not classified, the classifying entity has an obligation to provide an explanation for the view that such information should be classified.

Again, thank you for the opportunity to testify today and I look forward to any questions you may have of me.

Mr. NADLER. I thank the gentleman.

The Chair now recognizes Professor Horton for his statement.

TESTIMONY OF SCOTT HORTON, DISTINGUISHED VISITING PROFESSOR, HOFSTRA LAW SCHOOL

Mr. HORTON. Thank you, Chairmen Conyers, Nadler and Delahunt, Ranking Members Rohrabacher and Franks, and distinguished Members.

Back in 1950——

Mr. NADLER. Would you pull the mic a little closer please?

Mr. HORTON. Sorry.

Back in 1950, Robert Jackson observed in a case that involved a secret immigration exclusion proceeding, which a young Irish woman was being excluded on the basis of secret and, it turned out, totally false information, he said this: "Security is like liberty in that many are the crimes committed in its name. The plea that evidence of guilt must be secret is abhorrent to free men because it provides a cloak for the malevolent, the misinformed, the meddlesome, and the corrupt to play the role of informer undetected and uncorrected."

Today, I think we are looking at the investigation of an immigration proceeding which was conducted under a similar provision and

used similar rules to the celebrated Shaughnessy case, but in this case it is not just secrecy that has corrupted the proceeding. It is also secrecy that has obstructed the investigation of the proceeding and what happened to it.

I think Chairman Delahunt is correct in flagging the key issue that you need to keep before you. That is the correct construction and application of the Foreign Affairs Reform and Restructuring Act of 1998, and the provisions that implemented the prohibition on rendition to torture that is contained in the Convention Against Torture. That forbids the rendition of persons to countries where it is more likely than not that they will be tortured.

In this case, I think the very disturbing facts that have developed are essentially these. It is quite clear that the administering officials believed that Maher Arar, if rendered to Syria, would be tortured, and clearly he was at the end of the day, and nevertheless a decision was made to render him. How exactly we get from these two conclusions is the crux of the inquiry I think you have to make. It is going to turn ultimately on the question of diplomatic assurances.

Now, it is actually reasonable diplomatic assurances that is the question. There is nothing in the statute that provides that diplomatic assurances overcome the more likely than not to be tortured determination. So I think there is some very, very serious, weighty policy issues here that have to be gotten to the bottom of. This is about more than just the fate of Mr. Arar. It is about proper implementation of a rule that the United States put forward on the international stage and the United States has upheld in its own legislation.

Now, when I looked into this report and interviewed individuals who were involved in preparing it, I got the same account repeatedly. The thrust of the account was pretty simple. It was that there were a number of high-level political appointees who had been intensely involved in Arar's case. They were concerned that their identities would be exposed. The actions that they had taken were essentially to railroad Arar and his lawyer and ensure that he had no meaningful opportunity to be heard or to contest the decision to render him to be tortured.

By the way, I think that is really the focus. It is the rendition to Syria, not his exclusion. I think no one questions but that it was a reasonable decision to deny him entry to the United States based on the information that was at hand.

Now, having acted to accomplish their goal, these individuals then sought to enshroud their actions in a fog bank of secrecy. They invoked national security concerns and various privilege claims in order to obstruct the Inspector General and his report. They also seemed to have pressured the writers of the report intensely in an effort to editorially manipulate it. Some of this is in fact reflected in the redacted version that is being released today.

The center of this conduct is inside the Department of Justice, particularly it is in the Office of Legal Counsel and the Office of the Deputy Attorney General. It seems fairly clear to me that in sum we are not really dealing here with a process of internal bureaucratic weighing and deciding down below. We are dealing with a decision that was taken at a very, very high level in the bureauc-

racy and that was pushed down on people below. It seems to me that dynamic is a lot of what is going on here in the claims and the assertions of privilege and secrecy and been designed to obscure understanding of that dynamic, and an understanding of the fact that decisions were taken at a very high level.

Now, since I prepared my written statement, I have had a chance to look through the report. I would like to just offer questions, I think points that merit some further focus because I think we are going in the right direction now toward disclosure of vital information that the public needs to know. I do agree, by the way, that there are things that are legitimately cloaked by privilege and there are things that are legitimately covered by security classifications, but the sweep here is far, far too broad.

So the points I think that need to be focused on are, one, it seems to me pretty clear that classification could not have been the reason for originally withholding this report because it accounts for not more than about 20 paragraphs out of the entire document. Two, it seems to me that privilege and deliberative process also didn't justify the original decision to withhold because there is far more white than there is black. But even when we look into what has been redacted, there are many things where it appears the redactions are simply far too sweeping, and in some cases ridiculously so.

I also think the excuses that are offered for delay at times could be amusing if the issue were not so earnest here. I mean, for instance we are told that the Inspector General had to wait for the Justice Department attorneys to complete their FOIA process, and therefore it wasn't the OIG's office. But in fact this report was circulated in draft probably in late 2006 for the first time. That is plenty of time for the FOIA process to have been completed.

We are also told that FOIA doesn't require us to write a report to avoid implicating classification privilege issues. Now, that is true, but the IG Act does impose on the Inspector General an obligation to inform, and IG's write around the privilege of law enforcement-sensitive and classification issues all the time in order to provide the public and Congress with the gist of the problem on a timely basis. I think many of you here were involved in the hearing yesterday involving Glen Fine in which he dealt with this in the report he recently issued. Again, I think he timely, informatively and very carefully well-navigated those straits.

I think there is something foul-smelling about this report still. It is not the conduct of the investigation. It is not the professionalism of the investigators. But there is a very troubling failure of the Inspector General to rigorously uphold his mission. I do not think he has lived up to the charge that IG's carry to complete the report as expeditiously as possible, to root out the key operative factors, to write it all up in a manner that takes the claims of privilege and other bureaucratic efforts at obstruction into account, but nevertheless strikes a balance in favor of the Congress's and public's right to know the essence of what happened.

Had this report been prepared with zeal, it would have been completed along the same timelines that the Canadian report was completed that we have right here. In fact, just the one-page summary

compared to this tells you a lot about absence of zeal and thoroughness.

Now, looking at some of the redactions, on page three, the list of abbreviations and organizations that were involved has been redacted. The recipients of the report distribution, appendix G, was redacted. Both of these are standard normal components of every OIG report. They redacted information that was passed on by Canadian intelligence to the U.S. and they redacted the Canadian government's subsequent clarification of the false information, even though this is public information in the Canadian commission report.

Mr. NADLER. The light in front of Mr. Horton is apparently not working.

Mr. HORTON. Is my time up?

Mr. NADLER. The red light should have gone off a while ago, so we would appreciate it if you would wind up.

Mr. HORTON. I am sorry about that. I was looking for the red light and didn't see it.

Mr. NADLER. Well, none of the lights there are working.

Mr. HORTON. Thank you, thank you.

I think most disturbingly, the second recommendation, which is really the crux of our inquiry, has been deleted as classified, although it is clear from looking at the report that that second recommendation is that the State Department should be involved in these issues. Why is this a secret? Why is that recommendation pulled? That is something this Committee and Congress needs to probe further.

Thank you.

[The prepared statement of Mr. Horton follows:]

PREPARED STATEMENT OF SCOTT HORTON

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

Hearing on the U.S. Department of Homeland Security
Inspector General Report OIG 08-18
'The Removal of a Canadian Citizen to Syria'

June 5, 2008

Rm. 2141, Rayburn House Office Building

Prepared Remarks of
SCOTT HORTON

I am a lawyer and legal academic and my work has focused for some time on national security legal issues. Most recently, I appeared twice before the Judiciary Committee to discuss the legal regulation of private military contractors, a subject for which I recently prepared a study with the group Human Rights First. Today, however, we are looking at a subject that I came to in preparing a piece for *Harper's* magazine. Last fall, I was puzzled over the fact that the Department of Homeland Security's Inspector General had failed to issue a report, and I set out to interview some of the investigative team who had worked on the report to understand what had happened. What I learned left me just as concerned about the workings of the Inspector General's office as I was about the Arar case.

"What an infinite mock is this," Shakespeare tells us in *Cymbeline*, "that a man should have the best use of his eyes to see the way of blindness." Surely there's some irony in the Bard's expression—he puts the words in the mouth of a jailer. But I think it sums up the dilemma that comes before this Committee today, because it does relate to our efforts to "see the way of blindness," to understand where we as a nation have gone wrong or done wrong. Identifying mistakes is the essential first step on the path to their correction. But I would suggest that the immediate issue you have before you is not whether the CIA's program of extraordinary renditions is legal or illegal, wise or foolish, effective or improvident. It's something far more immediate. Congress needs to take up this issue on the basis of a solid set of facts. It needs to understand the program, why it was created, how it has been applied and how the Administration proposes to continue it. It should not act without a solid understanding.

The Department of Homeland Security Inspector General's report on Maher Arar should have provided Congress with some vital information—millions of Americans learned about the renditions program through reporting on the treatment of Mr. Arar. The IG report should have furnished a wealth of detail at the level of policy, and in particular it would allow us to understand how the program is applied with respect to persons on U.S. soil, clearly subject to U.S. law—including the immigration laws. But what the public received is worse than a disappointment; it's a breach of faith. It raises a sharp question: What use is served by the issuance of inspector general's reports which have been redacted or classified into oblivion?

Congress to be sure needs to take a degree of ownership over the policy and legal issues that the renditions program raises. At present there is an impermissible degree of uncertainty and secrecy about the program that only heightens concerns about the extent to which it may cross the line into illegality. This is unfortunate for many reasons, starting with the fact that it is inconsistent with our status as a rule of law society. It's also unfair to the nation's intelligence and law enforcement operatives who are expected to implement this program.

The path out of the current problems should have started with the DHS IG report on Maher Arar. I am convinced that the office of inspector general is well conceived and that it plays an important role in our government. The IG has always been something of a split-personality institution. On one hand, the IG's independence and tenacity as an investigator, prepared to overturn stones to reveal unpleasant truths is the essence of the role. But this is balanced with another vision of the office, one which is an active member of the president's management team. The role of the IG has obviously drifted over time, or perhaps it has swung as a sort of pendulum. In any event, however, it is clear that the office and work of the IG depends to a great degree on what the individual inspector

general would make of it. It seems clear to me, however, that a commitment to probe aggressively, a willingness to ask difficult questions and to fairly present the results the investigation yields, painful though it may be, is the essence of the office. The IG should of course monitor compliance of his agency with law and policy, but the bigger picture certainly is performance accountability, and the drive of legislation over the past two decades has been steadily towards a performance accountability system.

Considering the size and complexity of the current American government, the cooperation with inspectors general is important to Congress in performing your its oversight functions. The Congressional oversight function itself is essentially a public function, it is critical to building public confidence in government institutions—and this is a shared function between Congress and the inspectors general.

Where has the current report gone off the tracks? On December 2, 2003, Judiciary Committee Chairman John Conyers requested that the Department of Homeland Security commence an investigation into what happened to Mr. Arar. On July 14, 2004, then Acting-Inspector General Ervin advised that the investigation had opened on January 8, 2004. Interestingly, at that point Mr. Ervin noted that the investigation was already "unduly protracted and frustrating" and he named the address for his troubles: the Department of Justice. And he also identifies the issues: "privilege with respect to an on-going litigation."

In the late fall of 2007, I started to look into the status of the Arar report for *Harper's* magazine. I contacted and interviewed several members of the inspector general's staff about the report on a background basis. What I learned was disturbing. It was clear that considerable energy had been poured into the report, but it had not been pushed ahead to a conclusion with the vigor and resolve that was expected of an inspector general. In particular, the study had been impeded by assertions of privilege and security classifications. I probed at some length over these assertions, examined the pleadings from the pending litigations, and tried to understand the basis of the objections. It's clear that the assertions of privilege and security classifications were not altogether baseless – but it's equally clear that claims of privilege were asserted in an unjustifiably sweeping manner. Was this an effort to hide something that needed to come out in the report? That is a troubling thought, and impossible to dispel. In the background of the Arar case lurk powerful figures, political appointees at the Justice Department and higher up.

I am aware of the litigation that Mr. Arar has commenced against the United States in which he is represented by the Center for Constitutional Rights. Certainly the Justice Department has an interest in preserving privileged legal advice connected with that litigation. However, the invocation of privilege in this case appears designed to shield individuals who played key roles in the critical first days after Mr. Arar was seized at JFK. The treatment Mr. Arar received departed from the standard protocols at almost every turn. Intense pressure was asserted to keep the State Department out of the loop, and extraordinary steps were apparently taken to deny Mr. Arar access to counsel, in part apparently because of concern that a lawyer would file a *habeas corpus* petition or otherwise take steps that would have put the Administration in the embarrassing position of accounting for its conduct before a court. If you look at the many separate transactions that the Department completed in an extraordinarily short time, you must confront the suspicion that Arar was railroaded out of town and country by the Justice Department in an effort to deny him legal recourse.

There is no privilege against the disclosure of foolish or improvident conduct. There is no privilege against the disclosure of facts that are politically embarrassing. There is an attorney-client privilege. That privilege applies to legal advice dispensed by an attorney to his client. The simple fact that a person acting is a lawyer does not make his actions into legal advice. Moreover in this case the Justice Department has attempted to cast a veil of privilege around the conduct of individuals who were acting as decision-makers for the Executive Branch, not dispensing legal advice.

Moreover, even where there is a valid basis for assertion of the attorney-client privilege – and I believe that there is *some* basis here, though far less than evidently asserted by the Justice Department – the privilege needs to be weighed against other legitimate government interests. We should start with the recognition that virtually everyone in the Justice Department who played any meaningful role in this matter held a law degree, but to suggest on that basis that the institutional processes at play were enmeshed in attorney-client privilege is nonsense. In this case, it should certainly not stop the inspector general from gaining access to the information he needs to complete his report. It should not be used to obscure the identities of the individuals who were involved and the actual steps they took (as opposed to the formal analysis of legal issues they presented). In this case, the Inspector General will tell us that he negotiated a Memorandum of Understanding with the Justice Department, that under that MOU he was bound on privilege questions by the view adopted by the Justice Department, and therefore he was at their mercy. The Committees would do well to probe those assertions very carefully. I am not fully informed on the facts here and knowing them might cause me to take a different view, but it sounds suspiciously like the Inspector General gave away the shop if he allowed the Justice Department's admittedly very creative notions of privilege to cramp his investigation and what he could publish.

One point driven home to me repeatedly was that Justice Department figures who insisted on the privilege were extremely concerned about the depiction of facts that might emerge in the IG report. In particular, they were concerned that the IG report would furnish a detailed account of the conduct of Justice Department figures that was at odds with the factual account furnished by the Justice Department in the litigation launched on behalf of Mr. Arar. It was suggested to me by a staffer involved in producing this report that the Justice Department may have made a highly tendentious and aggressive presentation of the facts surrounding the initial detention and action on Mr. Arar, and that the IG report would damage the credibility of the position the Justice Department staked out. When I subsequently examined the pleadings filed in the Arar case and then followed the oral argument of Mr. Arar's appeal to the Second Circuit Court of Appeals, I was amazed to see the Court's openly skeptical questioning of the Justice Department lawyers. Moreover, the Court's skepticism turned on just this point—essentially the *bona fides* of the Justice Department's claims about what it knew and did in those critical days. Apparently even without the benefit of the IG report, the Justice Department's description raised candor issues.

It obviously would be improper for the Justice Department to raise privilege issues for purpose of obscuring *facts* surrounding its own conduct, or that of other U.S. Government agents. That is a point which can best be tested by disclosing the report, and particularly its portrayal of the facts relating to the treatment of Mr. Arar. In any event, it seems to me there are fair reasons to be extremely skeptical of the scope of the Justice Department's claims of privilege with respect to the Arar case.

The second roadblock that the DHS IG investigators faced consisted of claims of secrecy. Pervasive claims of secrecy were asserted. Again it is clear that these claims were not entirely unfounded.

And again there are solid reasons to question the extreme scope of the claims. Obviously the renditions program is being operated by the CIA, and obviously it impinges on national security. In particular, the CIA and the U.S. Government could reasonably be expected to assert secrecy claims with respect to sources and methods. In this case, I understand the U.S. has also suggested that disclosure of some of the information relating to the decision to detain Mr. Arar would embarrass a friendly government.

We know that Canadian intelligence (in particular it was Project A-O of the Royal Canadian Mounted Police) advised their U.S. counterparts that they suspected that Mr. Arar had terrorist connections. It seems to be principally based upon this advice that, on October 7, 2002, INS issued an order determining Mr. Arar to be a member of al-Qaeda. However, the Canadians had not made such a determination; they were still in the process of investigating him. When the Canadian authorities concluded their investigation, they acquitted Mr. Arar of the suspicions of terrorist involvement and recognized that the advice they had given to the Americans was mistaken. The Canadians nevertheless acknowledge that they improvidently influenced American authorities to draw false conclusions about Mr. Arar and to act on them (this is set out on pp. 27-30 of the *Report of Events Relating to Maher Arar* issued by the Canadian Commission of Inquiry). The Canadian Government directed the creation of a formal Commission of Inquiry which authored two detailed, authoritative reports. These reports furnish a specific, day-by-day account of the Arar case and the interaction between Canadian and American intelligence personnel. There are certainly points on which the Canadian reports can be questioned, and there are points at which their description of the conduct of intelligence agents is clearly less than candid. Nevertheless, the Canadian reports constitute a fulsome *mea culpa*, dispelling the factual assertions that inspired U.S. action against Mr. Arar. Canada awarded Mr. Arar compensation at the level of roughly $10 million for the injuries he suffered as a result of the improper action of Canadian authorities. In the light of this, claims that a candid presentation of the facts would damage relations with a friendly power, presumably Canada, are mystifying.

National security concerns could and should have been addressed by redacting discrete classified information from the publicly disclosed version of the report. Certainly the names of agents involved, the precise nature of certain interrogation techniques applied, the information learned from sensitive sources that could identify those sources are typical of the sort of information which the Government might seek to redact. But that would have to be weighed carefully against the fact that a great deal of this information is already public; moreover, it has been widely reported in the press in the United States, Canada and around the world, and much of it has been disclosed in official Canadian government publications. In such cases, the decision to press secrecy claims is unreasonable and counterproductive. It leads to a sense in the public that the secrecy claims are illegitimate – that they are intended to protect political actors from the reasonable consequences of their actions, not to protect the nation's security interests. Moreover, those concerns are particularly strong in this case, in which the notion of national security is invoked to withhold the report itself from disclosure. This step is, it seems to me, impossible to justify. Moreover, the Inspector General has not made much of an attempt to do so. In support of the sweeping claims of privilege, he cites the fact that individual Justice Department officials have been sued in their personal, as well as official capacity. But that only heightens the demands of accountability; it does not provide a policy basis for enshrouding their conduct in a smoke cloud.

Moreover, I am reminded of the struggle over other Justice Department documents, such as memoranda of the Office of Legal Counsel. One of those documents, a March 14, 2003 memorandum by John Yoo to William J. Haynes II addressing the scope of interrogations, was withheld for four years on the basis of a secrecy claim. When it was declassified and released—the week after Mr. Haynes's resignation—not a single word was redacted, and national security law experts were beside themselves trying to come up with a reason for its original classification. Plainly it had been classified to avoid political embarrassment, not because of legitimate national security concerns. I suspect the same considerations are at play here. This persistent conduct is undermining public confidence in the Government's use of national security classifications. It will inevitably lead to an erosion of the security classification system, which will not serve the Government or the safety and security of the public.

Indeed, I was particularly stunned by the Inspector General's decision to withhold on grounds of secrecy concerns even his policy analysis and recommendations. This reveals an approach to his mission which seems to be ripped from the pages of a novel by Franz Kafka, not an approach that can be reconciled with sound governmental policy.

We should keep in mind President Kennedy's words: "The very word 'secrecy' is repugnant in a free and open society; and we are as a people inherently and historically opposed to secret societies, to secret oaths and to secret proceedings. We decided long ago that the dangers of excessive and unwarranted concealment of pertinent facts far outweighed the dangers which are cited to justify it. Even today, there is little value in opposing the threat of a closed society by imitating its arbitrary restrictions. Even today, there is little value in insuring the survival of our nation if our traditions do not survive with it. And there is very grave danger that an announced need for increased security will be seized upon by those anxious to expand its meaning to the very limits of official censorship and concealment." The concerns that Kennedy articulated are precisely on point here. The suppression of the Maher Arar report is an "excessive and unwarranted concealment of pertinent facts." It may be that some honestly believe that it will be bad for our national security for the people to know that mistakes were made or to know exactly what was done to Mr. Arar and on whose authority. But that conclusion can only be reached by sharply discounting our interest in continuing to be a free and open society. That is a chilling thought.

