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DEPARTMENT OF HOMELAND SECURITY

Office of Inspector General

(U) The Removal of a Canadian Citizen to Syria

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Office of Inspector General

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

Homeland Security

(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

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(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, sought 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]

5 USC § 552 (b)(1)

[redacted] 5 USC § 552 (b)(1)

(S) [redacted] 5 USC § 552 (b)(1)

(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.

(S)

[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.)

[redacted] 5 USC § 552 (b)(1) [redacted]

(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. [redacted] Per consult with DHS 5 USC § 552 (b)(5) [redacted]

(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)(5)

(U) [redacted]

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

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

(S) [redacted]

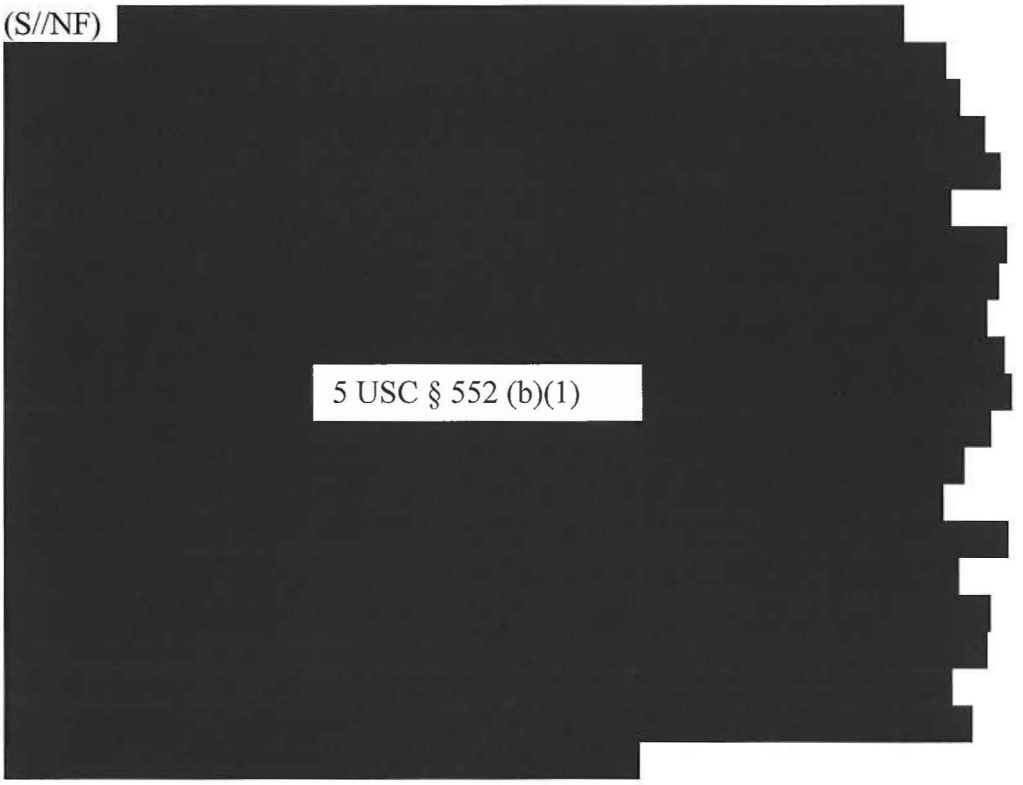
5 USC § 552 (b)(1)

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

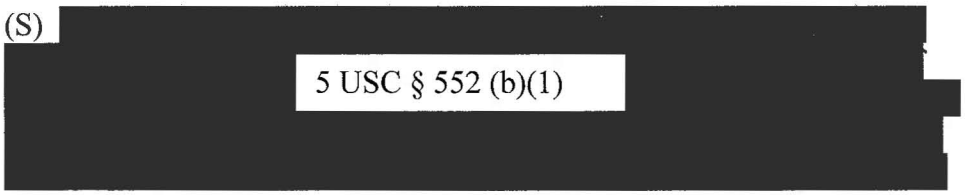
(S) [redacted]

(U) Use of Classified Information

(S//NF) [redacted]



(S) [redacted]



[redacted] 5 USC § 552 (b)(1)

(S) 5 USC § 552 (b)(1)

(S) 5 USC § 552 (b)(1)

(S) 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)

[redacted]

[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)

(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)

[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] 5 USC § 552 (b)(1)

(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)

(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.

(S//NF) [redacted] 5 USC § 552 (b)(1)

[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).

[redacted] Per Consult with DHS and DOJ 5 USC § 552 (b)(5) [redacted]

(U) Summary

(U) Syria was designated as Arar's country of removal [redacted] Per Consult with DHS and DOJ 5 USC § 552 (b)(5) [redacted]

(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. [redacted] Per Consult with DHS 5 USC § 552 (b)(5) [redacted] 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).

[redacted]
Per Consult with DHS
5 USC § 552 (b)(5)

(U) [redacted]
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, albeit 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)

[redacted][26]

(U) [redacted]

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

[redacted]

(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) 5 USC § 552 (b)(1)

(S) 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 declined to be interviewed for this review. Per consult with DOS 5 USC § 552 (b)(5)

[28] (S) 5 USC § 552 (b)(1)

(U) The Removal of a Canadian Citizen to Syria

5 USC § 552 (b)(1)

(S//NF)

5 USC § 552 (b)(1)

(S)

5 USC § 552 (b)(1)

(S)

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 E, 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 had 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] 5 USC § 552 (b)(1)

(S) [redacted] 5 USC § 552 (b)(1)

(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

~~LAW ENFORCEMENT SENSITIVE~~

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) exemption 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.

~~LAW ENFORCEMENT SENSITIVE~~

www.ice.gov

(U) Appendix C
(U) Representative John Conyers' Letter

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

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

Office of Inspector General

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

Homeland Security

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.

(U) Appendix D
(U) DHS OIG Letter to Congress Concerning the Interim Status of the Review

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.

Joe 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

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Withheld in Full
5 U.S.C. § 552 (b)(1)
and
5 U.S.C. § 552 (b)(2)

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- **Email** us at DHSOIGHOTLINE@dhs.gov; or
- **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.