

Grading the DOJ Office of Inspector General Report on the Detention of Non- Citizens in the Aftermath of 9/11

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ABOUT US

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INTRODUCTION

On April 2, 2002, the Office of Inspector General of the U.S. Department of Justice announced it would investigate detentions at Passaic County Jail in Paterson, NJ (Passaic) and Metropolitan Detention Center (MDC).¹ As part of the investigation, the OIG will examine the Justice Department's compliance with laws, regulations and policies that protect the civil rights of detainees.²

The investigation is an outgrowth of the reporting requirements in the USA PATRIOT Act.³ Last July, the Inspector General reported that the initial fieldwork of the investigation had been completed and that the report was expected to be released in October 2002. Since that time, the Inspector General has continued to indicate that the report will be released "soon."

In the OIG's most recent report to Congress under section 1001, the OIG stated that its investigation with respect to the two jails would focus on:

- 1) issues affecting the length of the detainees' confinement, including the process undertaken by the FBI and others to clear individual detainees of a connection to the September 11 attacks or terrorism in general;
- 2) the DOJ's efforts to oppose bond for all September 11 detainees and delay their deportations pending completion of the FBI's clearance investigation; and
- 3) conditions of confinement experienced by detainees, including allegations of physical and verbal abuse made by detainees against prison staff; detainees' access to counsel; medical care; and lighting conditions in the detainees' high-security cellblock.⁴

¹ Jonathan Aiken, "Treatment of detainees under review" CNN.com, April 3, 2002, available at <http://www.cnn.com/2002/US/04/03/inv.detainees.treatm.ent/?related> (accessed on December 18, 2002); Steve Fainaru, "Justice Department to Examine Treatment of Detainees at 2 Jails," Washington Post, April 3, 2002, available at <http://www.washingtonpost.com/ac2/wp-dyn?pagename=article&node=&contentId=A54080-2002Apr2¬Found=true> (accessed January 3, 2003).

² Jonathan Aiken, "Treatment of detainees under review" CNN.com, April 3, 2002, available at <http://www.cnn.com/2002/US/04/03/inv.detainees.treatment/?related> (accessed on December 18, 2002); Steve Fainaru, "Justice Department to Examine Treatment of Detainees at 2 Jails," Washington Post, April 3, 2002, available at <http://www.washingtonpost.com/ac2/wp-dyn?pagename=article&node=&contentId=A54080-2002Apr2¬Found=true> (accessed January 3, 2003).

³ U.S. Department of Justice, Office of Inspector General, "Report to Congress on Implementation of Section 1001 of the USA PATRIOT Act," July 15, 2002, available at http://www.usdoj.gov/oig/special/patriot_act/index.htm (accessed December 11, 2002).

⁴ U.S. Department of Justice, Office of the Inspector General, "Report to Congress on Implementation of Section 1001 of the USA PATRIOT Act," January 22, 2003, available at http://www.usdoj.gov/oig/special/2003_01a/final.pdf (accessed March 5, 2003).

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The OIG investigation would examine actions taken by the Federal Bureau of Investigations (FBI), the Immigration and Naturalization Service (INS)⁵, and the Federal Bureau of Prisons (BOP).

The OIG has unique access to internal government documents and the ability to interview high level government officials. This investigation is an important test of whether the OIG process can thoroughly and independently assess government action during a time of intense pressure and anxiety. In addition to verifying whether or not government agents complied with existing law and regulations, this investigation provides an opportunity to evaluate the policies and practices that governed these actions.

GIVEN THE DATA PUBLICLY AVAILABLE AT THIS POINT, THE OIG SHOULD CERTAINLY CONCLUDE THAT:

- Detainees were denied meaningful access to counsel, including inadequate access to telephones, and the right to make direct (not collect) calls to locations providing pro bono legal assistance.
- Detainees were denied due process due to the failure of the INS to charge individuals with a basis for detention within 48 hours of arrest.
- Detainees were effectively denied the presumption of innocence under a “clearance” policy directed by the Department of Justice.
- Detainees suffered physical and verbal abuse at the hands of federal officials.
- Detainees suffered mistreatment, including unjustified solitary confinement, inadequate medical care and interference with religious practice.

THE OIG REPORT SHOULD ANSWER THESE QUESTIONS:

- What directives relating to the processing and treatment of detainees came from Washington, who were they from, and how were they handled by federal officers at the district level?
- What criteria are used to determine who qualifies as a “special interest” detainee?
- Was there an official policy to interrogate detainees for criminal investigation purposes and if so, how were requests for counsel handled?
- What “special instructions” were issued to direct the handling of post-September 11 detainees?
- Why, how often and when was the post-9/11 INS regulation on custody procedures (8 C.F.R. 287.3) used to justify the detention of a detainee longer than 24 hours without charge, and when it was used, how was the “emergency” or “exceptional circumstance” defined?
- Why, how often and when was the post-9/11 INS regulation on automatic bond stay authority (8 C.F.R. 3.19) used to justify the prolonged detention of a detainee?