Laying the Inspector General's declassified report on the Maher Arar case side-by-side with the work of the Canadian Commission of Inquiry, the one-page DHS declassified summary seems cowardly, awkward and painfully protracted. Moreover, the decision to withhold the entire report from public view on grounds that hardly pass a test of facial plausibility is particularly troubling. The Inspector General tells us he did his best to cope with positions taken by other Government actors, but his defenses are weak and unconvincing. In this case, I do not believe the failings can be laid at the foot of the staff who investigated and prepared the report. I don't doubt that the Inspector General faced some steep obstacles with personnel and senior officials who were eager to avoid scrutiny, and assertions of privilege and security classifications. But this was a challenge to which he should have risen with more determination—to uphold the independence and integrity that are essential to his office, to cooperate with Congressional oversight in a manner that reflects respect for its constitutional role, to insure public confidence in the vital accountability function he performs. The fact that his report took so long and then was withheld even after it was first presented to Congress in January and then publicly announced as ready in March is an immense disappointment.

I understand that the Inspector General would answer this charge by laying it off on the Department of Justice. That is disingenuous, shamefully so. First, an Inspector General cannot allow him or herself to be muzzled by overbroad claims. The OIG at DHS is told everyday that the disclosure in one of its reports of a program deficiency or vulnerability should be classified because revelation could enable the enemy to exploit that gap. It could do not work to the use of our nation if it meekly accepted the claim of another agency under most of these circumstances. Second, an Inspector General has a statutory right to the cooperation of other agencies, and a failure to cooperate, as may have happened in this case with respect to the release of a fuller report, is, by law, something the Inspector General must report to Congress. There should have been a protest, there should have been an objection; at the very least, Congress should have been informed of the dispute and the consequences of it upon Congress's work and our nation's "need to know."

Congress has a specific interest in this report that goes beyond simply understanding the misfortunes that befell Mr. Arar. Congress needs to assess the procedures in place to implement the policy of *non refoulement*, the binding requirement contained—largely as a result of a U.S. initiative—in the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and enacted into U.S. law in the Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA"). All available public accounts of the treatment of Mr. Arar suggest that the requirements of FARRA have been ignored, or that the procedures in place to apply them do not work. In particular, the publicly available account raise serious questions about the Administration's purported reliance on "diplomatic assurances," that is formal or informal assurances by a receiving power that it will not subject the person returned to torture or other prohibited treatment, before rendering persons under detention to a foreign power with a doubtful reputation.

In this case, Mr. Arar was rendered to Syria under circumstances suggesting that the object of the rendition was to insure that he would be interrogated by the Syrian Government using coercive methods in order to get desired information from him. This suggests a head-on violation of the requirements of FARRA. If so Congress should be looking at further legislative action to be sure that its mandate in FARRA is conscientiously applied. It would not be wise for Congress to take that action without a complete and proper record. The Inspector General's decision to withhold the Maher Arar report impedes essential Congressional fact-finding and legislative action. Congress should take steps to compel the report's declassification and publication.

Thank you for your attention.

ATTACHMENT

Harper's Magazine, Nov. 16, 2007

The Missing IG Report on Maher Arar

By Scott Horton

Of all the Bush Administration's many perversions of the justice system, there is something particularly distressing about the case of Maher Arar. A Canadian software engineer, he was changing planes in JFK on his way home to Canada after a Mediterranean vacation when American law enforcement snatched him up. Arar had been fingered as a terrorism suspect by Canadian authorities. Within a brief period of time, he was interrogated, locked-up and then bundled off to Jordan with directions for transshipment to Syria, a nation known to use torture. Indeed, it was plain from the outset that he was shipped to Syria for purposes of being tortured, with a list of questions to be put to him passed along. Never mind that Syria is constantly reviled as a brutal dictatorship by some Bush Administration figures who openly dream of bombing or invading it… the Syrians, it seems, have a redeeming feature—their willingness to torture the occasional Canadian engineer as a gesture of friendship to the Americans.

In time, the Canadians launched a comprehensive inquiry into the matter, concluded that they were mistaken about Arar. He was cleared, the findings of the commission of inquiry were published, and Arar was given a roughly $10 million award in compensation for the role Canada played in his mistreatment.

Canada, in sum, behaved the way a democratic state is supposed to behave.

But what about the United States? Of course, the governing axiom of the Bush Administration is that it makes no mistakes. So, while intelligence community officials confirm, off the record, that the whole episode involving Arar was a gross mistake involving errors in judgment at every stage and a part-infantile rage, part-Savanarola zeal in the oversight, the official posture continues to be that Arar is a terrorist, so what happened was justified. Arar remains on the no-fly list and is denied entry to the United States.

Congress has had an interest in the Arar case since late 2003. As one Judiciary Committee member told me, "It's rare that you come across a case in which even the spokesmen for the Administration signal to you that they know the official answers they're conveying aren't quite true. This is such a case, and that makes it even more worrisome." Congress pressed for an internal investigation, and the lot fell to the newly created Inspector General for Homeland Security.

That was four years ago. In the meantime, Congressional sources note that issues rose and were worked out. The issues were predictable. There were questions of IG access to classified information. And there was the fact that the critical junctures in the case involved attorneys dispensing legal advice, usually to other attorneys. All of that was arguably subjected to attorney-client privilege.

Nevertheless, I have learned, these problems were overcome, the IG got access to the classified data it needed. And it was able to delve into the attorney-client materials and incorporate analysis of it into its draft report, to be shared with Congressional oversight committees under a special agreement limiting its use.

IG investigators were astonished particularly by what transpired in the first ten days of Arar's detention. Well-defined procedures were not followed. The State Department was consciously kept out of the loop. Steps were taken to circumvent Arar's rights, and particularly to guard against the prospect that a lawyer for Arar would challenge his highly dubious treatment through a habeas corpus proceeding. Who was at fault in this process? A group of very senior figures, mostly in the U.S. Department of Justice.

Justice Department figures, and particularly those who are fingered and criticized in the early drafts of the IG Report, have been frantic in their efforts to quash it. And they're succeeding. That, I am told, is why the IG Report has not been finalized and transmitted to Congress.

One pretext has been used to block the Report. It is the fact that civil litigation brought by Maher Arar is now pending in the U.S. Courts. Justice Department lawyers involved in managing the defense of this suit have expressed strong concern that the IG Report would, if delivered to Congress, deliver a potential death blow to their efforts. They also caution that it might result in the leakage of attorney-client privileged information which would greatly harm the litigating position of the United States.

Persons close to the investigation point to another concern. The position adopted by the Justice Department in this litigation, they say, rests on a painfully constructed house of cards which won't stand once the IG Report is issued, exposing some of the serious misconduct which occurred in the Arar case.

In fact, the Arar case is now before the Court of Appeals, which heard oral argument only a few days ago. The conduct of the oral argument suggests the accuracy of information I have received. Attorneys for the government played extremely fast and loose with the facts using the latitude they gain through withholding the IG Report. They present arguments about what the Justice Department believed at the time of Arar's initial detention. And according to my sources, the IG Report will provide very substantial grounds to question the candor and accuracy of these claims. Here's an exchange, reported in the Globe and Mail that demonstrates the points in play:

> Judge Robert D. Sack interrupted Mr. Barghaan during his characterization of Mr. Arar, asking if he was suggesting a current assessment. The lawyer replied that he was not at liberty to discuss the government's view. "So we will make believe he's a member of al-Qaeda?" asked Judge Sack, as the audience chuckled.
>
> At another point, the same judge asked why officials sent Mr. Arar, a Canadian citizen, back to a country he had long since left, as he passed through U.S. airspace on the way to Canada. "He was going to Canada!" Judge Sack said. "The question is not whether he was going to be conspiring with al-Qaeda on the bus between the Air Canada terminal and the airport building."
>
> Mr. Barghaan quickly backpedalled, saying he was only trying to outline the government's beliefs when Mr. Arar was seized while changing planes.

The Justice Department continues to dance in the shadows because it can only prevail in this case under cover of darkness. But the interests of justice demand that the facts come out, and that those

who misbehaved be held to account. And in the end, justice for Mr. Arar is not an irrelevant consideration either.

Senators Leahy and Specter wrote asking about this report in February. They got a run around in response. Nine more months have passed, and it is painfully obvious that the Arar report is being suppressed at the behest of the Justice Department for reasons that have nothing to do with justice and a lot to do with politics. It's time for Congress to press aggressively to free-up the Inspector General's report and generally to get to the bottom of this matter which constitutes an on-going embarrassment to the United States and to our relationship with our neighbor to the north.

Mr. NADLER. I thank the gentleman.

We will now start the questioning. I will begin by recognizing myself for 5 minutes to question the witnesses. As I said at the beginning, I will interpret for both majority and minority the 5-minute rule flexibly so we can get to the bottom of some of these issues.

First, I would like to address the question of why the decision was made for movement of Mr. Arar to Syria, rather than to Canada or Switzerland. Mr. Skinner, your report notes that in addition to Canada, Arar could have been removed to Switzerland, which is the origin of the flight coming here, and that this option would usually have been pursued. Why are there no publicly available facts regarding consideration or ruling out of Switzerland as an option over Syria? Did your investigation cover that issue?

I note that in the report, there is a lot of stuff redacted, but there is one sentence that is not redacted with respect to the decision not to have Canada, and that is saying that because of the porous border, it might have been considered that if Mr. Arar had gone to Canada, they have a porous border, presumably meaning he might have come to the United States after that.

That is certainly not true with regard to Switzerland, which may or may not have a porous border, but not with the United States. So did your investigation cover that issue? What facts did you discover? And did it not cause concern that the U.S. could have, but didn't, choose a country without a known history of torture in favor of one with a clear record of torture, when your report indicates that the INS felt that it was more likely than not that he would be tortured if sent to Syria?

Mr. SKINNER. Yes, we did take that into consideration. We did ask those questions. I could answer that, but it would have to be in a classified environment.

Mr. NADLER. You have a good answer as to why he couldn't go to Switzerland which cannot be publicly revealed?

Mr. SKINNER. That is correct.

Mr. NADLER. And you regard the classification decision as not outrageous with respect to that question?

Mr. SKINNER. I do not think it is outrageous.

Mr. NADLER. Okay. Well, then, we are going to have to follow up in a classified session.

Mr. SKINNER. Yes.

Mr. NADLER. And then we will make the decision as to whether it is outrageous.

Your report says that the usual disposition of a removal action—well, let me ask Mr. Horton. Mr. Horton, can you think of any reasonable reason why a decision that he couldn't be removed to Switzerland might be legitimately classified?

Mr. HORTON. You know, I can't speculate as to what it is, but it seems to me the Swiss cooperate with us very strongly. On counterterrorism law enforcement, they take aggressive preemptive action. They have rights under their legal system to hold people almost indefinitely under investigation. I am mystified by this.

Mr. NADLER. Thank you.

Mr. Skinner, your report says on page 22 that "the usual disposition of a removal action would have involved a removal to Switzer-

land or transporting him to the nearby country where he resided and had citizenship, that is Canada, not to transport him to a nation where his proof of citizenship had lapsed."

These, along with other findings, indicate that it is at least a reasonable possibility that the U.S. wanted to send Mr. Arar to Syria precisely because it knew he would be detained and interrogated and that harsh measures, or torture, depending on how you define these things, would be used to obtain information.

Do you feel that your investigation has ruled out the possibility that the decision was made to send him to Syria because people in our Government wanted him interrogated under conditions that our law would not permit?

Mr. SKINNER. We can't rule that out, but I want to say here, in the jurisdiction that I had in conducting this review, we tried to stay within the confines of the——

Mr. NADLER. But you couldn't rule it out?

Mr. SKINNER. That is correct.

Mr. NADLER. If this possibility could not be ruled out, which I believe it has not and cannot be given the incompleteness of the investigation as you have just said, why didn't your office refer this question to the Attorney General, or take greater steps to get the information to Congress in a timely manner? I note that the IG Act, the law, requires referral of possible criminal conduct and obviously if he were sent to Syria for the purpose of being tortured, that would be criminal actions under a half-dozen different laws.

Since you couldn't rule that out, the IG Act requires referral of possible criminal conduct to the Attorney General. If the Inspector General finds serious problems, he must report immediately to the Agency, who must then tell Congress within 7 days and not wait for 4 years. So if you could not rule it out, why didn't your office refer this to the Attorney General and take greater steps to get the information to Congress in a timely manner?

Mr. SKINNER. We did keep the Department of Justice informed. It is my understanding that there is an investigative inquiry going on as we speak.

Mr. NADLER. So referral for possible criminal action has been made to the Attorney General?

Mr. SKINNER. Investigation.

Mr. NADLER. Did you note that this was or was not told to Congress within 7 days, as the statute requires?

Mr. SKINNER. I am not sure I understand your question. Once we had sufficient information or facts, we did share that with the Office of Professional Responsibility with the Department of Justice, who has the responsibility for investigating attorneys within the Department of Justice. I didn't do it prematurely, when you say 7 days.

Mr. NADLER. No, referral to Congress must occur within 7 days of that.

Mr. SKINNER. That is not our standard protocol.

Mr. NADLER. No, it is the requirement that the department notify Congress within 7 days of your referral. Did you make any attempt to——

Mr. SKINNER. I am not aware of that requirement. I am sorry.

Mr. NADLER. You are not?

Yes, well, the statute requires that if you find a serious problem, you must tell the Agency head, which you did.

Mr. SKINNER. Yes.

Mr. NADLER. And that requires the Agency head to report that to Congress within 7 days, which he has not done to date. And you think you have no responsibility to note whether the Attorney General followed his statutory duty to report it to us?

Mr. SKINNER. I am not so sure. I am not familiar with that protocol, sir. I am sorry.

Mr. NADLER. Let me ask Mr. Ervin. Would you have acted differently in this matter?

Mr. ERVIN. Well, I would, sir, in a number of respects, as I outlined in my statement. But on the specific question that you are asking about, if I understand it correctly, this 7-day letter procedure I think relates to a formal criminal referral that the Inspector General would make to the Department of Justice.

Mr. NADLER. And not to a formal criminal investigation recommendation?

Mr. ERVIN. Right—a recommendation that the Department of Justice pursue prosecution because there is some sense that there might have been a——

Mr. NADLER. In what way do you think the actions in referring this to the AG or not referring this to the AG or not telling Congress on this whole question were not as you would have done or were inadequate?

Mr. ERVIN. Well, there are a number of things, sir. As I said in my statement, I would have written a public version of this report in the beginning that would have disclosed the process by which all the questions that we are talking about, the process by which Mr. Arar was rendered to Syria. I think that could have been done in a way that would not have disclosed legitimate privileges.

Further, in the classified version of the report—and certainly as we have all said there are things here that ought to be classified—those paragraphs that contained unclassified information I would have disclosed or at least summarized, but probably disclosed, certainly disclosed. My preference always is to get as much information on the public record with regard to a matter of legitimate public interest. And this clearly is a matter of legitimate public interest. I think it is possible to do that without disclosing classified information.

Mr. NADLER. Okay. Thank you. I have one further question for Mr. Skinner.

Mr. ISSA. Mr. Chairman, point of order?

Mr. NADLER. Mr. Arar's attorney filed——

Mr. ISSA. Point of order, Mr. Chairman.

Mr. NADLER. Had Mr. Arar's attorney filed a habeas corpus petition, a possibility raised by INS attorneys——

Mr. ISSA. I raise a point of order.

Mr. FRANKS. Mr. Chairman, he has raised a point of order.

Mr. NADLER. I am not recognizing him. I am in the middle of my questioning.

Mr. FRANKS. I understand. He has raised a point of order.

Mr. NADLER. He has not raised a point of order——

Mr. ISSA. I have raised a point of order, Mr. Chairman——

Mr. NADLER. Had Mr. Arar's attorney filed a habeas corpus petition, a possibility acknowledged by INS attorneys that your office interviewed as noted on page 27, an independent assessment might have been made regarding the validity of the Government's determination that Mr. Arar was a terrorist, Deputy AG Thompson's determination that he could not be removed to Canada, and any determination that Switzerland also wasn't possible, and whether shipping him to Syria violated his right not to be sent to a country where he would be tortured.

Now, the report indicates that given the fact that he was held almost incommunicado, that he wasn't really given an opportunity to contact an attorney, shouldn't we then be very concerned with the efforts that seem to have been undertaken by U.S. officials to interfere with his rights to obtain counsel in order to prevent the habeas corpus petition from being filed?

Mr. SKINNER. Mr. Chairman, it is my understanding INS did in fact provide Mr. Arar with a list of attorneys that he could contact. It is my understanding that he also was in contact with at least two attorneys, an immigration attorney that interviewed Mr. Arar when he was detained, one that his wife had arranged for, as well as I believe a criminal attorney that the immigration attorney had referred to Mr. Arar.

I am not aware in the course of our review that there was a deliberate effort to keep Mr. Arar from having contact with an attorney.

Mr. NADLER. Mr. Ervin, having read that report, do you——

Mr. ISSA. Mr. Chairman, point of order again.

Mr. NADLER. I will recognize your point of order after Mr. Ervin finishes.

Mr. ISSA. Mr. Chairman, my point of order is germane to your continued asking of question beyond the 5-minute rule.

Mr. NADLER. The gentleman will state his point of order.

Mr. ISSA. Mr. Chairman, pursuant to rule 3(d), the rules of the House do not allow for flexible 5-minute, but rather it says in the course of a hearing each Member shall be allowed 5 minutes for the interrogation of a witness until such time as each Member who so desires has an opportunity to——

Mr. NADLER. The gentleman's point of order is correct. We will be here for a few additional rounds so that everybody can get the information out. From now on, we will stay strict, especially when Mr. Issa has questions.

Mr. ISSA. Thank you, Mr. Chairman.

Mr. NADLER. I recognize Mr. Franks for 5 minutes, a strict 5 minutes.

Mr. FRANKS. Thank you, Mr. Chairman.

Mr. Skinner, you stated in your testimony, this is your written testimony, that "even a casual reading of the report reveals that significant portions that could have been redacted under the Freedom of Information Act have been in fact released, a testament both to the OIG's diligence and the good faith of the components and other entities with which we consulted." That is a basic quote.

Can you elaborate on that a little bit?

Mr. SKINNER. When we began this whole process, the department wanted to classify and redact the entire report. I would like to com-

ment on something my predecessor, Mr. Ervin, had said, and I do agree with him. This is Monday night quarterbacking. This is in retrospect.

Had we had to do this over, I would in fact have written, and in fact we attempted to write a report where in we could tell our story and we ran into a lot of difficulty with regard to redactions. So that is why we opted to go this route, with a classified report, then follow it up with a redacted version. But we did in fact try to write two reports—a classified report and an unclassified report that could tell the story.

This is where we ended up today with this redacted version. This has taken us over 2 months of sitting down with not one attorney, not two attorneys, not three, not four, not five, not six not seven, but eight or more attorneys in different parts of DHS and the Government, where we vetted word by word, and we pushed back very hard, and there is a lot in here that ordinarily that previously we were told could not be made public, is now made public.

Those items that we agreed to redact, we do, and I was personally briefed and brought into this, I do believe that the classified stuff is in fact classified. We did not classify it. We do not have the authority to declassify it. The attorney-client privilege, the deliberative process, the attorney work product—these are documents that we are convinced could jeopardize the Government's case in defense of itself in the civil lawsuit right now.

Mr. FRANKS. Thank you.

I have another question for you. Sometimes in these Committees, what we are really trying to do is just to get to the bottom line to what really happened and was there culpability on someone's part? Did American officials make mistakes? We are all interested in justice here.

So let me just ask you as sincerely as I can, to put it in your own words, tell us what happened here? What do you think potential injustices were and whose fault it was? What really occurred here, just the bottom line?

Mr. SKINNER. Without getting into it in a classified environment, it would be very difficult to do. But from what you can see in this report, there were some very questionable processes and actions that were taken here. When you look a the unclassified version, for example, the timing and the manner in which the CAT interview was conducted with the attorney on a Sunday evening late at night—that is questionable.

The process wherein the INS made one determination on the torture more likely than not, yet which was ultimately overridden—we could not find documentation though interview or documentation that gave us a comfort level that was justification for the INS's original decision to be overridden. We could get into detail, a lot more detail, if we were in a classified environment.

Mr. FRANKS. Mr. Chairman, I am going to go ahead and yield back here, because it sounds like we are going to have more rounds here of questioning. Thank you.

Mr. NADLER. I thank the gentleman.

The co-Chairman of the hearing, the gentleman from Massachusetts is recognized.

