15 December 2010

Eric Holder
Attorney General
United States Department of Justice
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Washington, D.C. 20530-0001

Thomas J. Perrelli
Associate Attorney General
United States Department of Justice
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Tony West
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Re: Call for Inspector General Investigation Pursuant to the Department of Justice's State Secrets

Dear Attorney General Holder, Associate Attorney General Perrelli, and Assistant Attorney General West,

The undersigned groups and individuals write to inquire whether the Department of Justice has referred to the Inspectors General (IG) of the Defense Department, the Central Intelligence Agency, the Department of Justice, or any other department or agency allegations arising from the government's extraordinary rendition program detailed in several recently dismissed civil complaints pursuant to the Department of Justice's new policy on the use of the state secrets privilege issued on September 23, 2009 (hereinafter "the September 23 policy"). That policy requires such allegations to be referred to the appropriate Inspector General for investigation; if such referrals have not yet been made, we respectfully request that you now ask the relevant IGs to undertake a joint investigation into the Executive's use of extraordinary rendition and to issue a public report—with as little redaction as possible—of their findings. Should the IG investigation uncover government wrongdoing, we also urge that plaintiffs' legitimate claims be acknowledged and redressed—that the government vindicate their claims by recognizing the ordeals they endured and denouncing any wrongdoing; by issuing a public apology; by providing monetary compensation; and through any other means that justice requires.

The September 23 policy provides that, in a case where the state secrets privilege is properly invoked but the complaint raises credible allegations of government wrongdoing, "the Department [of Justice] will refer those allegations to the Inspector General of the appropriate department or agency

for further investigation, and will provide prompt notice of the referral to the head of the appropriate department or agency."[1]

Several cases challenging aspects of the government's extraordinary rendition program raise credible allegations of wrongdoing appropriate for referral:

- In *Arar v. Ashcroft*,[2] the plaintiff, Canadian citizen Mr. Maher Arar, challenged U.S. officials for abusing the immigration laws, blocking his access to court to oppose his removal order, and rendering him to Syria, where he was tortured and detained for a year and never charged with a crime. The Supreme Court denied the petition for certiorari seeking review of the Second Circuit's *en banc* decision affirming dismissal of his complaint.[3] The Canadian government exonerated Mr. Arar, acknowledged its role in what happened to him, and compensated him.[4]

- In *El-Masri v. Tenet*,[5] the plaintiff alleged that former CIA Director George Tenet violated U.S. law when he authorized agents to abduct Mr. El-Masri. According to the complaint, Mr. El-Masri was beaten; drugged; transported to a secret CIA prison in Afghanistan; held incommunicado in an Afghani prison long after his innocence was known; and then, five months after his abduction, deposited at night, without explanation, on a hill in Albania. The case came to an end when the United States Supreme Court refused to review the Court of Appeals for the Fourth Circuit's decision upholding the dismissal of Mr. El-Masri's complaint on state secrets grounds.[6]

- In *Mohammed v. Jeppesen Dataplan Inc*,[7] five men allege that they were subjected to extraordinary rendition and charged that Jeppesen DataPlan, Inc., a subsidiary of the Boeing Company, knowingly participated in the government's rendition program by providing flight planning and logistical support to airplanes and crews that the CIA used to transfer these five men to places where they were subjected to torture, detention, and interrogation. The Ninth Circuit, sitting *en banc*, dismissed the complaint on state secrets grounds. The plaintiffs have petitioned the Supreme Court for certiorari.

Each of these cases satisfies the September 23 policy's requirement of "credible allegations of government wrongdoing." Allegations should at the very least be treated as "credible" in the absence of facial implausibility or objective evidence of the plaintiffs' untruthfulness in making the

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[1] The September 23 Policy § 4C.

[2] 585 F.3d 559 (2d Cir. 2009) (en banc); 414 F. Supp. 2d 250 (E.D.N.Y. 2006).

[3] 130 S. Ct. 3409 (2010).

[4] We recognize that the Second Circuit Court of Appeals did not dismiss *Arar* on state secrets grounds, but the government did invoke the privilege in that case, and the purpose of the policy would not be served by allowing the courts' reliance on alternative grounds for their decision to insulate credible allegations of wrongdoing from investigation.

[5] 479 F.3d 296 (4th Cir. 2007); 437 F. Supp. 2d 530 (E.D. Va. 2006).

[6] 552 U.S. 947 (2007). While the assertion of the states secrets privilege that brought this case to an end was made prior to the issuance of the September 23 policy, it still should be referred to the relevant IGs for investigation. It raises credible allegations of serious government wrongdoing, which were never subjected to judicial review. In the spirit of the September 23 policy, these allegations should not go uninvestigated.

[7] 614 F.3d 1070 (9th Cir. 2010) (en banc); 539 F. Supp. 2d 1128 (N.D. Ca. 2008).

allegations. Many of the allegations at issue in these cases have in fact been confirmed by some of the United States' allies.[8] Accordingly, under the September 23 policy, the Justice Department has a responsibility to ensure that these allegations are investigated, and that any wrongdoing uncovered is exposed and condemned.