⁵ The INS was within the Justice Department until its transfer to the Department of Homeland Security on March 1, 2003.

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- Why, how and when were detainees transferred between various facilities throughout the country, and how did the INS keep track of this information?
- What are the contours of the DOJ “clearance” policy and what were the criteria for using it?
- Did INS supply detainees with accurate materials informing them of available legal services, as required by INS regulations?
- Why, how often and by what criteria were detainees held in solitary confinement?
- Did the INS comply with regulations governing provision of health care and medical services?
- Did the INS comply with regulations governing requests for accommodation for religious dietary needs and other religious practice?
- How often and why was there concerted action by inmates, such as hunger strikes?
- How, why and in what circumstances was shackling used on detainees?

THE OIG’S FINAL RECOMMENDATIONS SHOULD INCLUDE:

- The Department of Justice should release the names of all persons detained on immigration charges, provided those individuals consent to release of such information, to family, legal counsel or others with a legitimate interest. Information should include the date of arrest, place of detention, and length of detention.
- The INS should permit legal service organizations access to visit detention facilities on a regular basis. Subject to reasonable security precautions, it should also allow independent monitoring groups access to visit these facilities.
- The Department of Justice should provide all detainees with access to legal counsel of their choice and entitle them reasonable hours and secure locations in which to meet.
- Congress should conduct a thorough review of provisions in the USA-PATRIOT Act relating to detention of non-citizens.
- The INS regulations on custody procedures (8 C.F.R. Section 287.3) and automatic stay authority (8 C.F.R. Section 3.19) should be immediately rescinded. At a minimum, the Department of Justice should instruct the INS to issue detailed guidelines governing the use of these regulations in order to prevent abuse. The INS should release information on the use of these regulations on an ongoing basis, including the length of detention without charge.
- The DOJ and the Department of Homeland Security should create a high level internal oversight mechanism with mandatory sign-off authority whenever extraordinary measures, such as these regulations, are invoked to prolong an individual's detention.

Grading the OIG Investigation: BACKGROUND PAPER

Jurisdiction and Authority of the OIG

The Office of Inspector General of the Department of Justice functions as an oversight mechanism to guard against fraud and abuse by, and to promote efficiency and effectiveness of, Justice Department employees and agencies. According to the Inspector General Act of 1978 (IG Act), Federal Inspectors General “conduct audits and investigations relating to programs and operations” of federal agencies; recommend policies “to promote economy, efficiency, and effectiveness” and “to prevent and detect fraud and abuse” in federal programs; and “provide a means for keeping the head of the establishment and the Congress fully and currently informed about problems and deficiencies relating to the administration of such programs and operations and the necessity for and progress of corrective action”.⁶ Investigations may be initiated by the OIG (often as a result of substantiated allegations from the public), the Attorney General or Congress.⁷ In any case, the OIG determines the scope of the inquiry and has autonomy to shape the direction of the investigation.⁸

The Office of Inspector General has broad access to internal Justice Department information, data, and documentation and has the power to subpoena materials if necessary. It may administer oaths and take testimony. The OIG also has ready access to the Attorney General.⁹ Agencies within the Justice Department are required to give assistance to the OIG to obtain the information it seeks.¹⁰

When abuses are uncovered and are found to have been the result of Department policies, an important part of the OIG function is to recommend changes to policy to prevent future abuses.

Areas of Investigation

Access to Counsel

One issue highlighted for investigation by the OIG is the “conditions of confinement experienced by detainees, including...detainees' access to counsel.”¹¹

⁶ Inspector General Act of 1978, Pub. L. 95-452 § 2.

⁷ Inspector General Act of 1978, Pub. L. 95-452 § 8.

⁸ Inspector General Act of 1978, Pub. L. 95-452 § 8E(b)(1).

⁹ IG Act section (6)(a)

¹⁰ Inspector General Act of 1978, Pub. L. 95-452 § 6 (3)

¹¹ U.S. Department of Justice, Office of the Inspector General, “Report to Congress on Implementation of Section 1001 of the USA PATRIOT Act,” January 22, 2003, available at http://www.usdoj.gov/oig/special/2003_01a/final.pdf (accessed March 5, 2003).

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Although not entitled to court-appointed counsel, immigration detainees are entitled to have access to counsel at their own expense. In ordinary times, the immigration system is very difficult to navigate without a lawyer. But since September 11, with the government's panoply of new powers and aggressive enforcement, immigration detainees are particularly disadvantaged if they are without legal representation.