Mr. DELAHUNT. I thank the Chairman for the time.

I find it incredulous that the department intended or sought to have the entire report classified. Was that your statement?

Mr. SKINNER. Either classified or redacted for other reasons because of the outstanding or the pending civil lawsuit.

Mr. DELAHUNT. But this is the entire report that was their stated request.

Mr. SKINNER. That was a request. That is where we started, then we sat down and negotiated to the point where we are at today, this report here.

Mr. DELAHUNT. I just find that—that says all that really has to be said. It is clear that this Administration, this Government does not want the facts surrounding this case to emerge. From my perspective, it is just that simple. To request at the beginning that this entire report not become public is outrageous. It is an embarrassment.

I am looking at the report of the O'Connor commission, the Canadian commission. All of that is in the public domain. The prime minister of Canada made a public apology and compensation was awarded to the tune of some $10 million to this individual.

You indicated, Mr. Skinner, that the CAT interview on a Sunday with no counsel present was questionable. To me, that is, again, outrageous. Any individual in those circumstances, any representative of the Government would know that the likelihood of securing counsel on a Sunday was remote at best.

Explain to me once more what your office did in terms of referral to the Attorney General or to the secretary of the Department of Homeland Security about your findings.

Mr. SKINNER. I am sorry. I am not quite sure I understand.

Mr. DELAHUNT. In other words, in response to the question by Mr. Nadler, when a serious abuse or deficiency becomes apparent or potential abuse or deficiency, what were the first steps?

Mr. SKINNER. I think I understand. During the course of our review, nothing came to our attention that was criminal in nature. So therefore, we would not have been referring anything to the Department of Justice or the Attorney General for prosecution. However, there were some questions raised by employees not within the Department of Homeland Security, not within INS, but there were other people involved in the Office of the Deputy Attorney General and their counsel, which is outside our jurisdiction and our purview.

We did turn over the results of our review to the Office of Professional Responsibility for their investigation and referral to the Attorney General for prosecution if deemed necessary.

Mr. DELAHUNT. Mr. Horton, given your familiarity with the facts, is there cause to have a criminal investigation conducted?

Mr. HORTON. Yes, I think the answer is yes here. In fact, Chairman Nadler in his opening remarks referred to it. I would say specifically section 2340(a) makes it—and this is one of the enforcement provisions under the CAT—it makes it a crime for individuals to gather together in a conspiracy to render someone to be tortured. In fact, there is an internal memorandum in the FBI prepared by legal counsel advising FBI agents not to participate with in any way or support this program because they risk the possibility of——

Mr. DELAHUNT. Let me interrupt because I know the Chairman is going to be strict with time. I would ask the Members of this panel on both sides to consider a request——

Mr. NADLER. The gentleman's time has expired. I apologize to the gentleman, but our colleague from California has insisted on his point of order. I do not like cutting off colleagues, but my hands are tied. Perhaps the gentleman from California will later apologize to you and everybody else.

Mr. CONYERS. Mr. Chairman?

Mr. NADLER. Yes, the gentleman from Michigan is recognized.

Mr. CONYERS. Might I generously yield the gentleman 1 minute of my time?

Mr. NADLER. The gentleman is yielded 1 minute.

Mr. DELAHUNT. I thank the Chairman of the full Committee.

What I was going to propose to Chairman Conyers and Chairman Nadler and to the Ranking Members that this Committee consider drafting a request to the Department of Justice, to the Attorney General, seeking the appointment of a special prosecutor to initiate an investigation to determine whether there have, in this particular case, been violations of the applicable domestic laws, as well as any of our obligations under the Convention Against Torture. I would hope that we would all join in that request because it is clear to me after 4½ years and the challenges that have been described by Mr. Skinner and by Mr. Ervin, and what we have observed and heard in the short time that we have been here, this Administration will not comply.

I yield back.

Mr. NADLER. The gentleman's time has expired.

The gentleman from California, Mr. Rohrabacher, is recognized for 5 minutes.

Mr. ROHRABACHER. Thank you very much.

I obviously think that our problems in this Administration, and I would say that the criticism by my friends on the other side of the aisle quite often in this area are justified in their specifics, but wrong in their general prescription of how to solve things. In this particular case that we are looking at, I think perhaps it is informative to us for Jerry to go through these specific areas that are being blocked off so that we do not know about them. I think that perhaps this case could serve as an instrument to educate us as to how justified or unjustified the control of information has been by this Administration and compare it to what it would be like if other people were making the decisions.

So I am watching very closely. I am sorry that I have some constituents out in the anteroom where we had a local issue that I had to touch on. But in the Maher case, I think that we should not—and I emphasized this in my opening statement—we should not take a case of someone who was innocent and caught up in this fight against radical Islam. We should not take that and use that as the basis for judging all policy that we are going to have and what our goals should be in the fight against radical Islam.

I know everyone likes to suggest Mr. Maher was tortured. He was tortured, and that is wrong, but we do not assume that everything that is called torture is something that is actually parallel to what Mr. Maher went through. Yesterday, we had a hearing and

at that hearing the FBI was basically outlining this misbehaving of the interrogators in Guantanamo. They went through a list of why the FBI had distanced themselves of the type of behavior, yes, the type of behavior that they were objecting to on the part of the interrogators.

I have heard the word "torture" over and over and over again, and the behavior that was described that was going on had nothing to do with what the average American would call torture. And the FBI was saying we shouldn't even go that far in questioning an individual who in this case the FBI was analyzing how a person had been interrogated, and that person happened to have been the 20th hijacker, a man who had actually been involved in the 9/11 conspiracy and by a fluke had been stopped getting on an airplane.

Now, frankly I think that when you are talking about the 20th hijacker, we shouldn't let what happened to Mr. Maher prevent us from interrogating and from dealing with the 20th hijacker in a way that would prevent us from getting information that might save the lives of millions of people. It is very easy just to stand up and say we should never use any type of physical pressure of any kind on someone who is a suspect of terrorism, and see what happened to Mr. Maher.

Well, I would suggest that we do not use the exception to the rule. Mr. Maher was an exception, and one we should acknowledge as a mistake, but we should not use that as the basis for how we will conduct the war on terror. I would certainly think that the appointing of a special investigator or prosecutor in this particular case is not justified because we are getting to the bottom of this case right now, and we will let the American people decide by exposing all the details, as Mr. Nadler is clearly committed to, exposing the details. Let the American people decide what was justified and what wasn't.

With that, if you have any comments, go right ahead.

Mr. NADLER. The gentleman's time has expired.

Mr. ROHRABACHER. Thank you very much.

Mr. NADLER. Again, I apologize for the rule we have imposed upon us.

I now recognize the distinguished Chairman of the full Committee on the Judiciary, Mr. Conyers, for 4 minutes.

Mr. CONYERS. I would like to invite Darrell Issa to my office for lunch next week because I think the results of his reciting the rule on whether we should be liberal or strict in interpreting the 5-minute rule may require some revisiting. We could be here well into the afternoon with the strict interpretation. Let's see how it works out today.

Mr. ISSA. Would the gentleman yield?

Mr. CONYERS. Of course.

Mr. ISSA. Mr. Chairman, certainly the practice of this Committee has been to allow the completion of a question. I think of Ms. Jackson Lee, who you sort of encourage her to finish her question, and then allow the witness to respond. If that goes beyond the 5 minutes, I certainly understand. The intention of the 5-minute rule is to end questioning and allow the witnesses to complete. You as Chairman have been great at making sure that witnesses did an-

swer even if the 5 minutes had expired. That was not the intention of my motion, and I hope the Chairman would understand.

And I look forward to lunch, Mr. Chairman.

Mr. CONYERS. Well, I look forward to the discussion.

But at any rate, I want to thank Trent Franks for the question that he raised that has led to a much deeper inquiry into this matter. I appreciate it very much.

Now, with the terminology and the language of my good friend from California, I am trying to figure out maybe terminology is used differently in the Foreign Affairs Committee. What do I know? We are at war against terrorists. We are at war against the Taliban. We are at war against al-Qaida.

Could I just ask my friend, we may be cutting this thing a little bit wider than we intend to, and then to leave it to the American people, I would think the American people are asking us to tell them where all of these inquiries, these years of investigations, these declassifications, all of these deletions have led us. We have admitted a reasonable amount of error. Mr. Skinner has been forthcoming as he feels he is permitted to. The former Inspector General has shed some light on the problem.

It would seem to me, I would say to my good friend from California, Mr. Rohrabacher, that why don't we at least determine whether it should be sent to a criminal investigation? There seems to be enough reasonable information before us. And how about us deciding, instead of letting 330 million Americans come to some kind of view? This is a representative democracy. It is not a direct democracy. That is why we are called representatives.

Mr. ROHRABACHER. Would the gentleman yield?

Mr. CONYERS. With pleasure.

Mr. ROHRABACHER. That would be the equivalent, in my eyes, of taking American military leaders at Normandy and sending a special prosecutor to see if they should be prosecuted for the death of French civilians as we got ready to invade. I do not see it. There was never an intent for this individual to be treated——

Mr. ISSA. Mr. Chairman, I would ask unanimous consent for the full Committee Chairman to have an additional 2 minutes.

Mr. NADLER. Without objection.

Mr. ROHRABACHER. Okay. I see no intent that this man was treated in the way that he was, an intent to treat an innocent person in that way. This was a mistake and we should admit our mistakes. It should be open to the American people. But to bring a prosecutor or something like that in with the idea that this might represent a criminal intent is absolutely the wrong way to go.

Mr. CONYERS. Well, you do not think you even want to find out if that is a possibility. The criminal investigation doesn't mean that we have made a finding of criminal intent. That is an inquiry.

Mr. ROHRABACHER. Mr. Chairman, I would say that would be up to us to make sure that when we make our final statement on this case, which Mr. Nadler is committed to do and I think Mr. Delahunt, my Chairman, is committed to do as well, that is for us to suggest that. If there was some type of criminal intent, that should be a statement made by our Committees. That is why we are here.

Mr. CONYERS. Well, I am not going to sleep more comfortably in my bed tonight.

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

Mr. CONYERS. Of course.

Mr. DELAHUNT. I think what we heard from Mr. Horton, and I dare say if I inquired of the others, is that there are grounds that would serve as a catalyst for a referral to determine whether there were violations of the United States criminal code. Clearly, in this particular case, because there is a significant role by the Department of Justice——

Mr. CONYERS. You would not object would you, Mr. Skinner, to this inquiry?

Mr. SKINNER. No.

Mr. CONYERS. Of course, you would not.

You would not object would you, Mr. Ervin?

Mr. ERVIN. I would enthusiastically support it, Mr. Chairman.

Mr. CONYERS. You would not object—well, you have recommended it, so I know your view. [Laughter.]

Mr. HORTON. I endorse the idea.

Mr. DELAHUNT. The point being here was, and Mr. Horton was correct when he said this isn't about stopping terrorists coming into the country. The issue is why did they send Mr. Arar back to Syria. That is the issue.

Mr. NADLER. The gentleman's time has expired.

I now recognize the gentleman from California for a strict 5 minutes.

Mr. ISSA. Thank you, Mr. Chairman.

I would like to associate myself with the full Committee Chairman's call that this line of investigation not end until we know whether or not there was in fact what I would call a back-door extraordinary rendition that took place. To that end, Mr. Horton, I will start with you.

Would you say that regardless of what might have been available in this declassified information, that it appears as though what effectively happened is the United States got an extraordinary rendition to Syria in which Syria asked question and that either may have given us information or may have been believed it would give us information on this individual?

Mr. HORTON. It is hard to find that in the report, in the declassified version that has just come out.

Mr. ISSA. It is clearly not there.

Mr. HORTON. It is clearly not there, but it is sort of in the periphery all around it. It looks to me that decisions were taken in the Office of the Deputy Attorney General to push forward a process that externally looks a lot like an extraordinary rendition, and then we have the Jordanians turning them over to the Syrians, several published reports that he was turned over with a list of questions that were suggested to be presented. That, then, begins to look an awful lot like extraordinary renditions.

But the question is still Syria. I mean, Syria is not a partner in the CIA's extraordinary renditions program. It is a country with whose intelligence services we do not have positive relations.

Mr. ISSA. And following up on that, 2002 was a long time ago. It was before we went into Iraq. It was at a time in which we were

reaching out to Bashar Assad's government, and there was high anticipation that they might be different, different than a man who killed 25,000 of his own people using chemical agents in order to let the Muslim Brotherhood know that he meant business. Different in many ways, but probably believing that they were similar to the Hafez Assad administration or government or dictatorship that in fact had supported us in Gulf War I. So I put my questions in perspective relative to the time in which this occurred.

Mr. Ervin, we are I think not unified, but somewhat unified up here in saying that we need to know more about this. But in your looking at this case relative to other cases—and this would be good for any of you—isn't it true that normally, notwithstanding suspicions alleged but not available to us today, that in fact normally when someone is transiting the U.S., not entering the U.S. per se, but simply trying to come through here or through London's airport or Paris's airport, that if in fact we object to them, we simply do not allow them to enter our space and we allow them to go to one of those three locations.

So the real question is, in every other case within reason, isn't it true that Mr. Arar would have in fact been given his choice of those three locations and told to decide.

Mr. ERVIN. That is my understanding, sir. Yes.

Mr. ISSA. Mr. Skinner?

Mr. SKINNER. No, I do not think that is totally accurate.

Mr. ISSA. Okay.

Mr. SKINNER. This was a 235(c) proceeding which is somewhat different than what I think you are referring to, which is a 240 proceeding under which people can come through here and for whatever reason we think they are undesirable or should not be——

Mr. ISSA. Okay, but he didn't attempt to enter the country. Is that correct?

Mr. SKINNER. But under 235(c), you do not have the same rights.

Mr. ISSA. Right. But I guess the question is, he did not intend to enter the country. He was transiting.

Mr. SKINNER. That is correct.

Mr. ISSA. Okay. And the world relies on transiting countries to be generally, unless there is a specific reason, free of interference by the country that is simply being a hub.

Mr. SKINNER. As a general rule, that is correct.

Mr. ISSA. Okay. And had he entered the United States, had he been through, he could have claimed that he was afraid of being tortured in Syria when we said we were going to send him back, and as such would have been allowed a lawyer and a hearing. Isn't that true?

Mr. SKINNER. No.

Mr. ISSA. It is not true that if someone enters the United States that before they can be sent to Syria, they have a right to a hearing?

Mr. SKINNER. I am sorry. I misunderstood your question. Under 235(c) or 240 you have a requirement——

Mr. ISSA. Right. I understand. Let me characterized the question. But isn't it essentially a technicality that he wasn't in the U.S. where he would have had a right to say do not send me to Syria, I will be tortured, but he was in our custody and we took advan-

tage of that transit. I am looking at this for the future. Regardless of the fact it was legal——

Mr. NADLER. The gentleman's time has expired.

The gentleman from Minnesota is recognized for 5 minutes.

Mr. CONYERS. I ask unanimous consent that the gentleman be given 1½ additional minutes.

Mr. NADLER. Without objection, the Chairman's courteous request will be granted.

Mr. ISSA. Thank you, and I won't use it all.

Mr. Skinner, if you would just sort of answer.

Mr. SKINNER. I see where you are going. We do have a responsibility regardless of the proceeding that we apply to ensure that people are not removed to a country that we believe could torture. In this particular case, the individual was on a terrorist watch list, and those are rare that they would come through this country, transit through this country if they aware of the fact they are on a terrorist watch list, which made him somewhat unique, and the reason he was pulled aside, interrogated. We did make the decision, the U.S. government, that he was in fact inadmissible and had to be returned.

Mr. ISSA. But he wasn't returned. He was in fact sent to a country that he was not per se from.

Mr. SKINNER. Yes. I can't go beyond that because of the classified——

Mr. ISSA. I understand that. I join with the Chairman in saying that further investigation until this Congress has full understanding is appropriate.

I thank the gentleman for the extra time and yield back.

Mr. NADLER. The gentleman's time has once again expired.

The gentleman from Minnesota is recognized for 5 minutes.

Mr. ELLISON. Mr. Chairman, before I get started I just want to make the observation that I wish that we as a Congress would stop saying that we are in a war with Islam or radical Islam. We are not. If we are at any kind of a war, it is a war against people who commit acts of terror no matter what their religious motivation may be. I hope we can come to a consensus in the Congress.

I believe it is this attitude that we are in a war with Islam that has created the Maher Arar situation. That is why somebody thinks it is a good idea to make all the parade of mistakes that have been made in this case and the subsequent cover-up. So I think we need to really re-tool our thinking on both sides of the aisle on this question. I make that abundantly clear.

You know, we have good relationships, formalized relationships with Egypt, Jordan, Saudi Arabia, Nigeria, Turkey, Indonesia, and Malaysia. All these are Muslim countries. What are we saying if we are in a war against Islam? It is ridiculous and it undermines American national security. I wish we would stop doing that.

Is Maher Arar available to come into the United States at this time or is he still barred?

Mr. SKINNER. He is not permitted into the United States, it is my understanding.

Mr. ELLISON. Is there any evidence that he is a threat to the United States at this point?

Mr. SKINNER. I can't answer that.

Mr. ELLISON. Mr. Ervin, in your view?

Mr. ERVIN. I can't answer that either, except that I do not believe that he is.

Mr. ELLISON. Mr. Horton?

Mr. HORTON. It is another point where I am mystified. I hear the points made by the Administration, but they do not make any sense to me, particularly in light of this.

Mr. ELLISON. Well, the Committee——

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

Mr. ELLISON. Okay.

Mr. NADLER. I will simply state that the Administration says that on the basis of classified information, he is a threat. I have seen the classified information. In my judgment, it is nonsense. I yield back.

Mr. ELLISON. Thank you for making that point, Mr. Chairman. I will confess that I kind of knew the answer already. [Laughter.]

But the point it, we are wrong and staying wrong. We are committed to being wrong. We won't get right regardless of that voluminous document the Canadian government has produced.

But here is the other question. The horrific thing that happened to Mr. Arar, which both sides of the aisle have apologized for, that is good. As I said, I think we are on a track to keep doing stuff like this if we do not re-orient our general national attitude. But besides all that, what about the affront to the Congress itself? As I understand it, Mr. Arar was rendered in 2002. You got a letter from Chairman Conyers in 2003. The AG did. And we get a follow-up letter asking about the earlier letter in July of 2007. Is that right?

Mr. SKINNER. I think you are referring to my response. That was July 2004.

Mr. ELLISON. Well, okay, so your response is that it is taking too long, and I am sorry that it is taking so long. Right?

Mr. SKINNER. Exactly.

Mr. ELLISON. But then the Members of Congress, Nadler and Delahunt, say in July 2007, where is the stuff. Right? Anybody want to acknowledge that?

Mr. SKINNER. That is correct.

Mr. ELLISON. And then we get a one-page unclassified, and then another thing that is classified, in December 2007. Right?

Mr. SKINNER. That is correct.

Mr. ELLISON. You know, what level of respect has the Administration accorded to the Congress with this extraordinarily lengthy amount of time that it took to respond?

Mr. SKINNER. I commented on that in my opening statement, and I believe also in my formal statement. This was as frustrating for my office as it was for the Congress. We worked diligently to get this report out. It involved, multiple-agency components within the department and outside the department.

Mr. ELLISON. Thank you. Do you believe there was deliberate obstruction from the Administration?

Mr. SKINNER. No. But I do believe that when we initiated this review, there was a lack of cooperation in the first year. I also believe that——

Mr. ELLISON. Do you mean in 2003 or 2004 would be that first year?

Mr. SKINNER. I would say the first 1½ years.

Mr. ELLISON. Okay.

Mr. SKINNER. Through 2004 to mid-2005. After that, things did begin to pick up. It was the logistics of getting the job done.

Mr. ELLISON. It was 2 more years after that before we got anything.

Mr. SKINNER. Going outside the department, I do not believe that those that we worked with had the same sense of urgency as we did. We cannot control those outside agencies.

Mr. ELLISON. Now, let me ask you this because my 5 minutes is short. Does the world know about what happened to Maher Arar? That is a rhetorical question. Yes, they do. Is that right, Mr. Horton? The whole world knows that——

Mr. HORTON. [OFF MIKE]

Mr. ELLISON. Right. And so Mr. Horton, what does this do to our national reputation?

Mr. HORTON. I think the fact that the facts are out there and we get a report in which they are redacted. In fact, even quotations to this report are redacted away, make us look ridiculous. It undermines public confidence, in fact the confidence of Americans first and foremost, and the comprehensiveness and quality of the work that is being done by the Inspector General.

Mr. ELLISON. Now, I will offer that as a matter of——

Mr. NADLER. The gentleman's time has expired. Without objection, the gentleman will get 1 additional minute.

