

Congress of the United States
House of Representatives
Washington, DC 20515

July 10, 2008

The Honorable Michael Mukasey
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

Dear Mr. Attorney General:

We write to request that you appoint an outside special counsel to investigate and prosecute any violation of federal criminal laws related to the removal of Canadian Citizen, Maher Arar, to Syria.

Mr. Arar's case has generated a great deal of concern in Congress, across the United States, and in other countries. It also has been the subject of a four-year-long investigation by the Department of Homeland Security's Office of Inspector General. The publicly-released report of that investigation has revealed troubling facts that warrant specific investigation into possible criminal misconduct. For example, the DHS OIG concluded that, after finding that it was "more likely than not" that Mr. Arar would be tortured if sent to Syria, INS officials still concluded that the United States could send Mr. Arar to Syria based on "ambiguous" assurances whose validity was not examined.¹ This decision was made by former INS Commissioner James W. Ziglar, with attorneys from the Office of the Deputy Attorney General making key decisions and consulting with INS officials at various stages in the removal process.²

During a joint hearing held by the Subcommittee on the Constitution, Civil Rights, and Civil Liberties of the House Judiciary Committee and Subcommittee on International Organizations, Human Rights, and Oversight of the House Foreign Affairs Committee on June 5, 2008, current DHS Inspector General Richard L. Skinner and former DHS Inspector General

¹See Department of Homeland Security Office of Inspector General, The Removal of a Canadian Citizen to Syria, OIG-08-18, March 2008 (released publicly June 5, 2008) ("DHS OIG Report"), at 5, 21-22, 25, available at http://www.dhs.gov/xoig/assets/mgmttrpts/OIGr_08-18_Jun08.pdf.

²Id. at 5, 11, 20-1, 25, 32.

Clark Ervin testified that they believe that the removal of Mr. Arar to Syria may have violated criminal laws, including the Convention Against Torture and Federal Torture Statute.³ In concluding that a criminal inquiry is necessary, Mr. Ervin explained that the DHS OIG report led him to conclude that United States officials intended to render Mr. Arar to Syria, as opposed to Canada, because of the likelihood that he would be tortured in Syria and the certainty that he would not be tortured in Canada. Mr. Skinner agreed that a prima facie case of criminal misconduct could be made based on facts showing that high-ranking U.S. officials intentionally deprived Mr. Arar of the means to challenge his detention and transfer with the knowledge that he would be tortured upon transfer to Syria.

As you are aware, Justice Department regulations require the Attorney General to appoint an outside special counsel when: 1) a “criminal investigation of a person or matter is warranted,” 2) the “investigation or prosecution of that person or matter by a United States Attorney’s Office or litigating Division of the Department of Justice would present a conflict of interest for the Department” and 3) “it would be in the public interest to appoint an outside Special Counsel to assume responsibility for the matter.”⁴ If this test is met, then you must select a special counsel from outside the government who would have the authority to secure resources for the investigation and prosecution and have full investigatory and prosecutorial powers.⁵

These three criteria clearly are met and warrant the appointment of a special counsel to investigate the removal of Mr. Arar to Syria. Inspector General Skinner testified that his office’s investigation could not rule out the possibility that Mr. Arar had been sent to Syria because United States officials wanted him interrogated under conditions that our laws would not permit, but noted that criminal investigation was beyond his office’s jurisdiction. Mr. Skinner also explained that his office’s investigation had been stymied by the lack of power to subpoena witnesses and by the assertion of various privileges to block access to information. As a result, Mr. Skinner’s office never interviewed several of the key decision makers, including former INS

³Congress implemented and confirmed the United States’s obligation not to transfer any individual to a country where torture is likely through the Foreign Affairs Reform and Restructuring Act of 1998. Pub. L. No. 105-277, div. G, Title XXII, § 2242 (implementing Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment). The Federal Torture Statute, 18 U.S.C. §§ 2340-2340B, criminalizes torture and conspiracy to commit torture outside of the United States.