Those detained in the aftermath of September 11 reported greater obstacles to accessing legal representation, including: very limited access to telephones (detainees in Passaic County Jail were allowed only one phone call to an attorney per week) and in some instances only collect calling was available; outdated phone lists for legal service organizations; failure of the INS to provide detainees with the handbooks that contain the information they need to find counsel; and restrictions on pro bono attorneys trying to gain access to clients or prospective clients at detention facilities.¹²

One example of this problem is the case of Ayub Ali Khan, an Indian citizen, who was detained for 57 days without access to an attorney. He was arrested on September 12, 2001 when federal authorities were conducting what they said was a routine drug sweep aboard the Amtrak train on which Khan was traveling.¹³ He was charged with overstaying his visa. The FBI questioned Khan several times without counsel present. He was held in solitary confinement at MDC. He was asked to sign papers waiving his rights to counsel, which he did, hoping that this would speed the process so he could be released. It took nearly two months before he was brought before a judge on the immigration charge.¹⁴

Transfer of detainees without notice to their families or their lawyers was also a serious problem. Fayez Khidir, a citizen of Sudan who was detained for overstaying his visa, was transferred to three different detention centers in the New York and New Jersey area without notification to his family or attorney. His attorney made numerous calls to the INS in an attempt to locate him, but to no avail. She eventually threatened that she would alert the media to Khidir's case if the INS did not reveal his whereabouts. An INS officer promised to get back to her within three business days, but failed to do so. It took four weeks for his lawyer to locate him.¹⁵

The attorney for Ahmed Abdou El Khier, an Egyptian national, had similar difficulties. El-Khier was charged with working without authorization on a tourist visa. For two weeks, he was transferred several times to different facilities during which time his

¹² Lawyers Committee for Human Rights, "A Year of Loss: Reexamining Civil Liberties since September 11, September 2002," September 2002, available at http://www.lchr.org/us_law/loss/loss_main.htm (accessed December 11, 2002).

¹³ Ross E. Milloy and Michael Moss, "More Suspects Are Detained in Search for Attack Answers," *New York Times*, September 26, 2001

¹⁴ "Man Detained After 9/11 Says Rights Were Ignored," *New York Times*, May 11, 2002; Human Rights Watch, *Presumption of Guilt* p. 34.

¹⁵ Human Rights Watch, *Presumption of Guilt*, p. 43.

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lawyer could not locate him. On a later occasion, El-Khier's lawyer made daily phone calls to the INS over a 5-day period in order to find out the date of El-Khier's hearing. On the fifth day, he was told the hearing already occurred and that El-Khier had waived his right to have his attorney present.¹⁶

Hady Hassan Omar was approached by the FBI on September 12, 2001. Apparently, he had used the same Kinko's computer station to purchase airline tickets as Mohamed Atta, one of the 19 hijackers.¹⁷ He was brought in for questioning, but when he asked the agents if he needed a lawyer, they said it wasn't necessary. He wasn't under arrest, they said. Although he was placed in handcuffs, he was told that he just needed to come in for a "voluntary interview."¹⁸ Omar was interviewed for seven and a half hours and given a polygraph test, which he passed.¹⁹ At that point, he was issued a Notice to Appear, the charging document in a deportation proceeding, alleging that he had violated his tourist visa, despite the fact that he had a valid work permit. Omar reports that a prison guard told him, "Today, the attorney general signed a new law, and we can keep you here as long as we want."²⁰

In the lawsuit that Omar has since brought against the federal authorities for mistreatment he suffered in detention, he alleges several instances where he was explicitly denied access to his attorney, which caused delay in appearing before a judge.²¹ When he finally did have a hearing, the immigration judge ordered him released on \$5,000 bond.²² In response, the INS invoked authority granted by a new post-9/11 regulation to appeal the ruling and prolong Omar's detention.²³ Omar began to suffer from depression, lost weight and contemplated suicide. Soon thereafter, he was granted release. Although no official reason was given for why he was finally released, one senior law enforcement official in Washington told a reporter that "If your subject has a complete breakdown, the barriers to resistance are lessened. Once a person is at that point, he has lost the will to deceive, and you can be pretty certain that he's not lying."²⁴

The OIG has the power and authority to investigate and evaluate these allegations and, if substantiated, to identify the policies that led to such abuses. The OIG should have access to INS documents detailing the facilities in which detainees were held and when, if ever, they were visited by a lawyer. The OIG also should have access to documents that showing whether individual detainees were represented in immigration court. As a result,

¹⁶ Human Rights Watch, *Presumption of Guilt*, p. 42.