Mr. ELLISON. I will offer that as a matter of national security, we need the help of the world to help protect our country and the rest of the world from people, whatever religion they may be, to stop terrorism. Would you agree with that, Mr. Horton? Are we instilling confidence in the world when we obstruct, evade, and obscure the truth when the Canadians have so clearly confronted this issue head-on? Are we doing ourselves any good? I do not think Mr. Horton thinks we are doing ourselves any good.

Mr. HORTON. Yes, sir.

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

Mr. ELLISON. Yes, sir.

Mr. DELAHUNT. I just want to note that I had read an excerpt from the book that was just published.

Mr. ELLISON. Philip Sands' book?

Mr. DELAHUNT. No. The author was Scott McClellan, who is known to many of us because he was the spokesman for the Bush administration. This is what he had to say. The Bush administration lacked real accountability in large part because Bush himself did not embrace openness or Government in the sunshine.

I think that is your answer, Mr. Ellison.

Mr. ELLISON. Thank you, Mr. Chairman.

Mr. NADLER. Thank you. The gentleman's time has expired.

There are four votes on the floor, two of them 15-minute votes, and there are 4½ minutes left on the first vote. So the Committee will stand in recess. The Committee will reconvene immediately after the four votes are completed, at which time we will proceed to our second round of questions. The meeting will be Chaired for

a while at least, while I have something else to do, by the co-Chair of the hearing, Mr. Delahunt.

The meeting now stands in recess.

[Recess.]

Mr. DELAHUNT. [Presiding.] We will commence, while we await my colleagues. I want to indicate that I expect very shortly Chairman Nadler to reappear, and hopefully Mr. Franks and Mr. Rohrabacher.

Let me proceed with my own questions. I am going to put forth my own apologies because I will have to depart within 10 minutes as I have to catch a plane to make a college reunion. I am not going to disclose what reunion it is.

To get back to the two questions I posed in my opening remarks, I will address this to Mr. Ervin and Mr. Skinner. Why Syria? In your investigations, were you able to divine the rationale to return Mr. Arar to Syria?

Mr. SKINNER. We did ask the question, and no, we could not determine the rationale for the return to Syria.

Mr. DELAHUNT. I am glad to hear that you asked the question. To how many individuals was the question posed, if you know, or you can give me a range?

Mr. SKINNER. Can I get back to you on that? I know we asked within and outside the department.

Mr. DELAHUNT. The Department of Homeland Security?

Mr. SKINNER. That is correct.

Mr. DELAHUNT. Did you ever ask representatives of the Department of Justice that question?

Mr. SKINNER. Yes, we did.

Mr. DELAHUNT. And was there a response?

Mr. SKINNER. Yes, but it wasn't satisfactory, in our opinion, and that is the reason I make the statement or draw the conclusion in our report that there the decision was somewhat ambiguous because we just could not find documentation through interviews or through file reviews that would lead us to believe, or give us a reason why Syria.

Mr. DELAHUNT. Did you inquire as to the Department of State?

Mr. SKINNER. Yes, we did.

Mr. DELAHUNT. And did you receive a response?

Mr. SKINNER. Yes, but I am going to stop there, because we did receive a response, but if I go beyond that, then I am getting into a classified arena here.

Mr. DELAHUNT. In terms of the diplomatic assurances that were provided by Syria, according to the O'Connor report, the Canadian inquiry commission, according to your own report, was there any definition of those assurances that were provided?

Mr. SKINNER. No. And I would just like to clarify when you say "diplomatic assurances."

Mr. DELAHUNT. Just "assurances."

Mr. SKINNER. "Diplomatic assurances" implies something entirely different.

Mr. DELAHUNT. Can you make the distinction for me?

Mr. SKINNER. Not here, sir. I am sorry.

Mr. DELAHUNT. Well, let me just draw my own inference then.

Let me go to Mr. Ervin and ask him for his assistance on the distinction between diplomatic assurances and assurances.

Mr. ERVIN. Well, I am not an expert in this area, sir, but my understanding is that there is a formality to diplomatic assurances that does not attach, of course, to assurances.

Mr. DELAHUNT. So one could speculate that this was an informal assurance.

Mr. ERVIN. Yes.

Mr. DELAHUNT. It could have been a whisper.

Mr. ERVIN. Yes.

Mr. DELAHUNT. It could have been a telephone conversation.

Mr. ERVIN. It could have been.

Mr. DELAHUNT. And yet we have the then-Attorney General of the United States, Mr. Gonzales, testifying before the a Senate Committee, and I do not know the exact language, but I think it was diplomatic assurances or reliable assurances. I will have to go back and review that, but I would suspect that those senators that heard that testimony presumed that it was more than just simply a phone call or a whisper or a wink or a nod, and you are on your way back to Syria.

Mr. Horton, do you have any opinion on this?

Mr. HORTON. Well, I think one of the issues in the background here that is very important is the role that the Department of State did or did not play in connection with this matter and similar matters. It seems to me fairly clear that there was an effort to keep the State Department out of the process, out of the loop here, and this is the subject of a number of the redactions that have occurred here.

Similarly, saying that something is not a diplomatic assurance is a way of saying that, well, the assurance would not necessarily be passed through the State Department diplomatic personnel. It might be passed through law enforcement personnel, for instance. So I think those are important points.

I also think the nature of what the assurance is—you know, my surmise is, again from listening particularly to statements that have been made by Justice Department personnel who have addressed this issue in the past—is that they do not seem to believe it has to be an assurance that a particular person will not be tortured in so many words. They seem to be prepared to accept a quite informal assurance that the country receiving him would abide by its laws, assuming they can say that the laws have protections against torture. That strikes me as outrageous, frankly.

Mr. DELAHUNT. Are you familiar with the domestic laws of Syria?

Mr. HORTON. I am not. I have not undertaken a general survey of them, but I would not be surprised if there weren't provisions in them that preclude torture. I would imagine those are things that are routinely ignored by police authorities in Syria, certainly in accounts I have read that have been issued by our own State Department, for instance.

Mr. DELAHUNT. Again, in my opening remarks, I read the statement by President Bush where he describes Syria as having a legacy of torture. Those are his words. They are not mine, but accepting them at face value.

Can you help me, Mr. Horton, with our relationship with Canada? Do you consider them a terrorist state?

Mr. HORTON. I certainly do not consider them to be a terrorist state. I am not familiar with any suggestion by our Government that Canada is a nation that harbors terrorists. In fact, I think cooperation between the U.S. and Canada on counter-terrorism issues is very, very strong. In fact, that does come out in the record here. This was launched, after all, by Canadians raising issues concerning one of their own citizens. So I would say there has been robust, close cooperation.

I know there is concern on the U.S. side that Canada is not as aggressive in its sort of preemptive measures in dealing with terrorist suspects as the United States is. There is also concern that——

Mr. DELAHUNT. In other words, as a matter of practice they do not render them to Syria.

Mr. HORTON. They do not render them to Syria, but I think also, too, the Canadian police authorities tend to study terrorist groups closely over a period of time to try and pull out all the roots very carefully, rather than leaping on them right away. There is a sort of difference in police approach between the U.S. and Canada.

I think there is also a concern that there is a porous border between the U.S. and Canada. I mean, that is certainly true.

Mr. DELAHUNT. Can you speculate as to why the acting Attorney General, Mr. Thompson at the time, would have concluded that to return Mr. Arar to Canada, rather than to Syria, would have been prejudicial to the interests of the United States?

Mr. HORTON. To me, this is one of the most difficult cases to understand because I think even if we look at the extraordinary renditions program itself, I can sort of understand the methodology or the legal reasoning that is involved, but this is not really in the extraordinary renditions program where someone is being rendered to a country that cooperates with the U.S. and intelligence. It is a country that harbors terrorists and is essentially an enemy of the United States. I think it has been defined that way quite sharply in the past.

I think that the rationale that must have been applied here was one where they expected some level of cooperation with Syrian police authorities. They expected an aggressive interrogation potentially using prohibited techniques, highly coercive techniques. And their legal analysis led them to believe that a highly formalistic assurance provided by Syrian authorities that they would not torture, even if they didn't believe that assurance deep down inside, was adequate.

So the attitude seems to be do not really probe, do not ask a lot of questions, do not——

Mr. DELAHUNT. Don't ask, don't tell.

Mr. HORTON. Worse than that, even. You know, just them to say something to you and go on that basis. That seems to me to be playing fast and loose with the statute and the requirements of the statute, because the statute basically puts forward the test of more likely than not that the person will be tortured. I mean, diplomatic assurances are under the regulations permitted as a route that can

be pursued, but they do not overcome this basic requirement of a determination that it is more likely than not.

I cannot see how the Attorney General could reach a determination that it was not likely that Maher Arar would have been tortured on rendition to Syria, under all the facts here.

Mr. DELAHUNT. Is there a formal process—and I will address this to Mr. Skinner and Mr. Ervin and to you, Mr. Horton—that describes the procedure of securing diplomatic assurances? Is there in existence a Department of State protocol or series of regulations that would clearly enumerate the steps to be taken to secure diplomatic assurances?

Mr. SKINNER. Yes, there are, and I believe we do comment on that in our report. There are processes that you would ordinarily take to obtain those assurances.

Mr. DELAHUNT. Were those assurances complied with in this particular case?

Mr. SKINNER. I do not want to draw a conclusion that they were or were not, but certainly from the information we have it does not appear that they were followed to the letter of the law or the regulation. We have to keep in mind that in this process there are two different processes that we could take here in the proceedings. One I referred to earlier is a 240 proceeding, which is not necessarily dealing with terrorist per se. And then there is the 235(c) proceeding, which does in fact deal with terrorists. It is somewhat nebulous as to exactly what process you must follow to obtain those assurances, so there is some flexibility there.

Mr. DELAHUNT. Let me go back to a question that was posed earlier about the requirements of the statute that a report to Congress be made after 7 days in the event of an apparent deficiency or lack of compliance. Why wouldn't the Office of Inspector General have reported to Congress, to the Committee on the Homeland Security or to the Judiciary Committee, this deficiency, given the serious nature and the consequences that we have endured since?

Mr. SKINNER. Let's keep in mind that the department did reach out to obtain assurances, and we could stop there. The question is whether those assurances were sufficient.

Mr. DELAHUNT. That is my point, Mr. Skinner.

Mr. SKINNER. Yes.

Mr. DELAHUNT. What I am suggesting to you, from my perspective, and I am becoming somewhat conversant with the details of this case, I would suggest that on their face they were insufficient. I would suggest to you that it was the responsibility of the office not to report necessarily to the secretary of the Department of Homeland Security, but to this institution, because we are in this together—you as Inspector General and Congress as an institution with the constitutional responsibility of serving as a check and balance on the executive branch.

We have been in the dark on this particular case since the incident occurred. This is a gross embarrassment to the people of the United States and to this institution. What I would hope is that you and Mr. Horton and Mr. Ervin and others would make recommendations so that we could clarify the responsibility of the Inspector General to report to the relevant Committees of this institution where there are areas of significant concern.

Mr. SKINNER. Mr. Chairman, we in fact did report to the department through our report, and immediately followed that up within 7 days, I believe 5 days actually, to report to the Congress. Now, as far as when we say reporting immediately to Congress on flagrant violations, what we are talking about here is an event that had occurred 3, 4 years earlier. We did not find during the course of this review that the practices that were applied to the Arar case were still ongoing. If it was, then of course we would have done a flash report immediately to the secretary, who had an obligation to report that to you. But we did not find any evidence that there was any flagrant or serious rendition activities involving the various elements within DHS. That would be ICE, CIS and CBP.

Mr. DELAHUNT. I note the appearance of Chairman Nadler. I am going to turn the gavel back to him and excuse myself. I want to thank the panel. It has been informative, but it has been very disturbing to hear your testimony. This is a matter that we have an obligation to pursue. Given the delay that has already occurred and the penchant for secrecy that appears to color this particular case and other situations in the Administration, my recommendation for a special prosecutor to be assigned will continue that secrecy, with the convening of a grand jury, so those who are concerned about secrecy can give their testimony to a Federal grand jury behind closed doors.

With that, I yield back the gavel to Chairman Nadler.

Mr. NADLER. [Presiding.] Thank you very much.

Let me ask Professor Horton, first of all. Before the votes, you said that you thought that the procedures in this case went outside the normal procedures and that very high-level senior Government people made decisions on this case. Can you elaborate on this? First of all, who and which decisions? And why was it outside normal procedures?

Mr. HORTON. Well, I would say you start with a real focus on the compression of time, the extraordinary schedule on which all of this happened, on which I think the CAT hearing that occurred at 7 o'clock in the evening on a Sunday is just a stunning example of it.

Mr. NADLER. With notice to the attorneys Friday night or Saturday.

Mr. HORTON. Telephonic notice left on a message——

Mr. NADLER. They were notified Sunday at 4:20, and surprise, they didn't get the message until Monday, and the hearing started at 7 o'clock. Do you think that is extraordinary?

Mr. HORTON. Absolutely extraordinary.

Mr. NADLER. Do you think it might be construed as designed to make sure that he didn't have counsel?

Mr. HORTON. I am quite certain that that is the case.

Mr. NADLER. Before you go further, Mr. Ervin would you concur with that judgment?

Mr. ERVIN. I would absolutely concur with that.

Mr. NADLER. And if you were writing this report, would you make that a conclusion of this report, that there was a deliberate intent that he not have an attorney?

Mr. ERVIN. I would certainly draw that conclusion and I would do it explicitly in the report.

Mr. NADLER. Thank you.

Mr. Skinner, do you draw that conclusion? If not, why not?

Mr. SKINNER. I am sorry. I am not really clear on what the question is.

Mr. NADLER. The question is, do you conclude from the fact that for the protection hearing under CAT which occurred at 9 o'clock on Sunday night, his attorneys were notified at 4:20 on Sunday, or at least a message was left, when they obviously thought that the odds were nobody is going to be in a legal office at 4:20 on Sunday. The hearing occurs at 9 o'clock. He had no legal representation.

Would you conclude from that—and if you didn't, why wouldn't you—that there was an intent that he not have legal representation?

Mr. SKINNER. Let me say it certainly appears that way.

Mr. NADLER. Well, what would mitigate that appearance?

Mr. SKINNER. The process that they were using in the Arar case was—I do not want to say exempt—was different than what would you would use ordinarily.

Mr. NADLER. Well, was it in a class that was sometimes used, but not often? Or was this unique?

Mr. SKINNER. The 235(c) process is not used often.

Mr. NADLER. I understand—235(c) is a very rare situation.

Mr. SKINNER. That is correct.

Mr. NADLER. But even within 235(c), was this done, given the compression of time, given on a Sunday, given other circumstances, would you say this is the way 235(c)s are normally done?

Mr. SKINNER. No. Let me add that we questioned why this had to be moved so rapidly through the system. To set up an interview on a Sunday and to contact attorneys on a Sunday is highly questionable.

Mr. NADLER. And to contact the attorneys on a Sunday for a Sunday evening interview, and to go ahead with the interview when you didn't reach them.

Mr. SKINNER. That is correct.

Mr. NADLER. And what response did you give to that?

Mr. SKINNER. Arar was not entitled to an attorney.

Mr. NADLER. He was not entitled to an attorney. So why did they call an attorney?

Mr. SKINNER. I am going to be getting into some redacted portions of our report.

Mr. NADLER. They called the attorney for secret reasons?

Mr. SKINNER. Not secret, but for other reasons which would be attorney-client privilege.

Mr. NADLER. Whose attorney-client privilege? Mr. Arar's privilege, his attorney's privilege?

Mr. SKINNER. No. Those that made the decision to move forward without the attorney.

Mr. NADLER. Now, you say that Arar was not entitled to an attorney in this hearing. That is not in the public report. Why isn't it?

Mr. SKINNER. It is not clear under the 235(c) proceedings, at least in my understanding, as to what his rights are.

Mr. NADLER. So he may have been entitled to an attorney.

Mr. SKINNER. Yes. We do know that he does not have a right to go through a hearing. He does not have the right to appeal. It is not clear as to what rights he has with regards to representation.

Mr. NADLER. So it is not clear. But nonetheless, they went through the motions of affording him the right to counsel by calling an attorney on Sunday, but not the reality.

Mr. SKINNER. That is correct.

Mr. NADLER. Now, why they did that is an attorney-client privilege? Why he was given the appearance but not the reality? How can that be attorney-client privilege? Which attorney and what client?

Mr. SKINNER. In this case here, it is those individuals who made the decision to proceed without allowing representation for Arar, or allowing an attorney to be present during the interview.

Mr. NADLER. And some attorney would have advised that decision-maker and the advice he gave him would be attorney-client privilege?

Mr. SKINNER. Yes.

Mr. NADLER. All right. Never mind the advice he gave him. What about the decision that he made? What was the reason for that? That is not privileged.

Mr. SKINNER. The reason he they wanted to do the interview, they wanted to remove as soon as possible, which we were never able to determine why.

Mr. NADLER. So for undetermined reasons of haste, he was denied effective assistance of counsel.

Mr. SKINNER. That is correct.

Mr. NADLER. And you are still attempting to figure out what was the rush?

Mr. SKINNER. I do not know if we will ever determine why because those people that made those decisions refused to be interviewed.

Mr. NADLER. You can't subpoena them?

Mr. SKINNER. No, I do not have subpoena authority.

Mr. NADLER. Who are those people? What are their names? Maybe we will subpoena them.

Mr. SKINNER. Maybe that is the INS commissioner, the chief of staff at INS, and that would be the chief counsel at INS.

Mr. NADLER. At the time, obviously.

Mr. SKINNER. Yes.

Mr. NADLER. Now, Professor Horton, I cut you off because you hadn't finished answering. You said that this was handled unusually even for a 235(c) case. Decisions were made by higher-ups who would not normally have been involved. Can you elaborate?

Mr. HORTON. I think it is quite clear here that the individuals who were involved were not just the commissioner and the commissioner's council, but also figures in the Department of Justice.

Mr. NADLER. How do we know that?

Mr. HORTON. I think it comes out from the report as to who was involved in these meetings at which the decisions were made. We note that there are two individuals from the Office of the Deputy Attorney General who were involved. We know that key decisions were made by the Deputy Attorney General then, as Acting Attorney General, to enable the entire process to move forward.

To me, it seems highly unlikely that the professionals within the INS would have proceeded in this highly expeditious and expedited, contracted, compressed fashion, I think violating normal rules that they would follow involving bringing in counsel, among other things, and allowing reasonable notice, without pressure coming from above for that to happen. I believe that is what happened here.

If we look at the redacted passages of the report, it is clear that immediately before this there is discussion in which we see a footnote which has not been redacted in which the key word appears: habeas corpus. It is clear that there has been extensive discussion here about the fact that——

Mr. NADLER. There has been extensive discussion about how to avoid allowing him to exercise the right of habeas corpus?

Mr. HORTON. Bingo.

Mr. NADLER. Mr. Skinner, do you concur with that? Do you think there was a deliberate plot, a deliberate scheme on the part of high Government officials to arrange things in such a manner, expedited and other ways, so as to make his right to file a writ of habeas corpus not real?

Mr. SKINNER. Mr. Chairman, I would be happy to answer that question in a closed environment.

Mr. NADLER. I am asking your opinion. You do not need a closed environment for an opinion.

Mr. SKINNER. Sir, I am representing the Inspector General's office. I am not going to offer my personal opinions. I do have personal opinions, but I do not think this——

Mr. NADLER. All right.

Mr. Ervin, as an experienced observer and a former Inspector General, do you think the facts and circumstances indicate a deliberate scheme to make sure that he couldn't exercise his habeas corpus right?

Mr. ERVIN. It seems to me that there is no reasonable conclusion otherwise that can be drawn from the facts and circumstances that we know.

Mr. NADLER. Is there any proper legal motive for such a scheme?

Mr. ERVIN. I can think of none.

Mr. NADLER. So you would conclude that such a scheme had to have an illegal or extra-legal motive?

Mr. ERVIN. Well, I do not doubt that the scheme—if we can use that word—was motivated by an intention to protect the United States.

Mr. NADLER. That is not the question.

Mr. ERVIN. But——

Mr. NADLER. Let me just observe, because I want to comment also on the comments by Mr. Rohrabacher before. Lots of terrible things have been done in history by people who were well motivated to protect their country or other notable goals. The reason we have laws and due process is to protect people from men and women of zeal who may be perfectly well motivated. So that is not the question.

If somebody has the motive of protecting the United States, and in order to do that does illegal things, we have laws because we

do not trust people's even well-intentioned motives to protect all of us.

