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**STATEMENT OF RICHARD L. SKINNER**

**INSPECTOR GENERAL**

**U.S. DEPARTMENT OF HOMELAND SECURITY**

**BEFORE A**

**JOINT HEARING OF THE**

**SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND  
CIVIL LIBERTIES  
COMMITTEE ON THE JUDICIARY**

**AND THE**

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

**U.S. HOUSE OF REPRESENTATIVES**

**JUNE 5, 2008**



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

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

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

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

### **A. Timeline**

#### Thursday, September 26, 2002

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

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

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

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

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

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

#### Friday, September 27, 2002

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

#### Saturday, September 28, 2002

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

#### Tuesday, October 1, 2002

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

Thursday, October 3, 2002

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

Friday, October 4, 2002

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

Saturday, October 5, 2002

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

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

Sunday, October 6, 2002

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

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

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

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

### Monday, October 7, 2002

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

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

### Tuesday, October 8, 2002

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

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

### Mr. Arar's Return to Canada

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

## **B. Results of Review**

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

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

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

## **C. Recommendations**

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

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

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<sup>1</sup> *United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Article 3, June 26, 1987.

## II. JOINT MEMORANDUM REGARDING TREATMENT OF PRIVILEGED INFORMATION

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

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

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

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

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

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

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

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

### **III. FOIA REDACTION PROCESS**

#### **A. General Process**

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### **C. Specifics of the Redactions**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Thank you.