¹⁷ Matthew Brzezinski, "Hady Hassan Omar's Detention," *New York Times Magazine*, October 27, 2002.

¹⁸ Robert Rubin, Lawyers Committee for Civil Rights, Hady Hassan Omar v. Carl Casterline, "Complaint for Damages; Demand for Jury Trial," September 9, 2002.

¹⁹ Matthew Brzezinski, "Hady Hassan Omar's Detention," *New York Times Magazine*, October 27, 2002.

²⁰ Robert Rubin, Lawyers Committee for Civil Rights, Hady Hassan Omar v. Carl Casterline, "Complaint for Damages; Demand for Jury Trial," September 9, 2002.

²¹ Robert Rubin, Lawyers Committee for Civil Rights, Hady Hassan Omar v. Carl Casterline, "Complaint for Damages; Demand for Jury Trial," September 9, 2002.

²² Matthew Brzezinski, "Hady Hassan Omar's Detention," *New York Times Magazine*, October 27, 2002.

²³ Matthew Brzezinski, "Hady Hassan Omar's Detention," *New York Times Magazine*, October 27, 2002.

²⁴ Matthew Brzezinski, "Hady Hassan Omar's Detention," *New York Times Magazine*, October 27, 2002.

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for each facility, the OIG should be able to report the status of legal representation for post-9/11 detainees held at that facility.

The OIG report should specify the number of detainees who were represented by counsel, and the number who were not represented. We would also expect the OIG to report both on the written policies of detention facilities regarding access by detainees to telephones, including whether free calls were permitted, and how frequently calls were permitted, as well as how this worked in practice. The report should identify the materials distributed to detainees to inform them about free legal services, assess the accuracy of these materials, determine whether the materials were made available in the detainees' native languages, and report on how promptly detainees were provided with this important information.

The OIG should identify any instances in which detainees were denied the right to contact their consulates. In particular, the OIG should specify how many detainees contacted their consulates and how many detainees signed a waiver giving up the right to contact their consulate. The OIG should explain whether they discovered evidence that detainees were coerced by federal authorities to sign such waivers with the promise of an earlier release from detention for cooperation.

In addition to these statistics, the OIG should incorporate facts gathered from interviews with detainees and immigration attorneys into the report so that, where there were problems, the OIG can provide an analysis of where the system broke down. For example, the mere provision of a detainee handbook containing numbers for pro bono legal assistance is not sufficient protection of access to counsel. The handbook must be in a language the detainee can understand. There must be adequate access to phones, and detainees must be able to dial direct and at no cost. Visitation policies must also provide reasonable times in which attorneys can visit for intake interviews.

Detention without Charge

A second area of investigation by the OIG includes "issues affecting the length of the detainees' confinement" and "the DOJ's efforts to oppose bond for all September 11 detainees and delay their deportations pending completion of the FBI's clearance investigation."²⁵

Prior to September 11, 2001, the INS was required to notify a detainee of the basis for his detention within 24 hours of arrest.²⁶ A new regulation issued by the Attorney General, effective September 17, 2001, increased from 24 to 48 the number of hours the INS could

²⁵ U.S. Department of Justice, Office of the Inspector General, "Report to Congress on Implementation of Section 1001 of the USA PATRIOT Act," January 22, 2003, available at http://www.usdoj.gov/oig/special/2003_01a/final.pdf (accessed March 5, 2003).

²⁶ See Lawyers Committee for Human Rights letter to Richard Sloan, Immigration and Naturalization Service dated November 19, 2001, available at http://www.lchr.org/us_law/loss/comments.pdf (accessed April 29, 2003).

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detain someone without charge. In addition, the regulation authorized detention without charge for an unspecified additional “reasonable period of time” in the event of an “emergency or other extraordinary circumstance.”²⁷ Determining what “reasonable” means or what constitutes an “emergency” or “extraordinary circumstance” is not defined in the regulation and appears to be left open to interpretation by individual INS officers. There are no meaningful checks on INS authority under this regulation, and the regulation applies even to detainees who are not charged with a crime.

Documents released by the INS on November 27, 2001 in response to litigation under the Freedom of Information Act provide a window into the abuse that has flourished under such blanket detention authority.²⁸ Those documents provided information about 718 so-called “special interest” detainees who were then held on immigration violations. According to the INS and as of November 27, 2001:

- 317 were held without charge for more than 48 hours;
- 36 were held for 28 days or more before being charged;
- 13 were held for more than 40 days without charge;
- 9 were held for more than 50 days without charge;
- One man from Saudi Arabia was held for 119 days without charge.

The OIG report should reveal whether these extraordinary delays were pursuant to the September 17 regulation and, if so, how the determination was made that the circumstances warranted detention without charge for so long.

