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

June ,

Rm. , Rayburn House Office Building

Prepared Remarks of
S H

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 , , Judiciary Committee Chairman John Conyers requested that the Department of Homeland Security commence an investigation into what happened to Mr. Arar. On July , , then Acting-Inspector General Ervin advised that the investigation had opened on January , . 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 , 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 , , 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. - 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 $ 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 , 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 ("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.

Harper's Magazine, Nov. ,

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 $ 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 . 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.
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> 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."
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> 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.