Mr. ERVIN. I completely agree with that. I was trying to be completely comprehensive in my answer. There is no question but that given everything we know, the intention here was to render him to Syria, as opposed to Canada, because of the certainty that he would be tortured in Syria and he would not be in Canada.

Mr. NADLER. And the intention was to take whatever shortcut possible so as to avert any legal challenge such as a writ of habeas corpus that he could bring, which would have stopped that rendition.

Mr. ERVIN. That, to me, is the only reasonable conclusion that can be drawn from this.

Mr. NADLER. Is there anything in our law that would stop them from doing it tomorrow to somebody else, Mr. Ervin?

Mr. ERVIN. Well, yes. The law would have prevented this occurrence, it is just that the laws were not observed.

Mr. NADLER. You think they broke the laws?

Mr. ERVIN. Yes.

Mr. NADLER. Do you think there were criminal violations of the laws?

Mr. ERVIN. I think there should be a criminal inquiry.

Mr. NADLER. What possible criminal laws might have been violated? Excuse me. What criminal laws might have been violated?

Mr. ERVIN. Well, we are a signatory to CAT.

Mr. NADLER. Yes. CAT, okay. And CAT is a criminal statute?

Mr. ERVIN. I believe that a failure to observe this international Convention of Torture would constitute a violation of criminal law.

Mr. NADLER. Okay.

Professor Horton, could you answer the same question please?

Mr. HORTON. Yes. One of the provisions implementing the CAT was section 2340(a) of the criminal code which makes torture and the conspiracy to torture a person a criminal offense.

Mr. NADLER. Any high official who engaged in a—I am trying to look for a word that doesn't have improper connotations—any high official who engaged in a course of conduct with the intent of depriving Mr. Arar of certain legal remedies so that he could be rendered to Syria within the knowledge that he might or probably would be tortured would be guilty of criminal offenses?

Mr. HORTON. Well, I think there are certain defenses built into the statute and built into the CAT that one would have to work one's way through, so there is a process——

Mr. NADLER. Clearly, but assuming those facts were proven?

Mr. HORTON. Prima facie, yes, I think a prima facie case could be made out here, yes.

Mr. NADLER. Mr. Ervin?

Mr. ERVIN. Yes, I agree.

Mr. NADLER. Mr. Skinner, do you agree?

Mr. SKINNER. That is correct. Let me also add, you asked can this happen again. I think with the new policies and procedures put in place, not to say it cannot happen again, but it would be more difficult for it to happen again.

Mr. NADLER. And I am told one of those new procedures is redacted as a secret procedure.

Mr. SKINNER. That is correct. I would be happy to talk to you about that in a classified environment.

Mr. NADLER. Mr. Skinner, given the extraordinary secrecy of this, given the extraordinary secrecy from the beginning up until now, what assurances does the American public have that anyone walking down the street can't be—well, other cases of rendition—well, let me ask you this. We have looked at a number of rendition cases. Am I correct that this is the only one in which the immigration laws were used as a pretext or a fig leaf, which was done supposedly under the immigration laws?

Mr. SKINNER. As far as I know, correct.

Mr. NADLER. And other cases of rendition that we know of were done just completely outside the law?

Mr. SKINNER. They were done outside the territory of the United States, so that U.S. immigration laws did not apply to them.

Mr. NADLER. They were all done outside the territory of the United States, but the CAT still applies and the other criminal laws still apply?

Mr. SKINNER. Yes.

Mr. NADLER. Mr. Ervin, given the extraordinary secrecy here and the evident use or misuse of classification and secrecy to cover up improper conduct, what changes would you recommend so that the American people could be more confident that official misconduct, official torture, official lawbreaking would not be covered up by the secrecy laws?

Mr. ERVIN. Well, I am very concerned by this tendency that we have seen in the last few years to over-classify information. In preparation for this hearing, I reviewed that mechanism that is available to challenge what one considers to be over-classification. The bottom line is at the end of the day the ultimate appeal is to the President. In these circumstances, it is needless to say——

Mr. NADLER. Only the executive? Congress can't declassify something if it wishes?

Mr. ERVIN. My understanding the answer to that is no.

Mr. NADLER. I am told except by a vote of the full House.

Mr. ERVIN. Well, then, if that is true, then that is your remedy.

Mr. NADLER. It is a rather difficult remedy.

Mr. ERVIN. Needless to say, but less difficult under these circumstances than to appeal to the President, of course.

Mr. NADLER. Professor Horton, do we know who the ODAG lawyers who were involved in this were?

Mr. HORTON. They have been identified to me, yes.

Mr. NADLER. And that is public knowledge?

Mr. HORTON. I am not sure it is public knowledge.

Mr. SKINNER. No, it is not public. They are protected under the privacy laws.

Mr. NADLER. Did they cooperate with your inquiry?

Mr. SKINNER. Yes.

Mr. NADLER. What about the Acting Attorney General, Mr. Thompson? Did he cooperate?

Mr. SKINNER. I do not believe we reached out to the Acting Attorney General.

Mr. NADLER. Was he not identified at some point in your report, if memory serves, as having made some of the key decisions here?

Mr. SKINNER. I do not believe he was involved in the decision to remove Mr. Arar to Syria. He made the decision I believe that we would not honor Arar's request to go to Canada because of the porous nature of our borders.

Mr. NADLER. Okay, because it was prejudicial to U.S. interests.

Mr. SKINNER. Yes.

Mr. NADLER. Now, given the fact that he made that decision, he seems to be a key actor in this. Why did you not seek to interview him?

Mr. SKINNER. When we were doing the review, I think the questions that we were asking could have been answered up through the Deputy Attorney General.

Mr. NADLER. Mr. Skinner, I think your report concluded that there is not enough evidence to justify that determination. Didn't you conclude that? Or that you do not have enough information to judge that determination with respect to Canada?

Mr. SKINNER. That is correct.

Mr. NADLER. Therefore, that being the case, shouldn't you have sought further evidence like by interviewing him?

Mr. SKINNER. I believe he signed the letter, but it was the recommendation that came from the Office of the Deputy Attorney General.

Mr. NADLER. Did you interview the Deputy Attorney General?

Mr. SKINNER. We did interview those individuals that were involved in that decision process, those attorneys that were present, who made that recommendation, yes.

Mr. NADLER. Okay.

I now recognize the distinguished Ranking Member, Mr. Franks.

Mr. FRANKS. Thank you, Mr. Chairman. I am glad you waited for me here.

Mr. NADLER. So you could ask questions.

Mr. FRANKS. I appreciate that. You know, I have never been physically afraid of the Chairman, but this gavel here lately is starting to intimidate me. It is pretty loud. [Laughter.]

In your written testimony, Mr. Skinner, you stressed the need to protect certain information from civil discovery and litigation involving Federal officials with national security programs. I understand that. In discussing the need to protect certain information under the Freedom of Information exemption five, you describe the costs of any attempt to make such information public, and you stated that "such disclosures would have ramifications not only for the Department of Homeland Security and the Office of the Inspector General, but for every Office of Inspectors General in the executive branch."

Can you elaborate on that? You make a very good point.

Mr. SKINNER. Yes. We obtain proprietary information with the understanding that we will protect that information. If we ask for documents that are classified secret, for example, we provide assurances that if you turn that over to us, we will in fact protect the classification of that document.

If we do not honor that, then we will lose the opportunity, we will lose our credibility within the department to cooperate with us. That can spread through other departments, and in the other departments why should I give any classified or proprietary informa-

tion to an IG if they cannot provide me assurances that they will protect it.

Mr. FRANKS. That makes sense to me.

On page 35 of the unclassified report, it states that ICE concurred with our recommendations and is taking steps to implement them, and that it didn't appear that any INS personnel, whose activities that your reviewed, violated any existing law, regulation or policy with respect to the removal of Mr. Arar. And you said that their responses to the recommendations resolved and closed the situation.

Can you elaborate on that a little bit?

Mr. SKINNER. Yes. Again, that is their statement. During the course of our review, we did not find anyone within the Department of Homeland Security that had violated any law or regulation. I think we also qualified that. That is, we were unable to interview everyone in the Department of Homeland Security that were involved in this case, particularly the INS commissioner at the time, the chief of staff, and chief counsel. So we qualified our statement in accepting their concurrence with our recommendations.

Mr. FRANKS. Okay. The Department of Justice's written response to the incident states "that the removal of Mr. Arar to Syria complied with all legal obligations. As the Attorney General recently testified, there were assurances sought that Mr. Arar would not be tortured from Syria." They sought those assurances. "Mr. Arar's removal order incorporated the determination by the commissioner of the INS that his removal was consistent with the Convention Against Torture, and in sum, the United States remains strongly committed to the worldwide elimination of torture."

Now, I know that there are some really difficult circumstances here to fathom and to understand. As I said earlier, the last thing I want to do is to see any injustice done to anyone. But I do want to try to go on the record here that at least from the stated perspective that there is a strong commitment by the United States to the worldwide elimination of torture. I do not know of anyone on this Committee that isn't absolutely committed to that, from the farthest to the right to the farthest to the left.

Do you have any information that contradicts their statement in that regard, that they at least have not tried to do everything they could to prevent torture, and their commitment to worldwide elimination of torture is still in place? Any contradiction of that?

Mr. SKINNER. I can. We would have to talk about this in a closed environment. But I do say that the information that was provided was in fact ambiguous.

Mr. FRANKS. Mr. Chairman, I am just wondering. I would be interested in learning more about this in some type of classified setting.

With that, I will yield back.

Mr. NADLER. I thank the gentleman.

We will go on to the next round, and I recognize myself for 5 minutes.

Mr. Ervin, would you answer Mr. Frank's last question that he addressed to Mr. Skinner?

Mr. ERVIN. If I understood the question, was there a reason to think that Syria would not engage in torture—essentially that was the question as I understood it.

Mr. NADLER. Was there a reason to believe that the people involved here were not committed against torture. That was the question.

Mr. FRANKS. I am sorry, Mr. Chairman. The Attorney General testified that "there were assurances sought that Mr. Arar would not be tortured in Syria." In other words, they sought those assurances, and they tried to follow the rules. In sum, he says that the United States strongly remains committed to the worldwide elimination of torture.

Do you know something that we don't that would contradict that statement?

Mr. NADLER. Or something that we do know.

Mr. ERVIN. Right. Well, I think we have talked about that a number of times during the course of the hearing. The President himself, the secretary of state, the reports of the Department of State routinely list Syria as a practitioner or torture. That itself, it seems to me, ought to have made it clear to the relevant officials here that to render Mr. Arar to Syria would make it more likely than not that he would be tortured. Indeed, it seems to me that that was precisely the reason that he was so rendered.

Mr. NADLER. And what about the assurances that we got from Syria that he would not be tortured? What reliability could be put on those assurances?

Mr. ERVIN. None, as a practical matter, because we talked a second ago about the distinction between diplomatic assurances, which are rather formal, and assurances, which is what we had here, which are informal. So there was no basis, it seems to me, given the assurances that were obtained, to think that Syria would not engage in torture under these circumstances.

Mr. NADLER. Thank you.

Now, to Professor Horton, it seems possible, perhaps likely, that privilege and in fact classification, but certainly privilege was used here to ensure that facts do not come out publicly so that the Administration can play fast and loose with facts in the litigation initiated by Mr. Arar.

Do you think this is the case? In other words, do you think that privilege is being misused here to prevent facts from coming out that might be useful in Mr. Arar's litigation? If so, is this an appropriate use of privilege?

Mr. HORTON. I think there is a high likelihood that the sweeping scope of privilege that has been invoked here has been designed to avoid publication of a complete statement of the facts that would show particularly the involvement of a number of fairly high-ranking players, especially people in the Office of the Deputy Attorney General.

I think that there seems to be a concern that the report might contradict the positions that the Department of Justice has taken in that litigation—positions as to fact. I do not think that is an appropriate use of privilege. I would just say, look, within the Department of Justice, most key decision-makers are attorneys. They have a law license, but that doesn't mean that everything that they do

is subject to an attorney-client privilege. Here, there seems to be a far too sweeping view of it. So their actual actions certainly are not covered by that privilege.

Mr. NADLER. Mr. Ervin, would you comment on the same question?

Mr. ERVIN. I completely agree with that. That is the distinction I was trying to draw in my formal statement, that there certainly were some privileges here, but it seems to me that there was an attempt to use privileges, legitimate privileges, over-broadly so as to cover-up information that would merely be embarrassing and perhaps inculpatory.

Mr. NADLER. Let me ask the last question that I am going to ask, and that is Mr. Arar was obviously subject to torture in Syria. He apparently, even from the report it is pretty clear, even what we do not know from the report, that he was deliberately rendered to Syria, or at least he was deliberately rendered to Syria either for the purpose of being tortured, which you certainly could gather, or in reckless disregard of whether he would be. That would seem to violate his rights, to put it mildly. He has instituted litigation, and that litigation so far has been dismissed on procedural grounds.

Is there anything that any of you would recommend to change the law or the practice in such a way that someone who might have the same kinds of violations done to him would be able to get a day in court properly without the procedural dismissals?

Mr. SKINNER. Let me say, we have to develop some policies, some procedures, and we must adhere to them. We do not want to get in the position where we have to go to court. We should never be in a position to begin with. I think outlining some clear policies, procedures, processes as to how you deal with cases like this and adherence to the policies and procedures will prevent this from happening again. I think the department in fact has taken some steps to ensure, or at least to mitigate this ever recurring within the department.

Mr. NADLER. Thank you.

Do either of you have any comments?

With that, I will yield back.

I recognize the gentleman from Arizona.

Mr. FRANKS. Mr. Chairman, just to kind of summarize my own perspective here, it is obvious or pretty clear to me that there were mistakes made here, but it appears to me that at least on the American side that most of those mistakes were predicated upon false information from Canada, and at least what is in evidence seems to be that the Americans generally tried to do the right thing.

Now, it appears from some of the panel members here that I am hearing almost an implied statement that somehow the United States deliberately, willfully, and knowingly sent Mr. Arar to Syria to be tortured. There is nothing in the evidence that has been presented here that convinces me of that.

However, if there is some type of evidence that can change my mind on that in a classified setting, I am certainly open to hearing that because I think that Congress is first and foremost about justice, about defending the innocent against the malevolent. If there

is malevolence here deliberately, I haven't seen it, but I am willing to hear it in a classified setting if the Chairman is inclined.

With that, Mr. Chairman, it seems to me like there has been a tragic situation occur here, but it is based primarily on information that Americans thought they could rely on from Canada, and it turned out to be unreliable.

With that, I yield back.

Mr. NADLER. Before closing the hearing, let me just observe that assuming the information from Canada had been reliable, what we are dealing with is what happened afterwards. Assuming the information was reliable and that Mr. Arar in fact was a terrorist, or that there were a lot of reasons to suspect he was, he was then given to Syria and tortured. It is not supposed to happen even to suspects who may in fact be guilty. So it is a different question. So the question is what do we do about that kind of thing.

I want to thank the witnesses. That concludes our hearing. Without objection, all Members will have 5 legislative days to submit to the Chair additional written questions for the witnesses, which we will forward and ask the witnesses to respond as promptly as you can so that the answers may be made part of the record.

Without objection, all Members will have 5 legislative days to submit any additional materials for inclusion in the record.

Again, I thank the witnesses.

With that, this hearing is adjourned.

[Whereupon, at 2:13 p.m., the Subcommittees were adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF THE HONORABLE STEVE COHEN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TENNESSEE, AND MEMBER, SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

The Bush Administration's practice of "extraordinary rendition" violates fundamental of American values and basic human rights. From what we know of this program, the Administration detains individuals and then sends them to third countries that are not constrained by the basic civil liberties and human rights guarantees of our Constitution and laws. Often times, the Administration does so knowing that the individual will be tortured, as the facts of Maher Arar's case illustrate.

What I find even more disturbing in some ways is the secrecy that continues to surround the Administration's "War on Terror." Mr. Conyers asked the Department of Homeland Security to investigate the Arar case as well as the policies and procedures governing rendition some four years ago. DHS responded only last December. Moreover, DHS, and the Administration generally, continues to refuse to release much information concerning rendition. Such secrecy does not serve the American public and threatens to undermine democracy.

DOCUMENT FROM THE DEPARTMENT OF HOMELAND SECURITY, OFFICE OF INSPECTOR GENERAL ENTITLED (U) THE REMOVAL OF A CANADIAN CITIZEN TO SYRIA

SECRET//NOFORN

DEPARTMENT OF HOMELAND SECURITY

Office of Inspector General

(U) The Removal of a Canadian Citizen to Syria

Derived from: Multiple Sources
Declassify On: 20300114

OIG-08-18

March 2008

SECRET//NOFORN

Office of Inspector General

U.S. Department of Homeland Security
Washington, DC 20528

(U) Preface

(U) The Department of Homeland Security Office of Inspector General (OIG) was established by the Homeland Security Act of 2002 (*Public Law 107-296*) by amendment to the Inspector General Act of 1978. This is one of a series of audit, inspection, and special reports prepared as part of our oversight responsibilities to promote economy, effectiveness, and efficiency within the department.

(U) This report assesses the processes and procedures used by U.S. immigration officials to deny Maher Arar admission to the United States and subsequently remove him to Syria. It is based on interviews with employees and officials of relevant agencies and institutions and a review of applicable documents.

(U) The recommendations herein have been developed to the best knowledge available to our office, and have been discussed in draft with those responsible for implementation. It is our hope that this report will result in more effective, efficient, and economical operations. We express our appreciation to all of those who contributed to the preparation of this report.

Richard L. Skinner
Inspector General

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Withheld in Full
5 U.S.C. § 552 (b)(2)

OIG

Department of Homeland Security
Office of Inspector General

(U) Executive Summary

(U) Maher Arar, a dual citizen of Canada and Syria, arrived at John F. Kennedy (JFK) International Airport in Queens, NY. His flight originated in Tunisia and arrived at JFK on Thursday, September 26, 2002, from Zurich, Switzerland. Arar applied for admission to the United States so he could transfer to his connecting flight to Canada, his country of residence.

(U) Arar was identified as a special interest alien who was suspected of affiliations with a terrorist organization. He was apprehended by inspectors of the Immigration and Naturalization Service (INS) at JFK, questioned by federal agents, and transferred to a nearby federal detention center. INS determined Arar inadmissible to the United States on the grounds that he was a member of a foreign terrorist organization and was removed on Tuesday, October 8, 2002. INS flew him to Amman, Jordan, and he was later taken into custody by Syrian officials. After Arar returned to Canada in October 2003, he alleged that he was beaten and tortured while in the custody of the Syrian government.

(U) Our review examined (1) the process applied by INS in determining that Arar was inadmissible to the United States, (2) the process to designate Syria as Arar's country of removal, and (3) how INS assessed Arar's eligibility for protection under the *United Nations Convention Against Torture*. For more information about our purpose, scope, and methodology, please see Appendix A.

(U) INS appropriately determined that Arar was inadmissible under relevant provisions of immigration law. INS officials analyzed the derogatory information regarding Arar's background, songht clarification of facts and statements made by the U.S. agencies that provided the information, and determined the appropriateness of the specific immigration charge. Because of the particular removal proceeding used by INS, Arar was not entitled to a complete statement of the facts about him, a hearing before an immigration judge, or any appeal.

(U) Syria was designated as Arar's country of removal. INS could have attempted to remove Arar to Canada, his country of citizenship, or Switzerland, his point of embarkation to the United States. Further, Arar specifically requested to be returned to Canada and formally stated his opposition to returning to Syria. However, the Acting Attorney General ruled against removing Arar to Canada because it was determined that removal to Canada was prejudicial to the interests of the U.S. Also, U.S. officials determined that they could ignore Arar's request and choose any of the three countries as a destination to remove Arar.

(U) INS followed procedures in assessing Arar's eligibility for protection under Article 3 of the *United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT).[1] [redacted] Per consultation with DHS 5 USC § 552 (b)(5) [redacted]. The assurances upon which INS based Arar's removal were ambiguous regarding the source or authority purporting to bind the Syrian government to protect Arar.

(U) We are making the following recommendations to the Assistant Secretary for Immigration and Customs Enforcement:

(U) **Recommendation #1:** Implement a policy to afford aliens subject to removal under section 235(c) proceedings of the Immigration and Nationality Act, a specified minimum amount of time to respond to the initial charges against them.

(S) **Recommendation #2:** [redacted] 5 USC § 552 (b)(1) [redacted]

[1] (U) *United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Article 3, June 26, 1987.