The experience of Mohammed Irshaid, a Jordanian Palestinian, illustrates what can happen under such broad detention authority. Irshaid has lived in the United States for 22 years. He has 3 American children. He was arrested on November 6, 2001 at his work site and jailed at Passaic County Jail for 23 days without any charge – even a charge of violating the immigration laws – being filed against him. His attorney filed a motion for bond, and he was released on \$1500 bond, even though no charge had been filed against him. In January, three months after his arrest and after he had been released on bond, Irshaid finally received notice from the INS that he was being charged with an immigration violation of overstaying his visa. However, he had documentation proving that this was incorrect and the case was quickly terminated.²⁹

In another case, an immigration judge granted a motion to terminate the deportation proceedings of Muhammad Abdul Qayyum on the basis that the INS did not comply with

²⁷ 8 C.F.R. § 287.3.

²⁸ These statistics were among the limited information the government provided in response to litigation under the Freedom of Information Act led by the Center for National Security Studies. Records are available on their website at <http://www.cnss.gwu.edu/>.

²⁹ Jim Edwards, “Data Show Shoddy Due Process for Post-Sept. 11 Immigration Detainees,” *New Jersey Law Journal*, February 6, 2002.

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its own regulation requiring charges to be issued within 48 hours.³⁰ In defense of the motion, the INS stated, “[c]ertainly, the enormously complex investigation into the September 11, 2001 terrorist attacks against the United States qualifies as both an emergency and an extraordinary circumstance.”³¹

The OIG report should detail what justification, if any, was provided for the extension of the time period beyond 48 hours in each of the 317 cases where detainees were held without charge. If these detentions were all authorized under the kind of general assertion of emergency made by the government in Qayyum’s case, i.e., that the investigation into the September 11 attacks is complex and difficult, it risks making any restrictions on the government's authority to detain without charge meaningless.

While the FOIA litigation resulted in the release of some information regarding 718 immigration detainees, many more have been detained since that time. On March 6, 2003, Attorney General John Ashcroft testified before the House Appropriations Subcommittee on Commerce, Justice, State and Judiciary, that 766 immigration detainees have been held “in connection with” the 9/11 investigation to date. However, this number does not necessarily represent all of the detainees who have been held for long periods without charge since September 17, 2001, the date the new regulation went into effect, since there seem to have been many detained who could not be said to be held “in connection with” the criminal investigation. Accurate figures on how many individuals have been detained, on what basis and for how long, have not been made public, and questions about the number of people detained remain.³²

The OIG’s report could clarify these questions. The OIG has access to documents and other evidence that should reveal how people were detained in connection with the investigation, how many were held but were not connected to the investigation, and how many were detained longer than 48 hours without charge.

The OIG could also discover in cases in which individuals are detained for longer than 48 hours without charge, whether the INS records the reasons for the extended detention. If any records were made in the detainees’ files indicating the reason for the delay in issuing charges, they should be provided in the OIG’s report. Any policies or directives that provide guidance to INS officers about when a person must be charged would be available to OIG investigators and should be included in the report. If guidelines were issued for the treatment of “special interest” detainees, especially if they provide criteria

³⁰ Order of Immigration Judge, U.S. Department of Justice, Executive Office for Immigration Review, In the Matter of Muhammad Abdul Qayyum, October 18, 2002.

³¹ Letter to Immigration Judge Esmerelda Cabrera, Executive Office of Immigration Review, from Alan Wolf, Assistant District Counsel for the Department of Justice, Immigration & Naturalization Service, dated March 18, 2002.

³² U.S. Representative Jose Serrano recently commented, “[Ashcroft] hasn’t told us how many people are suspected of knowing a cousin who knows a friend who knows an employee somewhere in the old country that knew someone that could have been a terrorist that is also detained. We don’t know that. We have no clue whether that’s 29 or 2,229, and we’ll never know. And that’s scary.” House Appropriations Subcommittee on Commerce, Justice State and Judiciary on FY 2004 Appropriations, March 6, 2003.

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for determining who is a “special interest” detainee, this information should also be included.

In addition to identifying policies and investigating compliance with them, the OIG should also report on the how decisions were made in individual cases, where decisions to invoke the September 17 regulation initiated, how the terms "emergency" and "extraordinary circumstances" were defined, and who made the decisions about when to issue a charging document.