Indeed, the Ninth Circuit sitting *en banc* recognized, when it upheld the dismissal of the complaint against Jeppesen Dataplan Inc., that the plaintiffs may be entitled to non-judicial relief. According to the court,

> [d]enial of a judicial forum based on the state secrets doctrine poses concerns at both individual and structural levels. For the individual plaintiffs in this action, our decision forecloses at least one set of judicial remedies, and deprives them of the opportunity to prove their alleged mistreatment and obtain damages. At a structural level, terminating the case eliminates further judicial review in this civil litigation, one important check on alleged abuse by government officials and putative contractors. Other remedies may partially mitigate these concerns.[9]

To be sure, an IG report cannot serve as a legitimate *substitute* for civil litigation of valid claims, or for the United States' treaty obligations to conduct impartial investigations and provide enforceable remedies for, *inter alia*, acts of torture[10] or other cruel, inhuman or degrading treatment or punishment and unlawful arrest or detention.[11] But in these cases, where the courthouse door has been shut on the plaintiffs, a thorough accounting by the relevant Inspectors General would at least partially address the court's structural concern. The Inspectors General will be able to document and expose any government wrongdoing, and proscribe corrective action to prevent similar actions in the future.

We recognize that, at Representative John Conyers' request, the IG of the Department of Homeland Security conducted an investigation into aspects of Mr. Arar's case. It found, among other things, that U.S. officials transferred Mr. Arar to Syria even after the Immigration and Naturalization Service determined that it was more likely than not that he would be tortured there—a violation of both U.S. and international law. In fact, the Inspector General testified before Congress that he could not rule out the possibility that Mr. Arar was sent to Syria in order to have him interrogated under conditions that our law would not permit. This report, while informative, is incomplete. It

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[8] Among the many sources that corroborate elements of the U.S. Government's extraordinary rendition program are the following: the Canadian "Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar" confirmed many of the allegations in his case; the Council of Europe, in a report confirming many of the details of both el-Masri's and Arar's cases, concluded that the United States had created secret detention centers in Europe and orchestrated unlawful inter-state transfers; the Parliamentary Assembly of the Council of Europe accused the United States of operating a "clandestine spiderweb of disappearances, secret detentions and unlawful inter-state transfers"; and the European Parliament concluded that "the CIA had operated 1,245 flights, many of them to destinations where suspects could face torture."

[9] *Jeppesen*, 614 F.3d at 1091.

[10] Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment arts. 13, 14, 16 and Committee against Torture, General Comment no. 2, UN Doc CAT/C/GC/2 (24 January 2008), paras 3 and 6.

[11] International Covenant on Civil and Political Rights art. 2, 7, 9; *see also generally* Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted and proclaimed by UN General Assembly resolution 60/147 of 16 December 2005.

assessed only the processes and procedures used by U.S. immigration officials. But IGs also must examine the roles of the Department of Justice, the Department of State, and the CIA, as well as the extent to which United States officials were complicit in Mr. Arar's treatment in Syria, and anything that took place beyond the borders of the U.S. In short, this report examines only one strand of a much larger web of government activity alleged in Mr. Arar's now-dismissed complaint. Moreover, several potential witnesses declined to be interviewed due to litigation that was ongoing at the time. That litigation having come to an end, those witnesses now should be available.

Nor does the CIA IG's investigation into the case of el-Masri and other "erroneous renditions," reported by the media to have been undertaken several years ago,[12] fill the void. This report, if it exists, remains entirely classified. It therefore does nothing to overcome one of the primary problems posed by the state secrets privilege—the systematic shielding from public scrutiny of information regarding government wrongdoing.

Consequently, we believe that a thorough investigation—conducted by all relevant Inspectors General with full access to all relevant witnesses, documents, tapes, photographs, and other material, and culminating in a public report—would serve the interests of justice, and would accord with the September 23 policy's aspiration to "provide greater accountability and reliability in the invocation of the state secrets privilege."[13] Moreover, where government wrongdoing is uncovered, providing plaintiffs appropriate redress could at least provide some small measure of recompense for the denial of these plaintiffs' day in court.

We would be happy to discuss this matter further with you or other officials from your department. If you have any questions, please do not hesitate to contact Emily Berman, Counsel, Liberty & National Security Project, Brennan Center for Justice, at emily.berman@nyu.edu or (646) 292-8335. We look forward to a response and further discussions.

Best Regards,

ACLU of North Carolina
Alliance for Justice
Amnesty International USA
Bill of Rights Defense Committee
Brennan Center for Justice at NYU School of Law
Center for Constitutional Rights
Center for Justice & Accountability
Center for Media and Democracy
The Constitution Project
Defending Dissent Foundation
Essential Information
Government Accountability Project
Human Rights First
The James Madison Project

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[12] Dana Priest, *Wrongful Imprisonment: Anatomy of a CIA Mistake*, Wash. Post, Dec. 4, 2005.

[13] September 23 Policy.

No More Guantanamos
North Carolina Stop Torture Now
OpenTheGovernment.org
PEN American Center
Physicians for Human Rights
Progressive Librarians Guild
Project On Government Oversight

Matthew Alexander, Former Senior Military Interrogator
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