(U) Background

(U) Maher Arar

(U) Maher Arar is a dual citizen of Canada and Syria, and a resident of Ottawa, Canada. On Thursday, September 26, 2002, Arar arrived at JFK aboard American Airlines flight 65. He had just spent three months in Tunisia with his wife and two children. Arar arrived at JFK after an intermediate stop in Zurich, Switzerland. After his arrival at JFK at 1:55 p.m., Arar presented a Canadian passport for admission into the United States as a nonimmigrant in order to transit through JFK to catch a flight for Montreal, Canada, which was scheduled to depart at 5:05 p.m. that day. Arar did not formally apply for admission to the United States, but because he did not have a transit visa, by operation of law he was deemed an applicant for admission.

(U) En route from Zurich, Arar was identified in the Department of State's (DOS) "TIPOFF" system as a "special interest" alien who was suspected of affiliations to terrorist activity and was described as "armed and dangerous." The TIPOFF database, at the time of Arar's arrival in the United States, was the principal database containing names of known and suspected terrorists. If an INS inspector queried the TIPOFF system with passenger information from the Advance Passenger Information System and a match occurred, the INS inspector would receive a message that the alien was the subject of a lookout. A lookout is an entry in one of several immigration and security databases that lists previously deported aliens, criminal aliens, or other aliens who were of interest to law enforcement agencies. If an alien is the subject of a lookout, this is an indication that an alien might be inadmissible to the United States and requires additional review at a U.S. port of entry (POE). Before Arar arrived at JFK, a team from the New York Federal Bureau of Investigation's (FBI) Joint Terrorism Task Force (JTTF) was dispatched to interview Arar upon his arrival at JFK.

(U) Upon his arrival, Arar was immediately referred by INS inspectors to secondary inspections. The JTTF investigators interviewed Arar that afternoon at the INS secondary inspections facility at JFK's American Airlines terminal. The JTTF investigators concluded that they had no interest in Arar as an investigative subject. Arar was turned over to INS inspectors who determined that he was inadmissible to the United States. The INS inspectors allowed Arar to voluntarily withdraw his application for admission so he could return to Zurich, his original point of embarkation. Arar agreed to withdraw his application for admission to the United States in order to return to Zurich. While waiting for his flight to depart, Arar continued to be

detained for additional interviews with the JTTF. The next day, Friday, September 27, 2002, INS made the decision to rescind the original offer to Arar to withdraw his application.

(U) Arar was determined by INS to be inadmissible to the United States on the grounds that he was a member of a foreign terrorist organization. On Tuesday, October 8, 2002, Arar was transported by an INS "Special Response Team" to Teterboro Airport in New Jersey, where he was flown by private aircraft to Dulles International Airport near Washington, DC. At Dulles, an INS "special removal unit" boarded the plane, then accompanied Arar to Amman, Jordan, where he arrived on Wednesday, October 9, 2002. Arar was later transferred to the custody of Syrian officials.

(U) Arar was released by Syrian authorities and returned to Canada in October 2003, about a year after his initial apprehension at JFK. He alleged that he was beaten and tortured while in the custody of the Syrian government. Arar sued the governments of Canada and the United States for the alleged wrongful removal to Syria.

(U) The Canadian government appointed a special commission to conduct an inquiry regarding the involvement of the Canadian government in the Arar matter in February 2004.[2] The commission completed its work in October 2005 and released a redacted report detailing its findings and recommendations in September 2006. In August 2007, the commission released additional information that was redacted from the September 2006 report.

(U) Federal Court Ruling

(U) On February 16, 2006, the U.S. District Court, Eastern District of New York, issued a ruling on the complaint that Arar filed against the U.S. government. Arar's complaint consisted of four counts of alleged wrongdoing by the U.S. government:[3]

(U) 1. Violated the Torture Victim Prevention Act by "conspiring with and/or aiding and abetting Jordanian and Syrian officials to bring about his [Arar's] torture."

[2] (U) See the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar website at http://www.ararcommission.ca/eng/index.htm.
[3] (U) Maher Arar v. Ashcroft, et al, 414 F. Supp. 2d 250 (E.D. NY 2006).

(U) 2. Violated Arar's Fifth Amendment rights by "knowingly and intentionally subjecting him to torture and coercive interrogation in Syria."

(U) 3. As a result of the actions of the U.S. government, Arar was subjected to "arbitrary and indefinite detention in Syria."

(U) 4. Arar suffered "outrageous, excessive, cruel, inhumane and degrading conditions of confinement" while in INS detention in New York.

(U) The judge, in his deliberations, considered the jurisdictional basis and legal sufficiency of Arar's complaint. The judge ruled, in the first three counts of the complaint, that there was no jurisdictional basis for Arar's complaint. He dismissed the first three counts with prejudice. On the fourth count, he ruled that Arar had not sufficiently identified the specific actions taken by the U.S. government that substantiated his claim that his detention in New York violated his civil rights. However, the judge left open the possibility for Arar to replead the fourth count by dismissing it without prejudice.

(U) On July 14, 2006, Arar notified the court that he would not replead the fourth count. On August 16, 2006, the court entered judgment dismissing Arar's claims for declaratory relief against the defendants in their official capacities with prejudice; dismissing his claims against officials of the U.S. government in their individual capacities with prejudice; and dismissing Arar's claims against all John Doe defendants with prejudice.

(U) The judge's ruling considered the technical merits of Arar's complaint without addressing the validity or appropriateness of the actions taken by the U.S. government in the matter. On September 12, 2006, Arar appealed to the U.S. Court of Appeals for the Second Circuit.

(U) Results of Review

(U) Inadmissibility Determination

(S) [redacted] 8 USC § 1182 (b)(1) [redacted]

[redacted]

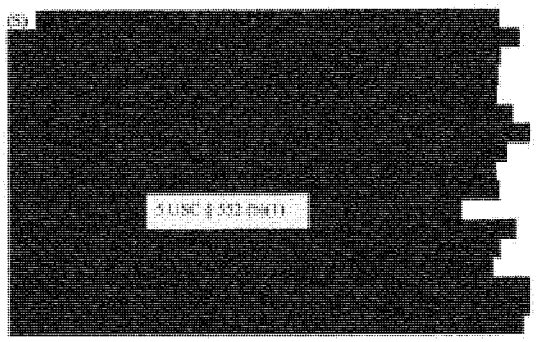
(U) INS elected to remove Arar pursuant to section 235(c). The section 235(c) removal proceeding is rarely used to exclude someone from the United States. Most aliens found inadmissible are removed pursuant to INA section 240 proceedings.[4] Section 240 removal proceedings involve hearings before immigration judges, the aliens' right of access to counsel, and the aliens' right to appeal immigration judges' decisions to the Board of Immigration Appeals. By using a section 235(c) proceeding, INS could use classified information to substantiate the charge without any risk that the classified information would be disclosed during an open hearing in an immigration court.

(U) Apprehension at JFK

(U) On Thursday, September 26, 2002, at 1:06 p.m., INS inspectors at JFK conducted a routine screening of the passenger manifest, provided by the Advance Passenger Information System (APIS), for Arar's inbound flight. APIS, at the time of Arar's arrival in the United States, was a system used to identify inadmissible aliens and prevent their entry into the United States. Air carriers participating in APIS submitted passenger data when their planes departed foreign airports for the United States. The results of the screening showed that a passenger on American Airlines flight 65 from Zurich, due in at 1:55 p.m., was the subject of a TIPOFF lookout. The passenger was Maher Arar. According to instructions contained in the lookout, INS inspectors notified the FBI's New York JTTF. JTTF agents proceeded to JFK to interview Arar.

[4] (U) Section 240 of the INA is codified at 8 U.S.C. § 1229a.

(U) Arar arrived at JFK, after having been in Tunisia with his family, and applied for admission into the United States in transit to Canada. He was scheduled to depart JFK for Montreal at 5:05 p.m. However, the INS inspector at the primary inspections station sent Arar to secondary inspections to confirm whether Arar was the person specified in the TIPOFF lookout.[5] INS inspectors in secondary inspections confirmed that Arar was the person named in the lookout. At 3:00 p.m., JTTF agents, consisting of INS special agents, New York City Police Department Intelligence Division detectives, and FBI special agents, interviewed Arar.



[5] (U) INS inspectors screen all arriving aliens during the primary inspections process. The INS inspectors ask the aliens basic questions, verify the identity of the aliens, review their travel and identity documents for validity, and query their names and passport numbers in various U.S. immigration databases. If the INS inspectors believe or suspect that the aliens might not be admissible into the United States or they find derogatory information concerning the aliens during the database queries, the aliens are further screened in the secondary inspections process. In secondary inspections, INS inspectors interview the aliens and conduct additional database queries. A final determination on the aliens' admissibility is usually made in secondary inspections, as well as the applicability of any administrative or criminal charges.

[6] (U) A nonimmigrant applicant for admission who is inadmissible for non-serious, non-deliberate immigration violations may be offered a Withdrawal of Application for Admission at a POE, rather than be detained for a removal hearing before an immigration judge or placed in expedited removal proceedings. The offer of withdrawal is discretionary on the part of INS and acceptance is voluntary on the part of the alien in lieu of removal proceedings. Aliens who withdraw their applications for admission are not considered formally removed and therefore do not require permission to reapply for admission to the United States. Once the reason for the alien's inadmissibility is overcome, the alien may be eligible to apply for a new visa or admission to reenter the United States. An alien who is permitted to withdraw must depart immediately from the United States, or as soon as return transportation can be arranged. (INA, section 235(a)(4), and Code of Federal Regulations (CFR), Title 8, section 235.4.)

5 USC § 552 (b)(1)

(U) Arar agreed to withdraw his application for admission. INS inspectors prepared INS Form I-275, Withdrawal of Application for Admission/Consular Notification, which Arar signed. INS planned to return Arar to Zurich on Friday, September 27, 2002. At this point in time, INS inspectors at JFK were handling Arar's case as a routine matter. As with the New York JTTF, the INS inspectors at JFK had no idea that there was such high-level interest in Arar in Washington, DC. However, the JTTF investigators requested that INS detain Arar while he awaited the flight to Zurich as JTTF investigators planned to re-interview Arar at 8:00 a.m. on Friday, September 27, 2002.

(U) High Level Interest in Arar

(U) DOJ and INS officials in Washington, DC learned of Arar's apprehension on the evening of Thursday, September 26, 2002. A meeting took place in the office of the INS Commissioner involving the Commissioner, the INS Chief of Staff, and INS attorneys.

Per consult with DHS
5 USC § 552 (h)(5)

(U) On Friday, September 27, 2002, INS inspectors, at the direction of the INS Eastern Regional Director, canceled Arar's original withdrawal of application and planned return to Switzerland. INS inspectors, again at the direction of the INS Eastern Regional Director, offered Arar a new opportunity to withdraw if he agreed to return to Syria. When he refused, INS inspectors told Arar that if he did not agree to return to Syria, he would be charged as a terrorist and removed under section 235(c) of the INA. The former INS Eastern Regional Director said that all discussions regarding the Arar case occurred with INS operations staff and attorneys at INS Headquarters. The Regional Director could not specifically recall who first discussed returning Arar to Syria. The Regional Director also could not recall when the 235(c) proceeding against Arar was first considered, but believed that it occurred during discussions with INS Headquarters. The Regional Director said that when he first became involved, he was unaware that an I-275 had been prepared earlier that would have allowed Arar to return to Switzerland. It was only after INS Headquarters contacted the INS Eastern Regional Director about Arar, sometime after the INS inspectors at JFK prepared the I-275, that he became involved in the processing of the case and cancelled the original I-275.

(U) [redacted]

Per consult with DHS
5 USC § 552 (b)(3)

(U) [redacted]

Per consult with DHS
5 USC § 552 (b)(3)

Second, the porous nature of the U.S.-Canadian border would enable Arar to easily return to the United States.

(S) [redacted]

5 USC § 552 (b)(1)

[7] (U) An abbreviated summary of this report is available at www.ararcommission.ca/eng/SummaryInCameraHearings-Dec20.pdf.

(S) [redacted]

5 USC § 552 (b)(1)

(U) Use of Classified Information

(S//NF) [redacted]

5 USC § 552 (b)(1)

(S) [redacted]

5 USC § 552 (b)(1)

(U) The Removal of a Canadian Citizen to Syria

5 USC § 552 (b)(1)

(U) Arar was served with the INS Form I-147 on Tuesday, October 1, 2002.[8] The form advised Arar that he would be removed from the United States

[8] (U) The Form I-147, "Notice of Temporary Inadmissibility," informs the alien that he or she was found inadmissible and denotes the INA provision governing inadmissibility. The form usually affords the alien the opportunity to respond

under the section 235(c) proceeding and he was given 5 days to respond. Both the INS Assistant District Director for Inspections and Arar signed the form. However, the form did not specify the underlying reasons for the section 235(c) proceeding, nor did it inform Arar of the country to which he would be removed. Work on the draft I-148 classified addendum continued throughout the week (after October 1, 2002). Versions of the draft were exchanged several times for review and comment between INS, the FBI, and INS' Eastern Region office.

(U) Process Concerns

(U) As these discussions were taking place in Washington, DC, Arar was transported on Saturday, September 28, 2002, from JFK to the Federal Bureau of Prison's (BOP) Metropolitan Detention Center (MDC) located in Brooklyn, NY. The detention facilities at JFK were intended for short periods of detention, usually a maximum of 12 hours. In BOP detention facilities, Special Housing Units (SHU) are designed to segregate inmates who commit disciplinary infractions or who require administrative separation from the rest of the facility's population. Arar was held in the most restrictive type of SHU - an Administrative Maximum (ADMAX) SHU. According to BOP officials, ADMAX units are not common in most BOP facilities because the conditions of confinement for disciplinary segregation or administrative detention in a normal SHU are usually sufficient for correcting inmate misbehavior and addressing security concerns. Detainees in the ADMAX SHU are restricted to their cells, have limited use of telephones with strict frequency and duration restrictions, and can only move outside their cells for specific purposes and while restrained and accompanied by MDC staff. While this transfer was not necessarily intended to frustrate any attempt by Arar to seek assistance or legal representation, MDC's restrictive environment contributed to his difficulties in obtaining counsel and advice on his immigration case.

(U) Legal Representation

(U) [redacted] Per consult with DHS 5 USC § 552 (b)(5) [redacted] INS was aware of two attorneys who represented Arar, which we confirmed during our interviews. INS provided Arar with a list of pro bono attorneys when he was served with the I-147 on Tuesday, October 1, 2002, as a matter of INS procedure. Arar's family did not contact an immigration attorney in New York City to locate Arar until after Arar was served with the I-147.

to the charges within a specified period of time. The I-147 served on Arar did not provide details of the charges against him, but did assert his alleged membership in Al-Qaeda.

Therefore, the INS attorneys that were discussing this on Monday, September 30, 2002, had no knowledge of the actions either contemplated or taken by Arar's family to obtain legal representation for Arar. An ODAG attorney told us that Arar had access to counsel, as his attorney visited him at the MDC.

(U) Consular Notification

(U) Another immigration process issue concerned consular notification. INS was required to notify every alien of his or her right to communicate by telephone with appropriate officers of the alien's country of nationality in the United States, when the alien's removal could not be accomplished immediately and the alien must be placed in detention for longer than 24 hours.[9]

(U) After his apprehension at JFK, INS inspectors afforded Arar the opportunity to call the Canadian consulate on Thursday, September 26, 2002, but he elected not to call. However, when the withdrawal of application and removal to Switzerland was cancelled, Arar asked to call the Canadian consulate on Friday, September 27, 2002. According to an INS inspector, this request was denied by the New York JTTF because it was concerned that an outside phone call might jeopardize the investigation of Arar. When Arar was served with the I-147 on Tuesday, October 1, 2002, he was provided with a list of foreign consulates in New York City, including both the Canadian and Syrian consular offices. We know of only one telephone call that Arar made during his detention in New York. That was made to his family in Ottawa, Canada, who notified the Office for Canadian Consular Affairs. According to the complaint filed by Arar against the U.S. government, a Canadian consular officer visited him at MDC on Thursday, October 3, 2002. Arar's alien file (A-file) included a notation that an official from the Canadian consulate visited him on this day. Further, Arar's immigration attorney confirmed this visit. We did not interview Canadian officials for our report. However, the visit is described in the RCMP Report, p. 18 (see footnote 7).

(U) Time to Respond to Charges

(U) One final issue with process involved the amount of time Arar was allowed to respond to the I-147 before he was served with the final order of removal. [redacted]

Per consult with DHS
5 USC § 552 (b)(5)

[9] (U) 8 CFR section 236.1(e), and the INS Inspectors' Field Manual, section 17.156.

[redacted]

(U) [redacted]

Per consult with DHS and DOJ
5 USC § 552 (b)(5)

[redacted] Arar was served with the I-147 on Tuesday, October 1, 2002, and did not file a response. The I-148 addendum was completed on Monday, October 7, 2002. Arar was served with the I-148 and the unclassified addendum at 4:30 a.m. on Tuesday, October 8, 2002, while being transported to the airport en route to Syria.

(U) Attorney Visit with Arar

(U) In early October 2002, almost a week after his Thursday, September 26, 2002 apprehension at JFK, Arar's family in Canada contacted a private immigration attorney in New York City. They knew Arar had been detained by INS but did not know the basis for his detention or where he was held. The immigration attorney agreed to determine the circumstances of Arar's detention. Importantly though, the immigration attorney never became Arar's "attorney of record." The immigration attorney was retained by Arar's family only to ascertain the circumstances of detention and never filed a Form G-28 with the immigration court or INS.[11] The immigration attorney later provided Arar with contact information for the criminal attorney.

(U) The immigration attorney met with Arar on Saturday, October 5, 2002. Their meeting was held in an interview room at the MDC and lasted about one and a half hours. The meeting was non-contact as the immigration attorney and Arar were separated by a glass partition. The immigration attorney described Arar as emotional and distraught, and confused about the nature of the immigration charges. He was also adamantly opposed to being removed to Syria. The immigration attorney assured Arar that if he was afraid to go to

[10] (U) A *habeas corpus* petition is a petition filed with a court by a person who objects to his or another's detention or imprisonment. A writ of *habeas corpus* is a judicial mandate to a prison official, or an official ordering detention, ordering that a detainee be brought to the court so it can determine whether or not that person is imprisoned lawfully, and whether or not he or she should be released from custody.

[11] (U) Immigration attorneys, as well as representatives of religious, charitable, social service, or similar organizations, who are representing specific aliens before the immigration court, the Executive Office for Immigration Review, are required to file a Form G-28.

Syria, he could apply for protection. During the visit, Arar said that a representative from the Canadian government had visited him at MDC on Thursday, October 3, 2002.

(U) During their visit, the immigration attorney recalled that Arar had an INS Form I-862, Notice to Appear (NTA) he had received.[12] However, INS officials said that an NTA was never served on Arar as it was inappropriate for the charge. We could not find any record of an NTA ever being served on Arar. According to the attorney, Arar did not mention the 5-day deadline. At the time of this meeting, Arar's response was due the next day.[13]

(U) The immigration attorney presumed that Arar's case would go through normal processes, which meant Arar would have had a bond hearing in a few days, at which time a date would be set for his hearing before an immigration judge. Knowledge of the 5-day response time could have signaled to the immigration attorney that Arar was being subjected to an extraordinary process.

(U) Summary

(S) [redacted] 5 USC § 552 (b)(1) [redacted]

(U) We are aware that Arar has denied any terrorist connections. Further, according to media reports, while in its custody, the Syrian government obtained a confession from Arar but could find no terrorist link.[14] However, at the time, INS could not dismiss derogatory information provided, nor did it have the capability to independently verify the information.

(S) [redacted] 5 USC § 552 (b)(1) [redacted]

[12] (U) An NTA is a charging document issued by INS to an alien to commence formal removal proceedings under section 240 of the INA.
[13] (U) The I-147 was served on Arar on Tuesday, October 1, 2002. His response was due Sunday, October 6, 2002. This meeting took place on Saturday, October 5, 2002.
[14] (U) *The New York Times*, February 15, 2005.

(U) Being removed under section 235(c) meant that Arar was not entitled to a hearing before an immigration judge or any subsequent opportunity to appeal. However, Arar might have been eligible for protection under the CAT.

(U) Given the seriousness of the charges, the intent to remove him to Syria, and his highly restrictive detention conditions at MDC, we question the reasonableness of the length of time he was given to comprehend and respond to the charges against him and his ability to obtain counsel. Arar was in a maximum security detention facility and as such, was virtually incapable of harming national security or public safety and had very limited opportunities to communicate with anyone. An ODAG attorney said that the process to remove Arar moved very quickly. However, he said that it was imperative to resolve the matter consistent with applicable law.