Prolonged Detention Pending “Clearance”

The OIG’s investigation of issues affecting the length of detainees’ confinement will address “the process undertaken by the FBI and others to clear individual detainees of a connection to the September 11 attacks or terrorism in general” and “the DOJ’s efforts to oppose bond for all September 11 detainees and delay their deportations pending completion of the FBI’s clearance investigation.”³³

Under a new government policy, those who have been found eligible for release by the INS or by immigration judges have faced additional lengthy detention, in some cases for months or longer. The Administration has refused to provide the policy in writing. It seems to require that a presumed connection to terrorism be disproved before final release is approved – in effect, turning the presumption of innocence on its head. This “clearance” policy, initiated after September 11, has resulted in children, sick people and the elderly, as well as many others, languishing in jail.

In one case, a thirteen year-old Iraqi girl spent more than five months in detention before being released to the care of her older brother, who was a legal resident of the United States. Her release, and that of other members of her family, was prolonged because of delays in the new “clearance” procedures. The girl’s 62-year-old father, who was in poor health, was finally released in August 2002—eight months after the family came to the U.S. to seek asylum.³⁴

The “clearance” policy was challenged by human rights organizations, including the International Human Rights Law Group and the Center for Constitutional Rights, in a request for “precautionary measures” before the Inter-American Commission on Human Rights (IACHR). The IACHR is a seven-member panel of the Organization for American States (OAS) that monitors human rights abuses in the Americas.³⁵ The groups

³³ U.S. Department of Justice, Office of the Inspector General, “Report to Congress on Implementation of Section 1001 of the USA PATRIOT Act,” January 22, 2003, available at http://www.usdoj.gov/oig/special/2003_01a/final.pdf (accessed March 5, 2003).

³⁴ See Marisa Taylor, “Background Check for Asylum Seekers,” *San Diego Union-Tribune*, August 15, 2002.

³⁵ Request by the International Human Rights Law Group, et. al., “Request for Precautionary Measures Under Article 25 of the Commission’s Regulations”, June 20, 2002, available at <http://www.hrlawgroup.org/resources/content/IACHRPrecautionaryMeasures.pdf> (accessed January 26, 2003).

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argued that U.S. policy violated international prohibitions on prolonged and arbitrary detention in both the American Convention on Human Rights and the American Declaration of the Rights and Duties of Man. They asked the IACHR to order the United States either to release or to justify the detention of dozens of INS detainees, and to provide details on detainee names, nationalities and places of detention.³⁶

On September 26, 2002, the IACHR granted this request and called on the United States to take urgent measures to protect the rights of detainees, including the right to personal liberty and security, the right to humane treatment and the right to resort to the courts for the protection of their rights.³⁷ In a letter to the U.S. government, the IACHR noted that “despite the Commission’s specific request for information concerning the present circumstances of these detainees, the United States has failed to clarify or otherwise contradict the Petitioners’ information” indicating violations of domestic and international law.³⁸ The U.S. government has ignored requests from the IACHR for information relating to the detainees and has not publicly revealed its position on the matter.

The OIG has access to information that could explain what this “clearance” process is and how it is implemented. The OIG should include the number of detainees affected by the policy, the length of time each individual was detained beyond the final resolution of his case as a result of the policy, and whether any detainees failed the “clearance” test. If there are any detainees who failed to be cleared, the status of those cases should be reported. The OIG should also clarify whether the “clearance” policy is still in use and what legal justification exists for the policy.

Conditions of Detention

Another area of investigation by the OIG concerns “conditions of confinement experienced by detainees, including allegations of physical and verbal abuse made by detainees against prison staff...medical care; and lighting conditions in the detainees’ high-security cellblock.”³⁹

Allegations of abuse and mistreatment of detainees have been documented in detail by several human rights organizations.⁴⁰ Of particular concern are circumstances relating to solitary confinement, use of shackles and other restraints, inadequate provision of

³⁶ Ibid.

³⁷ See Letter from the Inter-American Commission on Human Rights to Gay McDougall, International Human Rights Law Group, dated September 26, 2002, available at http://www.hrlawgroup.org/resources/content/IACHR_Award.pdf (accessed December 2, 2002).

³⁸ Ibid.

³⁹ U.S. Department of Justice, Office of the Inspector General, “Report to Congress on Implementation of Section 1001 of the USA PATRIOT Act,” January 22, 2003, available at http://www.usdoj.gov/oig/special/2003_01a/final.pdf (accessed March 5, 2003).

⁴⁰ See Human Rights Watch, Presumption of Guilt, August 2002, Amnesty International March 2002, Center for Constitutional Rights, Ibrahim Turkmen v. John Ashcroft.

medical assistance, interference with religious practice, physical abuse and other mistreatment or harassment by prison guards and/or other inmates.

The OIG has access to information that could verify or dispel these allegations. But if the OIG report issued in July 2002 under section 1001 of the USA PATRIOT Act is the model for this, it is not a hopeful one.⁴¹ In that report, the OIG stated that out of 87 complaints filed within the jurisdiction of the OIG, nine investigations were opened during the period of October 26, 2001 to July 15, 2002. It was silent as to why only nine out of 87 have been investigated.

