

DOJ INSPECTOR GENERAL CONTINUES TO EXAMINE POSSIBLE ABUSE OF AUTHORITY IN CONNECTION WITH POST-SEPTEMBER 11 DETENTIONS

On April 2, 2002, the Office of Inspector General (OIG) of the Department of Justice announced it would investigate detentions at Passaic County Jail in Paterson, NJ (Passaic) and Metropolitan Detention Center (MDC) as well as the detentions of other specific individuals whose cases have been highlighted in the media. The OIG said the investigation will focus on three primary issues:

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.¹

A report detailing the findings of the investigation is expected in early 2003.

The investigation is an outgrowth of the reporting requirements in the USA PATRIOT Act.² Section 1001 of the Act requires the OIG to issue semi-annual reports to Congress detailing any abuses of civil rights and civil liberties by employees and officials of the Justice Department in connection with implementation of the Act.³ This special investigation of the treatment of detainees reaches further than implementation of the USA PATRIOT provisions and is independent from the semi-annual reports required under USA PATRIOT.

During the months of September and October 2001, the Justice Department periodically reported the number of people detained in its investigation of the September 11 attacks. These numbers climbed to a total of 1,182 as of November 5, 2001.⁴ On November 8, 2001, however, the DOJ announced that it would no longer release an official running tally of the number of detainees.⁵ Nevertheless, over time, in response to

¹ 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).

² 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).

³ USA PATRIOT Act, Section 1001

⁴ See Attorney General Press Briefings on September 9, 2001; September 28, 2001; and October 18, 2001. See also Dan Eggen and Susan Schmidt, "Count of Released Detainees is Hard to Pin Down," *Washington Post*, November 6, 2001.

⁵ See Amy Goldstein and Dan Eggen, "U.S. to Stop Issuing Detention Tallies," *Washington Post*, November 9, 2001.

press and congressional inquiries, additional information about the numbers of detainees has surfaced, and community groups, lawyers, and human rights and civil liberties organizations maintained close watch for information. Recent statements out of the Justice Department indicate that 765 individuals were detained on immigration violations “over the course” of the investigation. Yet, these numbers are inconclusive.

It is difficult to know what these numbers represent and what criteria are being used to classify individuals detained as part of the government's terrorism investigation. According to various DOJ sources, the number in INS custody over the course of the post-September 11 investigation rose from 718 in February 2002,⁶ to 752 in July,⁷ to 765 in December 2002.⁸ But community-based organizations continue to report immigration sweeps and detentions in the Arab, South Asian and Muslim communities that suggest the numbers of those detained in this ongoing effort are much higher.

Important questions remain unanswered about who is being included in the official government count. For example, it is unclear whether the Justice Department considers individuals arrested as a result of its Absconder Apprehension Initiative (an effort to capture immigrants already ordered deported, starting with those from Arab and Muslim countries) or through its Special Registration Program (discussed in detail below) as part of these numbers. The government has not been willing to answer these questions.⁹ Although the DOJ refuses to release it, information about the detainees continues to be sought in the courts.¹⁰

TREATMENT OF DETAINEES CAUGHT UP IN INITIAL POST-SEPTEMBER 11 SWEEPS

Most people detained in the immediate aftermath of the attacks of September 11 were cleared by the FBI of involvement in terrorism, and then deported. Many questions remain about the initial justification for their detention by the United States, about their treatment while in detention, and 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

⁶ Plaintiff's Statement of Material Facts, *Center for National Security Studies v. Department of Justice*, March 18, 2002, available at <http://www.cnss.gwu.edu/~cnss/cnssstatementoffacts.htm> (accessed December 16, 2002).

⁷ Letter to U.S. Senator Carl Levin from Daniel J. Bryant, Assistant Attorney General, U.S. Department of Justice, July 3, 2002 (on file at Lawyers Committee).

⁸ See Dan Eggen, “U.S. Holds 6 of 765 Detained in 9/11 Sweep,” *Washington Post*, December 12, 2002.

⁹ Adam Clymer, “Government Openness at Issue as Bush Holds Onto Records,” *New York Times*, January 3, 2003.

¹⁰ A number of civil liberties groups filed a complaint against the Department of Justice for failing to disclose information about the detainees under the Freedom of Information Act. To access filings in this case, see *Center for National Security Studies v. Department of Justice*, available at <http://cnss.gwu.edu/~cnss/cnssvdoj.htm> (accessed March 7, 2003).

known to engage in arbitrary detention and torture.¹¹ 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.¹²

The case of Maher Arar is an alarming example of the risks of U.S. policy in this regard. Arar is a Canadian citizen who was born in Syria. 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, more than five months later, Arar is believed to be in a Syrian jail at risk of torture. He has not been charged with a crime, and the Syrian government has not disclosed where Arar is being detained. Canadian officials were permitted to meet with Arar, under restrictive conditions, until January 7. They have not seen him since that time.¹³

International and U.S. laws prohibit the return of any person to a place where there is a substantial likelihood that they will be subjected to torture.¹⁴ U.S. immigration 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.¹⁵ There is no evidence that Maher Arar was afforded access to this procedure.

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

¹² *Ibid.*

¹³ "Demonstrators want Ottawa to do more for Canadian held in Syrian jail," CBC, Canada News, December 17, 2002.

¹⁴ 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 also Foreign Affairs Reform and Restructuring Act (FARRA), Pub. L. No. 105-277, Div. G, October 21, 1998, Section 2242 (a).

¹⁵ 8 C.F.R. § 208.18.