⁴28 C.F.R. 600.1

⁵28 C.F.R. 600.3-6.

The Honorable Michael Mukasey

Page 3

July 10, 2008

Commissioner James W. Ziglar. Inspector General Skinner and former Inspector General Ervin agreed that criminal laws may have been violated and that further criminal investigation could be warranted.

Second, there appears to be a clear conflict of interest in this matter. Outside special counsel is necessary because of the clear involvement of high-ranking Administration officials, including former Deputy Attorney General Larry D. Thompson and former INS Commissioner James W. Ziglar. It is also clear that attorneys from the Office of the Deputy Attorney General were involved in key decisions and consulted with INS officials at various stages in the removal process. If conflict of interest provisions in your regulations ever apply, they would apply when the Justice Department may have been involved in the abuses that were committed, as is the case here. Thus, the Department has no business conducting the investigation and should instead appoint an outside special counsel.

Finally, there can be no doubt that the public interest will be served by a broad and independent investigation into the removal of Mr. Arar to Syria. After Mr. Arar returned to Canada in October 2003, the Canadian government agreed to convene a commission to investigate his case (the "Arar Commission"). The Arar Commission spent two years looking into Mr. Arar's case, interviewed 70 government officials, and reviewed approximately 21,500 documents. It ultimately concluded that there is no evidence that Mr. Arar ever was linked to terrorist groups or posed a security threat, and that the Canadian government shared inaccurate information with the United States that led to Mr. Arar's detention by the United States while he was transiting through JFK airport on his way home to Canada.⁶ The Canadian government subsequently apologized to Mr. Arar for its role in his detention by the United States and awarded him nearly \$10 million dollars in damages.

While the Canadian government may have provided inaccurate information to the United States that led to Mr. Arar's initial detention, United States officials made and executed the decision to remove him to Syria. Yet the United States refused to cooperate with the Canadian investigation,⁷ and the individuals involved in Mr. Arar's case have cooperated reluctantly – if at

⁶Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, Report of the Events Relating to Maher Arar, Factual Background, Report of the Events Relating to Maher Arar: Analysis and Recommendations, at 13, 59 (2006), http://www.ararcommission.ca/eng/AR_English.pdf.

⁷See Letter from William H. Taft, IV, Legal Adviser, U.S. Dept. of State, Sept. 10, 2004, <http://www.state.gov/s/l/2004/78071.htm>.

The Honorable Michael Mukasey

Page 4

July 10, 2008

all – with the DHS OIG investigation. Moreover, in response to a civil lawsuit filed by Mr. Arar, the United States has refused to answer his allegations and has sought dismissal of the case based on the state secret privilege.

As discussed above, possible misconduct in Mr. Arar's case extends to high-ranking officials within the Executive Branch, and the government's unwillingness to expose how and why this happened has fueled public concern and criticism. Appointing a special counsel would clearly serve the interests of the Department and the public by ensuring that the investigation is thorough, impartial, and independent, and would show that the government is willing to allow fair investigation into serious allegations of wrongdoing.

We look forward to a response to our request at your earliest convenience. Responses and questions should be directed to the Subcommittee on the Constitution, Civil Rights, and Civil Liberties of the House Judiciary Committee, B-353 Rayburn House Office Building, Washington, D.C. 20515 (telephone: 202-225-2825; fax: 202-225-4299).

Sincerely,



JOHN CONYERS JR.
Chairman
Committee on the Judiciary



JERROLD NADLER
Chairman
Subcommittee on the
Constitution, Civil Rights,
and Civil Liberties
Committee on the Judiciary



WILLIAM D. DELAHUNT
Chairman
Subcommittee on
International Organizations,
Human Rights and Oversight
Committee on Foreign
Affairs

cc: Hon. Lamar Smith
Hon. Howard L. Berman
Hon. Ileana Ros-Lehtinen
Hon. Trent Franks
Hon. Dana Rohrabacher
Keith B. Nelson