Significant Issues Not Covered by the OIG investigation

When the Office of Inspector General announced the investigation, a coalition of more than 20 human rights and civil liberties advocates, community-based organizations, and immigration practitioners organized to discuss their common interest in a thorough and accurate report.⁴² The group met with OIG investigators to express concern about the limited nature of the inquiry. Thoroughly researched reports issued by human rights organizations and the press have documented a wide range of concerns about the treatment of immigration detainees, concerns that extend beyond the scope of the OIG's stated objectives for the investigation.⁴³ The group urged the OIG to consider issues such as selective enforcement of immigration law, application of the material witness statute, classification of detainees as "special interest" cases, FBI and INS "clearance" procedures, and the manner and consequence of deportation.

The geographical scope of the inquiry is too limited. The investigation is focused primarily on the Metropolitan Detention Center and Passaic County Jail. A few months after the investigation began, a representative of the OIG expressed an intention to review the cases of a few selected detainees mentioned in the press, but did not confirm the number.⁴⁴ The organizations urged the OIG to investigate other detention facilities across the country where problems had been reported in order to get a full picture of what had occurred. The investigation of other facilities is also important because of the

⁴¹ U.S. Department of Justice, Office of Inspector General, "Report to Congress on Implementation of Section 1001 of the USA PATRIOT Act," July 15, 2002, available at http://www.usdoj.gov/oig/special/patriot_act/index.htm (accessed September 12, 2002).

⁴² Participants in this group included the American Civil Liberties Union of New Jersey, American Friends Service Committee Immigrant Rights Program, American Immigration Law Foundation, Amnesty International USA, Center for Constitutional Rights, Center for National Security Studies, Coalition for the Human Rights of Immigrants, Columbia Human Rights Clinic, Council on American-Islamic Relations of New Jersey (CAIR-NJ), Council on American-Islamic Relations of New York (CAIR-NY), Desi's Rising Up and Moving (DRUM), Human Rights, Education and Law Project (HELP), Human Rights Watch, International Human Rights Law Group, Islamic Circle of North America (ICNA) Relief, Law Offices of Claudia Slovinsky, Law Offices of Sandra P. Nichols, Law Offices of Sohail Mohammed, Lawyers Committee for Human Rights, Legal Aid Society of New York, New York Area Muslim Bar Association, New York Immigration Coalition, New York State Defenders Association Immigrant Defense Project, Post September 11 Civil and Human Rights Project of Building Resistance.

⁴³ See, e.g., Human Rights Watch, *Presumption of Guilt*, Amnesty International,

⁴⁴ Telephone conversation with Lawyers Committee staff member.

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practice by the INS of secretly transferring detainees to other facilities. There are numerous allegations of individuals transferred several times during their time in custody, often creating problems for lawyers and family members to track their whereabouts.⁴⁵ Attempts to visit, bring clothing or bail money or provide legal assistance were thwarted by the INS's failure to notify counsel or family of the transfer. There are also reports that detainees may have been transferred out of MDC and Passaic in response to the OIG's announcement of its investigation.⁴⁶

If the OIG does not include an analysis of transfer policies in its report, it will only present a partial story. Also, by limiting the review to only two detention facilities, the OIG has cut out a significant number of detainees from its analysis. It is unknown how many of the 1,182 detainees reported by DOJ to be in custody in November 2001 were held at Passaic or MDC. But it is known that many other facilities held and continue to hold immigration detainees as a result of Department of Justice policies post-September 11, 2001.

It is also important that the OIG gather as much evidence as possible directly from detainees and their lawyers. Many of the immigration detainees had been deported or released by the time the OIG announced its investigation in April 2002. At that time, the current figures on detainees still in custody was unknown. Figures available in February 2002 stated that 327 were still in INS custody.⁴⁷ However, in July 2002, while the OIG investigation was underway, only 81 remained in INS custody.⁴⁸ Interviews of such a limited number of detainees, may not present an accurate picture of the patterns of abuse suffered by detainees.

Another concern that the investigation apparently will not cover is the underlying question of why these detainees were arrested in the first instance. Allegations of discriminatory and selective enforcement of immigration laws against Arab and Muslim populations have sparked widespread controversy.⁴⁹ The criteria by which the authorities stopped and arrested individuals are still unknown, and reports of sweeps at apartment buildings and mosques raise questions about racial, ethnic and religious profiling. This question is not included in the scope of the OIG investigation.