(U) Recommendation

(U) We recommend that the Assistant Secretary for Immigration and Customs Enforcement:

(U) **Recommendation #1**: Implement a policy to afford aliens subject to removal under section 235(c) proceedings of the Immigration and Nationality Act, a specified minimum amount of time to respond to the initial charges against them.

(U) Country Designation Process

(U) The determination to remove Arar to Syria was more controversial. While he was both a Canadian and Syrian national, his Syrian passport had expired. Further, most aliens found inadmissible at a U.S. POE are returned to the country from which they departed for the United States. In Arar's case, that would have been Switzerland. Canada was also an option and would have been a more efficient country of return, both logistically and economically.

(U) Initial Discussions Regarding Syria

(S) [redacted] 5 USC § 552 (b)(1) [redacted]

[redacted] 5 USC § 552 (b)(1) [redacted]

(U) Two ODAG attorneys described a meeting on Thursday, October 3, 2002, between all three ODAG attorneys we identified as being involved in the matter and the INS Commissioner. [redacted] Per consult with DOJ 5 USC § 552 (b)(5) [redacted]

(U) On Friday, October 4, 2002, the INS Eastern Regional Director provided a memorandum to Arar requesting that he designate the country to which he wanted to be removed. Arar requested that he be sent to Canada. However, in a letter to the INS Eastern Regional Director, dated Monday, October 7, 2002, the Acting Attorney General disregarded Arar's request to return to Canada because it would be "prejudicial to the interest of the United States."[15]

(U) According to one INS attorney, the decision to remove Arar to Syria was made during a meeting between INS, including the INS Commissioner and General Counsel, and two ODAG attorneys on Friday, October 4, 2002, in the DOJ Command Center.[16] However, two ODAG attorneys told us that the INS Commissioner was still considering where to remove Arar on Saturday, October 5, 2002, and Sunday, October 6, 2002. Notes taken during a meeting on Saturday, October 5, 2002, by one of the ODAG attorneys seem to indicate that the Commissioner had not made a final decision on where to remove Arar on that day.

[redacted] 5 USC § 552 (b)(1) [redacted]

[15] (U) The Deputy Attorney General signed this memorandum as the Acting Attorney General because the Attorney General was out of the country at the time.

[16] (U) Both ODAG attorneys told us that, as staff of the Deputy Attorney General, they did not have the legal authority to direct the INS Commissioner to make a decision.

(U) Country Designation Law

(U) Under section 240 removal procedures, the INA directs removal to the country of embarkation, in this case Switzerland.[17] If the country of embarkation is unwilling to receive the alien, then other choices become available, such as country of citizenship or birth, in Arar's case Canada or Syria.[18]

(U) Section 241(b)(2) of the INA, 8 U.S.C. § 1231(b)(2), establishes for those aliens not removed under section 240 proceedings, e.g., those removed under section 235(c), other rules for determining the country for removal with the first consideration being the country that the alien designates. While Arar designated Canada, there is no evidence that Canada officially refused to accept him.

(U) The INA gave the Attorney General the authority to disregard the alien's country of choice under certain circumstances, such as when the alien fails to designate a country promptly. Significantly, the Attorney General can disregard the alien's country of choice if the Attorney General determines that removal to that country is prejudicial to the United States, which was the provision invoked in Arar's case. We do not know on what basis the Acting Attorney General deemed Arar's return to Canada as prejudicial to the interests of the United States. The memorandum signed by the Acting Attorney General did not specify the reason why Arar's return to Canada would be prejudicial to the interests of the United States. However, one INS attorney told us that there was concern about the porous nature of the U.S.-Canadian border and that returning Arar to Canada would not prevent him from returning to the United States for nefarious purposes.

(U) An INS attorney told us that INS had the understanding that the designation of a country was a process of moving down the list of options until the next in order could work, and that the process should have stopped with the country of citizenship or the country of embarkation.[19] This approach is used under section 240 removal proceedings, not for other types of removals.

(U) [redacted] Per Consult with DHS 5 USC § 552 (b)(5) [redacted]

[17] (U) 8 U.S.C. § 1231(b)(1)(A).
[18] (U) 8 U.S.C. § 1231(b)(1)(C).
[19] (U) INA, section 241(b)(1)(C), 8 U.S.C. § 1231(b)(1)(C).

Per Consult with DHS and DOJ
5 USC § 552 (b)(5)

(U) Summary

(U) Syria was designated as Arar's country of removal

Per Consult with DHS and DOJ
5 USC § 552 (b)(5)

(U) The usual disposition of a removal action would have involved removing Arar to Switzerland or transporting him to the nearby country where he resided and had citizenship, not to transport him to a nation where his proof of citizenship had lapsed.

(U) Convention Against Torture Assessment

(U) We reviewed the process that INS used to determine Arar's protection needs under CAT. The INS concluded that Arar was entitled to protection from torture and that returning him to Syria would more likely than not result in his torture.

Per Consult with DHS 5 USC § 552 (b)(5)

However, the validity of the assurances to protect Arar appears not to have been examined.

(U) On Wednesday, October 2, 2002, an INS attorney was brought into the Arar case for the purpose of helping to conduct the CAT assessment. The INS attorney did not know when the Syrian country determination was made, but that it was likely made before Wednesday, October 2, 2002. By that date, it appeared to the attorney that the section 235(c) proceeding and Syrian removal decisions were finalized, which triggered the need for a CAT assessment.

(U) The regulations at 8 CFR § 235.8 for conducting removal proceedings under section 235(c) are less comprehensive than those for conducting section 240 proceedings in order to allow for flexibility in administering the section 235(c) proceedings. Under section 240 removal proceedings, aliens are afforded the opportunity to claim protection under CAT in hearings before immigration judges. The decisions of the immigration judges are subject to review by the Board of Immigration Appeals, and ultimately in U.S. federal

courts. However, one INS attorney wanted to slow the process to preclude mistakes and to ensure that Arar had proper legal representation.

(U) CAT Description

(U) According to Article 3 of the CAT, no country shall remove an alien to another country "where there are substantial grounds for believing that he would be in danger of being subjected to torture."[20] Substantial grounds as defined by 8 CFR § 208.16(c)(2) means that "more likely than not" if the alien is returned to a particular country, the alien would be tortured. In making this determination, INS must consider all relevant country conditions including "the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights."[21]

(U) According to U.S. regulations implementing the CAT, an alien's removal order in section 235(c) proceedings shall not be executed in circumstances that would violate the CAT.[22] Under section 235(c), claims for CAT protection by aliens apprehended in the United States and subject to removal were determined by the Attorney General.

(U) Notification of Eligibility for Protection Under CAT

(U) [redacted]

Per Consult with DHS
5 USC § 552 (b)(5)

(U) Debate Over Legal Representation for Protection Interview

(U) [redacted]

Per Consult with DHS
5 USC § 552 (b)(5)

[20] (U) *United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Article 3, June 26, 1987.
[21] (U) *United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Article 3, June 26, 1987.
[22] (U) 8 CFR section 235.8(b)(4).

Per Consult with DHS
5 USC § 552 (b)(5)

(U)

Per Consult with DHS
5 USC § 552 (b)(5)

The INS attorney told us that Arar's attorneys were contacted by telephone at their office telephone numbers – not at their home telephone numbers. An ODAG attorney who we interviewed did not recall the process or the timing for notifying Arar's counsel of the protection interview.

(U) On Sunday, October 6, 2002, at approximately 4:30 p.m., the INS attorney sent the email to the INS Command Center directing it to notify Arar's attorneys. The INS Command Center completed the notification about 5:00 p.m. Arar's immigration attorney was not in the office on Sunday and an INS official in New York left a voice mail message. The criminal attorney was also contacted. Arar's criminal attorney said he could not attend the interview and requested that it be rescheduled for Monday, October 7, 2002. His request was denied.

(U) Protection Interview at MDC

(U) On Saturday evening, October 5, 2002, INS Headquarters notified the New York Asylum Office that it would conduct an interview on Sunday, October 6, 2002. The supervisory asylum officers were to interview Arar to determine if he feared being returned to Syria, Canada, or any other country because he might be tortured. They were to obtain from Arar specific information that would support his claims of fear. The supervisory asylum officers were not told the identity of the subject or the purpose of the interview. They were directed to meet INS investigators at the INS New York District Office on Sunday afternoon. Asylum officers conduct interviews to support the establishment of an alien's "credible fear" of persecution or torture, as well as eligibility for asylum. "Credible fear" of persecution means that there is a significant possibility, taking into account the credibility of the

statements made by the alien in support of the alien's claim and other relevant facts presented to an immigration officer, that the alien could establish eligibility for asylum under U.S. law.[23]

(U) The asylum officers were not to make a judgment or determination as to Arar's eligibility for protection under CAT. That responsibility rested with the INS Commissioner. INS attorneys would consider the information provided by Arar during the protection interview and any other information that they deemed relevant to Arar's case when making the CAT protection determination. The INS attorneys, through the INS General Counsel, would then make a recommendation to the Commissioner.

Per consult with DHS
5 USC § 552 (b)(2), (b)(5)

(U) INS attorneys prepared a line of questioning for the protection interview [redacted] In an email, an INS attorney wrote that the questions had been "cleared" by an ODAG attorney.

(U) On Sunday, October 6, 2002, the INS investigators provided limited background on Arar's case to the supervisory asylum officers who would interview Arar. They were only told that Arar was detained on a terrorism-related charge. The supervisory asylum officers said that they were told to ascertain if Arar had a fear of returning to Canada, Syria, or any other country. Their line of questioning was not to mention CAT, protection, or credible fear.

(U) The interview was conducted at MDC beginning about 9:00 p.m. on Sunday, October 6, 2002. The supervisory asylum officers described Arar as calm, alheit evidently annoyed about his situation. He requested counsel several times during the interview. The supervisory asylum officers explained to him that his attorneys were notified but were not coming. Arar repeatedly said that he did not want to go to Syria. He said that he feared being arrested and tortured in Syria because he had not performed his mandatory military service.

(U) The supervisory asylum officers did not find Arar's concerns persuasive and continued to attempt to elicit other information from him that would more convincingly indicate whether he would be persecuted or tortured if removed to Syria. At one point, Arar said he would be persecuted because he was a Sunni Muslim but did not further elaborate. He denied being a member of any terrorist organization. As the interview progressed, Arar became increasingly unresponsive.

[23] 8 U.S.C. § 1225(b)(1)(B)(v).

(U) The interview lasted almost six hours, until about 2:30 a.m. on Monday, October 7, 2002. The supervisory asylum officers left the interview room several times to consult with INS Headquarters on questions they had asked and Arar's responses. INS Headquarters provided follow-up questions for the supervisory asylum officers to ask Arar. At the conclusion of the interview, Arar was presented with a typed statement of the interview. The statement was read to Arar and he was provided a copy, which he refused to sign.[24]

(U) CAT Assessment

(U) INS was to assess the applicability of the CAT to an alien to ensure that INS would "not execute a removal order … under circumstances that violate" the United States' CAT obligations.[25] INS attorneys prepared Arar's CAT assessment.

Per consult with DHS
5 USC § 552 (b)(5)

(U)

Per consult with DHS
5 USC § 552 (b)(5)

(U) Reliable Assurances

(U) Assurances, obtained from a specific country to guarantee that an alien would not be tortured if the alien were removed to that country, are normally obtained through DOS. The Secretary of State then provides the assurances

[24] (U) At their meeting on Saturday, October 5, 2002, Arar's immigration attorney told him not to sign any documents.
[25] (U) 8 CFR § 235.8(b)(4).
[26] (U) Christian Science Monitor, "US Ships Al Qaeda Suspects to Arab State," (July 26, 2002).

received from the relevant country's government to the Attorney General.[27] The nature and reliability of such assurances, and any arrangements through which such assurances might be verified, requires careful evaluation before any decision is reached that removal is consistent with the United States' CAT obligations.

(U) According to the CAT regulations, 8 CFR § 208.18(c), the Attorney General shall determine whether the assurances are "sufficiently reliable" to allow the alien's removal to the designated country in a manner consistent with CAT obligations. Once these assurances are received and approved by the Attorney General, the alien's claim for protection under the CAT is not reviewable by any immigration court or officer. However, the INS attorneys involved in this matter said that Arar could have filed a *habeas corpus* petition in federal district court.

(S) [redacted] 5 USC § 552 (b)(1)

(S) [redacted] 5 USC § 552 (b)(1)

[27] (U) The Secretary of State may forward to the Attorney General assurances that the Secretary has obtained from the government of a specific country that an alien would not be tortured there if the alien were removed to that country. If the Secretary of State forwards such assurances to the Attorney General for consideration, the Attorney General shall determine, "*in consultation with the Secretary of State*," whether the assurances are sufficiently reliable to allow the alien's removal to that country consistent with Article 3 of the CAT. (8 CFR section 208.18(c)) (emphasis added). The INS Commissioner [redacted] declined to be interviewed for this review. Per consult with DOS 5 USC § 552 (b)(5)

[28] (S) 5 USC § 552 (b)(1)

[redacted] 5 USC § 552 (b)(1)

[redacted] 5 USC § 552 (b)(1)

[redacted] 5 USC § 552 (b)(1)

[redacted] 5 USC § 552 (b)(1)

[29] (U) *Second Periodic Report of the United States of America to the Committee Against Torture*, May 6, 2005.

[redacted] Per consult with DOS 5 USC § 552 (b)(1) and (b)(5)

(U) [redacted] Per consult with DOS 5 USC § 552 (b)(5) [redacted]

(U) Removal

(U) On the morning of Monday, October 7, 2002, Arar's immigration attorney listened to the voice mail message left on Sunday, October 6, 2002, by the INS official in New York. The immigration attorney said that the message was that "a hearing" would be held for Arar at 7:00 p.m. that evening at MDC. The immigration attorney said the message did not specify what day, but she assumed that it was 7:00 p.m. on Monday, October 7, 2002. The immigration attorney thought it was odd that an immigration interview would be scheduled for that hour. The immigration attorney contacted MDC to obtain more information about the interview and learned that Arar had been moved to INS' Varick Street Service Processing Center in New York City.

(U) The immigration attorney then contacted the Varick Street facility and learned that Arar was being processed - photographed and fingerprinted - and would be moved to the INS contract detention facility in Elizabeth, NJ. At that point, the immigration attorney believed that Arar's case was proceeding routinely because the processing at Varick Street and the transfer to New Jersey were normal immigration procedures.

(U) On Sunday, October 6, 2002, the operations order to remove Arar was prepared, and the country clearances were requested for the escort officers and flight crew and sent to the U.S. Embassies in Rome, Italy and Amman, Jordan.[30] These actions were taken before the protection interview was conducted, before the completion and serving of the I-148, before the CAT assessment was made, and before the assurances were provided to INS.

(U) The INS attorney working on the CAT assessment did not realize that Arar's removal would occur immediately upon service of the I-148. In other removal proceedings, there was always a period of time between the final

[30] (U) The U.S. government formally requests permission from another government when officials of the U.S. government are traveling to or through that country on official U.S. government business.

determination of inadmissibility and the execution of the removal order. The attorney told us that he believed the decision to remove Arar to Syria had been made before the CAT assessment was performed.

(U) On Monday, October 7, 2002, the INS Eastern Regional Director signed the I-148 that ordered Arar's removal. That same day the INS Commissioner signed the memorandum that authorized Arar's removal to Syria. The memorandum discussed Arar's inadmissibility under section 235(c), the order of removal made earlier by the INS Eastern Regional Director, and the Attorney General's disapproval of Arar's request to be removed to Canada.

(U) At approximately 4:30 a.m. on Tuesday, October 8, 2002, Arar was served with the I-148 while being transported to an airport in New Jersey.[31] The I-148 specified the section 235(c) proceeding, his alleged association with Al-Qaeda, and his impending removal to Syria. An unclassified addendum was provided to Arar included with the I-148, which Arar had never seen before. The unclassified addendum provided to Arar discussed his alleged relationships with two suspected Al-Qaeda terrorists and concluded that because he was a member of Al-Qaeda he was inadmissible to the United States. Arar never responded to the I-147. The unclassified addendum mentioned the classified addendum, which Arar never saw. Arar was flown to Amman, Jordan via Washington, DC in the custody of INS detention and removal officers. Arar was later transferred to the custody of Syrian officials.

(U) Arar's immigration attorney attempted to locate Arar by calling the Elizabeth, NJ detention facility on Tuesday, October 8, 2002. However, facility officials were unable to locate Arar at the facility. Finally, on Wednesday, October 9, 2002, INS officials told her that Arar had been removed from the United States. While the INS officials did not specify the removal country, the immigration attorney assumed it was not Canada or Switzerland because she believed Arar's family would have known. Arar's immigration attorney learned through media articles published weeks later that Arar had been removed to Syria.

(U) Summary

(U) The method of the notification of the interview to Arar's attorneys and the notification's proximity to the time of the interview were questionable. INS attorneys believed that Arar and his attorney would have had the

[31] (U) According to the INS operations order developed for Arar's removal, Arar was transported by nine members of INS' Special Response Team (SRT) in a convoy of four vehicles. The SRT members were equipped with their service weapons in addition to Remington 870 shotguns and M-4 rifles. They were wearing ballistic vests and helmets.

opportunity to review the I-148 after its issuance and INS attorneys expected the "inevitable habeas" to be filed at any time. However, that opportunity was never realized as Arar was removed immediately after service of the I-148.

Per consult with DHS
5 USC § 552 (b)(5)

(U) [redacted] the United States had labeled him as associated with Al-Qaeda. [redacted]

(U) [redacted] Per consult with DHS 5 USC § 552 (b)(5) [redacted]

(S) [redacted] 5 USC § 552 (b)(1) [redacted]

(U) Recommendation

(U) We recommend that the Assistant Secretary for Immigration and Customs Enforcement:

(S) **Recommendation #2:** [redacted] 5 USC § 552 (b)(1) [redacted]

(U) Management Comments and OIG Analysis

(S) [redacted] 5 USC § 552 (b)(1) [redacted]

[redacted]
5 USC § 552 (b)(1)

(U) We have decided to forgo publishing a lengthy, public version of this report, as many of the events surrounding the removal of Arar involve information protected by privileges such as attorney-client, attorney work product, and deliberative process. We are unable to provide a meaningful, detailed account of these events without discussing privileged information. Most agencies that reviewed the draft versions of our report said both versions contained privileged information. For example, [redacted]
Per consult with DHS
5 USC § 552 (b)(5)
[redacted] We will, instead, publish and make available to the public a brief unclassified executive summary of the full report.

(U) After submitting the drafts for review, during February 2007, we met with two former ODAG attorneys who had been involved in this matter to discuss their comments and concerns regarding the draft reports. An official from ODAG and an official from the DOJ Office of Legal Counsel accompanied both ODAG attorneys. [redacted]
Per consult with DOJ
5 USC § 552 (b)(5)
[redacted]

[32] Per the agreement reached between the DHS Office of Inspector General and the DHS Office of General Counsel, which is attached to this report as Appendix B, we provided an advance copy of our draft report to the DHS Office of General Counsel for review in September 2006.

Based on their comments, we made changes to the draft classified report that we deemed appropriate.

(U) Additionally, three attorneys with USCIS, who had been involved in this matter as INS attorneys to varying degrees, provided comments on both versions of the draft and suggested some changes. We met the three USCIS attorneys, two during March 2007 and one during June 2007, to discuss their comments to the draft report. These attorneys confirmed that their comments were not necessarily representative of USCIS or DHS. Rather, their comments reflected their individual recollection of the events related to the removal of Arar. Based on their comments, we made changes to the draft classified report that we deemed appropriate.

(U) DOS, in its comments, asked that the term "special interest alien" be removed from the report, and it requested that we replace the term "TIPOFF" with "TECS."[33] In a discussion with a DOS employee about DOS' comments, the employee said that the term "special interest alien" has different meanings to different agencies and DOS was trying to discontinue the use of this term. Additionally, the DOS employee said that the term "TIPOFF" is no longer in use. However, the DOS employee told us that term "special interest alien" was in use at the time of this matter, and "TIPOFF" as it is used in our report to describe the database queried by INS inspectors, is correct in the context of the time Arar arrived at JFK on Thursday, September 26, 2002. Thus, we did not change the report to replace those terms.

(U) In its comments on the draft reports, ICE said that it had no knowledge that Arar's Syrian passport had expired. ICE asked us to provide the source of the information that Arar's Syrian passport had expired. While we have no direct evidence that Arar's Syrian passport had expired before the time he applied for admission to the United States, the record of Arar's protection interview indicated that Arar recalled his Syrian passport had expired by approximately 1996. According to the record of the interview, Arar said that his father had renewed his Syrian passport for five years in approximately 1991, although Arar could not recall the exact year. Moreover, there is no evidence that Arar presented a Syrian passport—valid or expired—or bad a Syrian passport in his possession when he applied for admission to the United States. There is, however, direct evidence that he presented a valid Canadian passport when he arrived at JFK on Thursday, September 26, 2002. We maintain that the documentation we reviewed supports the conclusion that Arar's Syrian passport had expired prior to September 2002.

