



**Testimony of Clark Kent Ervin
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Security
Before the House Judiciary Subcommittee on the Constitution, Civil Rights
and Civil Liberties
and
the Foreign Affairs Subcommittee on International Organizations, Human
Rights, and Oversight
on: the U.S. Department of Homeland Security Inspector General Report
OIG-08-18, *The Removal of a Canadian Citizen to Syria***

June 5, 2008

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

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

As I explained to you in my July 2004 "update letter," while my staff and I by then had obtained access to a number of classified documents (and we noted that, in our judgment, such documents were properly so classified), we were stymied in our efforts to complement the review of those documents with a review of other documents and interviews with present and former government officials. Those efforts were blocked by the assertion of certain privileges, namely, attorney-client, attorney work product, and pre-decisional privileges. It was my view then, expressed in the update letter, and it remains my view now, that such privileges must yield to the broad authority of the Inspector General under Section 6(a)(1) of the Inspector General Act. And, in any event, there is considerable legal support for the proposition that providing information to an Inspector General does not constitute a waiver of privileges that can be asserted by an agency in litigation with a third party.

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

Since leaving DHS at the end of 2004, I have followed the Arar case with great interest through the news media. Like many, I had been anxiously awaiting the release of my successor's report on this matter. Like many, I am disappointed that the public version of the report, issued nearly four years after the start of the investigation, said so little, citing legal privileges. Had I still been in office, I would have asserted the Inspector General's statutory authority to trump such privileges and exercised that authority by disclosing information relevant to the process the Immigration and Naturalization Service used to make the determination to remove Mr. Arar, given especially the conviction that such disclosure would not constitute a

waiver of those privileges in any third party litigation. It seems to me that, at a minimum, the public version of this report should have explained exactly what privileges were asserted; the rationale for their assertion; and why the Inspector General felt compelled to acquiesce in their assertion.

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

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

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

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