⁴⁵ Matthew Brzezinski, "Hady Hassan Omar's Detention," *New York Times Magazine*, October 27, 2002; Amnesty International, "Amnesty International's concerns regarding post September 11 detentions in the USA," March 14, 2002; Tamara Audi, "Secrecy Veils Arrests, Jailings in Terror Probe," *Detroit Free Press*, October 22, 2001.

⁴⁶ Letter to Glenn Fine from the New York Civil Liberties Union, dated May 28, 2002; Letter to Paul Martin from the New York Civil Liberties Union, dated June 7, 2002.

⁴⁷ Steve Fainaru, "Detainee Consented to Search," *Washington Post*, February 16, 2002.

⁴⁸ Letter from Daniel Bryant to Carl Levin

⁴⁹ See Amnesty International, "Amnesty International's concerns regarding post September 11 detentions in the USA," March 14, 2002; Testimony of Gerald H. Goldstein, Attorney, National Association of Criminal Defense Lawyers, U.S. Senate Judiciary Committee Hearing, "DOJ Oversight: Preserving Our Freedoms While Defending Against Terrorism," December 4, 2001; and Jean AbiNader and Kate Martin, "Just the Facts, Mr. Ashcroft," *Washington Post*, July 25, 2002.

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While the OIG has stated that it will look at detainees' access to counsel with respect to representation in deportation proceedings, it has not been clear on whether it will address the issue of denial of the right to counsel during interrogations by the FBI and other federal authorities that were conducted for criminal investigation purposes. While in INS custody, several detainees reported lengthy interrogations without counsel present. These allegations merit further inquiry and should be pursued by the OIG.

In addition, the OIG report may not cover the consequences for many detained in the immediate aftermath of the attacks of September 11 who were cleared by the FBI of involvement in terrorism, and then deported. Many questions remain about what has happened to them in the countries to which they were deported. In some countries, anyone with a perceived connection to the U.S. investigation into terrorist activity may be subject to suspicion and possible arrest or detention. And many of the countries to which the U.S. detainees were deported are known to engage in arbitrary detention and torture.⁵⁰ Asylum seekers who are denied refuge and sent back may be particularly vulnerable to retribution from their governments, which typically are implicated in asylum claims. It now in fact appears that some of these detainees were arrested and detained by their own governments upon their return.⁵¹

The case of Maher Arar is an example of the risks of this policy. Arar is a Canadian citizen who was born in Syria, and thus is a dual national. On September 26, 2002, traveling on his Canadian passport, Arar was detained at New York's JFK Airport while in transit from Tunisia to Montreal. According to reports, U.S. officials interrogated him for approximately nine hours, accused him of having links to terrorist organizations, and detained him in the United States for two weeks before forcibly deporting him to Syria. While he was in U.S. custody, Canadian government officials asked the United States whether it was detaining Arar. United States officials denied that they were holding him.

Now, eight months later, Arar is in a Syrian jail at risk of torture. The Syrian government recently announced that it may charge him with membership in a "terrorist" group (though the group is not on the U.S., Canadian or UN lists of designated terrorist groups) and may try him in a secret military proceeding. Canadian officials say they are continuing to try to secure Arar's release.⁵²

International and U.S. law prohibit the return of any person to a place where there is a substantial likelihood that they will be subjected to torture.⁵³ U.S. immigration

⁵⁰ Jim Edwards, "Sept. 11 Detainees Fear Abuse in Their Homelands After Deportation," *New Jersey Law Journal*, December 2, 2002.

⁵¹ *Ibid.*

⁵² See "Demonstrators want Ottawa to do more for Canadian held in Syrian jail," CBC, Canada News, December 17, 2002; Letter from Alex Neve, Secretary General, Amnesty International Canada to the Honourable Bill Graham, Minister of Foreign Affairs, dated May 9, 2003, available at <http://www.amnesty.ca/library/news/Arar0503.htm> (accessed May 19, 2003); "Syria to charge Arar with terrorist links," *Canadian Broadcasting Corporation*, April 30, 2003, available at http://ottawa.cbc.ca/regional/servlet/View?filename=ot_arar20030430 (accessed May 19, 2003).

⁵³ See United Nations Convention Against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment, G.A. Res. 39/46, 39 U.N. GAOR Supp. No. 51, p. 197, U.N. Doc. A/RES/39/708 (1984); See

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regulations spell out procedures under which immigration detainees can challenge U.S. plans to deport them to a country where they fear being subjected to torture.⁵⁴ There is no evidence that Maher Arar was afforded access to this procedure. The OIG report should clarify whether US law and policy was adhered to in Arar's case and the cases of other detainees who were deported.

also Foreign Affairs Reform and Restructuring Act (FARRA), Pub. L. No. 105-277, Div. G, October 21, 1998, Section 2242 (a).

⁵⁴ 8 C.F.R. § 208.18.