[33] (U) Formerly, the acronym "TECS" stood for Treasury Enforcement Communication System. Now a system that is used by DHS, "TECS" stands for The Enforcement Communications System.

(U) Both ICE, in its comments, and two USCIS attorneys who reviewed the drafts, requested that the term "diplomatic assurances" not be used in the report. ICE requested that we simply use the term "assurances" as statute does not require DOS involvement when obtaining assurances for an alien being removed according to 235(c) proceedings. The two USCIS attorneys requested that the term "diplomatic assurances" be replaced with "evidence." A USCIS attorney told us that the INS Commissioner did not find assurances reliable as indicated in our report. Rather, according to this attorney, the INS Commissioner was presented additional "evidence" that other INS staff were never made aware of, and based on that evidence, made a new CAT assessment determining that it was "***not*** more likely than not" that Arar would be tortured if he were removed to Syria (emphasis added). The USCIS attorney did not say what the evidence was. We have not seen any documentation that the INS Commissioner made any CAT assessment other than the assessment we discuss in the report. Thus, we did not change the report to reflect an additional CAT assessment. However, we are persuaded that the term "diplomatic assurances" could be misconstrued. Furthermore, we agree that under statute obtaining CAT assurances for an alien being removed according to 235(c) proceedings does not necessarily require the involvement of DOS. Therefore, we have decided to change the report to remove the modifier "diplomatic" from the term "diplomatic assurances." In the draft report, we replaced the term "diplomatic assurances" with "reliable assurances" or simply "assurances." "Reliable assurances" was the term INS used in its CAT assessment of Arar.

(U) Revised Draft Submitted

(U) During November 2007 and after making changes to the draft classified report described above, we submitted a revised classified draft report to the DHS Office of General Counsel, ICE, CBP, USCIS, and the DOJ Office of Legal Counsel. CBP did not have any comments to the revised report, and ICE declined to provide any additional comments beyond its comments to the draft reports.

(U) Additionally, during November 2007, an ODAG attorney and his private attorney reviewed the revised classified report at our offices. This ODAG attorney declined to provide any comments.

(U) An attorney from USCIS, who had been involved in this matter as an INS attorney, and an attorney from the DHS Office of General Counsel provided comments to the revised classified draft during November 2007. The attorney from the DHS Office of General Counsel provided comments during a few

telephone conversations. DHS Office of General Counsel did not provide any written comments to the revised draft. The attorney from USCIS returned the classified draft report to us with comments written in the margin of the report. Based on their comments, we made changes to the revised classified report that we deemed appropriate.

(U) During early December 2007, officials from the DOJ Office of Legal Counsel and ODAG, provided comments to the classified report orally over the telephone. Also, one of the ODAG attorneys who reviewed and commented on the draft report reviewed the revised draft in December 2007. The attorney provided comments to us orally over the telephone. Based on their comments, we made changes to the report that we deemed appropriate.

(U) ICE Responses to Recommendations

(U) In its response to the recommendations contained in this report, ICE concurred with the recommendations and has taken steps to implement them. However, it is notable that ICE concurred with the recommendations with the "understanding that the OIG concluded that INS did not violate any then-existing law, regulation, or policy with respect to the removal" of Arar. Based on the documentation we reviewed and the interviews we conducted, it does not appear that any INS personnel whose activities we reviewed violated any then-existing law, regulation, or policy with respect to the removal of Arar. However, that should not be construed to mean that we have completely discounted that possibility, especially since we did not have the opportunity to interview all the individuals involved in this matter. Nonetheless, we have reviewed ICE's responses to the recommendations and consider both recommendations resolved and closed.

(U) Recommendation 1

(U) Implement a policy to afford aliens subject to removal under section 235(c) proceedings of the Immigration and Nationality Act, a specified minimum amount of time to respond to the initial charges against them.

(U) ICE Response

(U) ICE concurred with this recommendation. In its response, ICE explained that the Assistant Secretary for ICE issued policy guidance that an alien removed according to 235(c) proceedings will be provided a minimum of 15 calendar days to submit a written statement and any other additional information to the Assistant Secretary for consideration. ICE added that the

number of days could be reduced after consultation with the Secretary of Homeland Security.

(U) Additionally, ICE said that it would forward the policy guidance to the Commissioner of CBP for consideration as the Assistant Secretary for ICE's authority only pertains to ICE employees.

(U) OIG Analysis

(U) We conclude that the Assistant Secretary for ICE's policy guidance fully complies with this recommendation. Therefore, this recommendation is resolved and closed.

(U) Recommendation 2

(S) [redacted] 5 USC § 552 (b)(1) [redacted]

(U) ICE Response

(U) In response to this recommendation, ICE said that it will consult with DOS before accepting assurances with respect to aliens in removal proceeding under 235(c).

(U) OIG Analysis

(U) We conclude that the Assistant Secretary for ICE's policy guidance fully complies with this recommendation. Therefore, this recommendation is resolved and closed.

(U) Appendix A
(U) Purpose, Scope, and Methodology

(U) We initiated this review at the request of the then-Ranking Member, Committee on the Judiciary, United States House of Representatives.[34] We began our fieldwork in January 2004. Our objectives were to examine (1) the determination of inadmissibility made concerning Arar's application for admission into the United States; (2) the process that determined to which country Arar would be returned; and, (3) the process used to assess Arar's eligibility for protection under the CAT.

(S) [redacted]

(S) [redacted]

(U) In addition, we were confronted with the issue that Arar is suing the U.S. government and several individually named U.S. government officials for his alleged mistreatment by both U.S. and Syrian authorities.[36] Government and private counsel expressed concern that our interviews of some witnesses

[34] (U) See Appendix C.
[35] (U) See Appendix D.
[36] (U) At the time of issuance of our report, the United States District Court, Eastern District of New York had entered judgment dismissing with prejudice all of Arar's claims. Arar has appealed to the U.S. Court of Appeals for the Second Circuit.

might constitute a waiver of privileges that counsel would want to preserve for the litigation with Arar. Discussions between attorneys and their clients are privileged and are protected from disclosure. In this case, the attorneys involved are the government agencies' attorneys who provided legal advice and guidance to agency officials (the clients) concerning the Arar matter. We sought to interview the agency officials regarding their decisions and the advice that they received.

(U) DHS and DOJ attorneys opined that providing this information to us might constitute a waiver of the privilege.[37] A waiver would make the information provided to us discoverable and available to Arar and his attorneys in his litigation. On December 10, 2004, OIG counsel negotiated a protocol whereby the information and interviews that we requested would be provided to us, that the provision of this information would not constitute a waiver of the privilege, and that DHS' Office of General Counsel would have the opportunity to review our draft report prior to publication to identify any information that may be privileged.[38] Further discussions were necessary to clarify details of the protocols. We were able to proceed with our interviews in July 2005.

(U) Upon resumption of our work, we encountered a third impediment. Many of the principal decision-makers involved in the Arar case have left government service and declined our requests for interviews. As they are no longer DHS employees, we cannot compel them to speak with us. These decision makers included the former INS Commissioner, former INS Chief of Staff, and former INS General Counsel. Some of these individuals wanted to be interviewed but, because of the pending litigation, declined on the advice of their counsel. Many of the decisions concerning Arar were made during conversations between these individuals.

(U) We also requested an interview with Arar. We believed that the inclusion of his testimony in our report was vital to providing an accurate and complete accounting of the events from his arrest at JFK on Thursday, September 26, 2002, to his removal on Tuesday, October 8, 2002. However, citing the ongoing litigation of his case in both Canada and the United States, Arar's counsel declined several requests for an interview.

[37] (U) Information would include internal memoranda, notes, and interviews.
[38] (U) "Joint Memorandum Regarding Treatment of Privileged Information in Arar v. Ashcroft, et al.," December 10, 2004. See Appendix E.

(U) Finally, we were hampered by the amount of time that has lapsed since this event occurred – more than four years. While the memories of some of the people who we interviewed were extremely vivid, others' memories had faded to the point that they only vaguely remembered Arar's name. Even though the documentation of the events was sparse, we were able to compile enough written records to corroborate the information that we obtained through interviews and to reconstruct significant events of this case.

(U) Appendix B
(U) Management Response to Draft Report

Office of the Assistant Secretary
U.S. Department of Homeland Security
425 I Street, NW
Washington, DC 20536

U.S. Immigration and Customs Enforcement

[redacted]

February 29, 2008

MEMORANDUM FOR: Carlton I. Mann
Assistant Inspector General for Inspections

FROM: Robert F. De Antonio
Director
Audit Liaison Office

SUBJECT: Response to OIG Draft Report: "The Removal of a Canadian Citizen to Syria"

U.S. Immigration and Customs Enforcement (ICE) submits the following in response to the recommendations of the subject draft report to facilitate Office of Inspector General (OIG) publishing of the final report.

This agency asserts any applicable privilege and Freedom of Information Act (FOIA)/ Privacy Act (PA) exemptions as to both the classified and unclassified versions and supporting materials, including, but not limited to: state secrets, attorney-client, attorney work products, deliberative processes, and law enforcement and/or investigative files.

OIG Recommendation 1: ICE concurs, noting that it does so with the understanding that OIG concluded that the Immigration and Naturalization Service (INS) did not violate any then-existing law regular, or policy with respect to the removal of Maher Arar. The Assistant Secretary for ICE has issued policy guidance on the use of INA § 235(c), providing that upon service of Form I-147 (Notice of Temporary Inadmissibility) on an alien, such alien will be provided a minimum of 15 calendar days to submit a written statement and any addition information for consideration by the Assistant Secretary. This policy will provide an alien in Section 235(c) proceedings a specified minimum amount of time to respond to the initial charges. The 15-day period may be abbreviated at the discretion of the Assistant Secretary after consultation with the Secretary of Homeland Security.

This policy will be forwarded to the Commissioner of U.S. Customs and Border Protection for consideration inasmuch as this agency's authority to order the 15-day timeframe in INA § 235(c) proceedings extend only to ICE employees.

OIG Recommendation 2: ICE concurs, noting that it does so with the understanding that OIG concluded that INS did not violate any then-existing law, regulation, or policy with respect to the removal of Maher Arar.

ICE is prepared to provide briefings as needed on classified and unclassified elements of this matter.

~~[redacted]~~

www.ice.gov

(U) Appendix C
(U) Representative John Conyers' Letter

ONE HUNDRED EIGHTH CONGRESS

Congress of the United States
House of Representatives

COMMITTEE ON THE JUDICIARY

2138 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6216
(202) 225-3951
http://www.house.gov/judiciary

December 16, 2003

The Honorable Clark Kent Ervin
Acting Inspector General
Department of Homeland Security
Washington, D.C. 20528

The Honorable John D. Ashcroft
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

Dear Mr. Inspector General and Mr. Attorney General,

I am writing to request that the Inspector General's and Attorney General's office investigate your departments' rendition of Maher Arar to Syria in October of 2002. Recent reports indicate that the Immigration and Naturalization Service, the Central Intelligence Agency and the Attorney General arranged for Mr. Arar to be delivered into the hands of Syrian intelligence officials who are renowned for their use of torture against prisoners.

Mr. Arar is a citizen of both Syria and Canada, and has lived in the latter for the past 15 years. On September 26, 2002, the INS detained Mr. Arar while he was changing planes at John F. Kennedy airport. He was subsequently interrogated, and when he did not divulge any terror-related information, he was shipped to Syria. While then-acting Attorney General Larry D. Thompson could have returned Mr. Arar to his home in Canada, or in fact any other country that does not practice torture, Mr. Thompson chose to deport him to a country notorious for its abuse of human rights. Because Mr. Arar no longer has any ties to Syria, the only reason for doing so could have been the hope of extracting information through methods disallowed by the United States and international law.

(U) Appendix C
(U) Representative John Conyers' Letter

The Honorable Clark Kent Ervin
The Honorable John D. Ashcroft
Page 2
December 16, 2003

Putting aside the moral and ethical bankruptcy of such an act, it violates international law. The United States is a party to the International Convention Against Torture which prohibits the removal of a person to another state "where there are substantial grounds for believing that he would be in danger of being subjected to torture."[1] It is unfathomable that we would accept assurances that Mr. Arar would not be tortured from a country the State Department has long recognized as using torture tactics such as electrical shocks, pulling out of fingernails, and forcing objects into the rectum.[2] With this information, one can only conclude that Syria was chosen precisely for the likelihood that torture would be employed.

I am sure that you both agree that intentionally rendering a human being to be tortured has no place in our anti-terror efforts. To that end, I ask that your respective agencies immediately investigate the circumstances around Mr. Arar's removal to ensure that such a rendition never happens again. Specifically, I would like your offices to explain:

1. What standard does the Attorney General's office use in determining that removal to the country of the detainee's designation is "prejudicial to the United States?"

2. Specifically, what about returning Mr. Arar to his home in Canada would have been prejudicial to the United States?

3. Even if there was reason to believe that Canada was not the proper country for removal, why was Syria chosen over some other country?

4. What reason did we have to believe that Syria would abandon its long standing tradition of torturing prisoners?

5. How often in the last two years has DHS and/or the DOJ rendered aliens to third countries? What standards and procedures have you set for doing so?

Thank you for your time and attention to this request. Because of this human rights implications of such rendition activities, I am sure your offices will give this matter your immediate attention. If you have any questions, please contact Perry Apelbaum or Ted Kalo of the House Judiciary Committee staff at 202-225-6906.

Sincerely,

John Conyers, Jr.
Ranking Member

cc: F. James Sensenbrenner, Chairman

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[1]International Convention Against Torture, and Other Cruel, Inhuman, or Degrading Treatment or Punishment, art. 3.

[2]Country Reports on Human Rights Practices, 2002, available at: http://www.state.gov.

(U) Appendix D
(U) DHS OIG Letter to Congress Concerning the Interim Status of the Review

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Office of Inspector General

U.S. Department of Homeland Security
Washington, DC 20528

July 14, 2004

The Honorable John Conyers, Jr.
Committee on the Judiciary
United States House of Representatives
Washington, DC 20515-6216

Dear Congressman Conyers:

I am writing you to provide a status report on your request that we conduct a review into the circumstances under which the Immigration and Naturalization Service removed Maher Arar, a naturalized Canadian citizen, to Syria. You wrote me on December 16, 2003, requesting that my office conduct an investigation because of your concerns about the legal and human rights implications of Mr. Arar's removal to Syria and your desire "to ensure that such a rendition never happens again."

We have strived to be diligent in our review of this matter. Indeed, I would have preferred, and thought it reasonable to have expected, that you would have had a completed report by now. However, I write to inform you that our work has been delayed and may not be completed in a timely matter. Here is a brief history and explanation of our effort.

After receiving your request, I assigned the matter to our Office of Inspections, Evaluations, and Special Reviews. On January 8, 2004, the project officially started when I sent a formal initiation letter to the Immigration and Customs Enforcement office. By mid-January, we learned that there were restrictions on parts of the material we sought to review. We were informed that some of the information that we sought was classified. With respect to other information, we were informed by department attorneys that we could not have access on grounds of privilege related to the civil litigation that Mr. Arar has brought against the federal government.

By mid-May, we were able to review the classified documents that we had sought and that initially we had been told might not be made available to us. In the main, I am satisfied that there were sound reasons for the documents to have been classified, that they were not classified as a means of shielding them from scrutiny by an office such as mine, and that some consideration of our request prior to disclosure was appropriate, although the process was unduly protracted and frustrating.

During this same period, my office sought to interview present and former government employees relating to their role in the Arar matter. Concurrently, we have discussed with government attorneys the privilege issues that have been cited to block our access to additional documents that we believe exist and to impede our requests to interview potential witnesses. In regard to these efforts, we have had no success, although we continue to press our arguments. Government counsel continue to assert the privilege or to decline to seek a waiver, which we understand could be done, and as a result have stymied this aspect of our work.

I do not believe that the assertion of a legal privilege, such as the attorney-client privilege (when in the context of advice given by government counsel to a government official regarding government work) or the attorney work product or pre-decisional privileges can be asserted to block the clear statutory access to the agency's business conferred upon Inspectors General by section 6(a)(1) of the Inspector General Act. Further, I understand that there exists a strong legal proposition that providing information to an agency Inspector General does not constitute a waiver of privileges available to an agency in litigation with a third party.

Therefore, I believe my office should have been given these materials earlier, and that they are still owed to my office. I shall continue to seek access to them. In the meantime, I write with this explanation because of the unanticipated delay in responding to your request. I am pleased to meet with you or to answer any further questions you may have.

Sincerely,

Clark Kent Ervin
Inspector General

(U) Appendix E
(U) Joint Memorandum Regarding Treatment of Privileged Information in Arar v. Ashcroft

U.S. Department of Homeland Security
Washington, DC 20528

Homeland Security

December 10, 2004

JOINT MEMORANDUM REGARDING
TREATMENT OF PRIVILEGED INFORMATION IN
ARAR V. ASHCROFT, et al.

Arar v. Ashcroft, et al., C.A. No. 04-CV-249-DGT-VVP, arises from the detention and expedited removal of Maher Arar, a Syrian-born Canadian citizen. This litigation is ongoing, and, according to the Office of General Counsel (OGC), will implicate a number of privileges against disclosure in the litigation, including information protected by attorney-client, attorney work product and deliberative process privileges.

The Office of the Inspector General (OIG) is simultaneously conducting an inquiry into the handling of Arar's application to enter the United States and his expedited removal. As part of this inquiry, the OIG is seeking various documents from Department components, primarily U.S. Immigration and Customs Enforcement and U.S. Citizenship and Immigration Services, that OGC contends are covered by multiple privileges, including but not limited to, attorney-client, attorney work product and/or deliberative process privileges.

In order to preserve the privileges that have attached to these materials while also providing the OIG access to the information necessary for its investigation, OGC and the OIG have agreed as follows:

1) both DHS and OIG agree that the Department's sharing of the information with the OIG does not constitute a waiver of any privilege for any purpose;

2) the OIG will not disclose materials designated as privileged by OGC to parties outside the Department, except Congress, unless specifically authorized to do so in writing by the Department's General Counsel;

3) if the OIG discloses privileged information to Congress, it will do so in the form of a confidential report only, and will obtain assurances from Congress prior to such disclosure that the material will be treated as confidential and privileged;[1]

[1] See Rockwell Int'l Corp. v. United States, 235 F.3d 598 (D.C. Cir. 2001) (disclosure of information to a Congressional oversight committee, conditional upon the committee's promise not to disclose the information to the public, does not waive attorney-client and attorney work product privileges asserted to prevent disclosure under FOIA). See also Murphy v. Dept. of the Army, 613 F.2d 1151 (D.C. Cir. 1979) (disclosure of a legal memorandum to a member of Congress did not waive the deliberative process privilege, even absent an understanding that the document was not to be disclosed further).

(U) Appendix E
(U) Joint Memorandum Regarding Treatment of Privileged Information in Arar v. Ashcroft

4) the OIG agrees that should any third party, other than Congress, seek the materials, the OIG will alert OGC so that OGC may assert the Department's legal position -- that the disclosure of the materials by the Department to the OIG and by the OIG to Congress does not waive any privileges that have attached to the information sought. OIG will refer any requests for designated privileged information to OGC and will not release such information to such third parties without OGC's approval absent court order; and

5) OGC agrees that all Department employees and former federal employees with knowledge of the Arar matter that the OIG seeks to interview in connection with its inquiry will be informed, upon OIG request, that OGC does not view cooperating with the OIG as waiving any Department privileges and shall encourage all such individuals or entities to cooperate fully with the OIG.

Jay D. Whitley
General Counsel

Dated: Dec. 10, 2004

Richard Skinner
Acting Inspector General

Dated: Dec 10, 2004

(U) Appendix F
(U) Major Contributors to Report

Per OIG
5 USC § 552 (b)(6),
(b)(7)(C)

[redacted] Inspector, Office of Inspections

[redacted] Inspector, Office of Inspections

[redacted] Inspector, Office of Inspections

Page 48
Withheld in Full
5 U.S.C. § 552 (b)(1)
and
5 U.S.C. § 552 (b)(2)

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- **Write** to us at:
  DHS Office of Inspector General/MAIL STOP 2600, Attention:
  Office of Investigations - Hotline, 245 Murray Drive, SW, Building 410,
  Washington, DC 20528,

The OIG seeks to protect the identity of each writer and caller.

○