US appellate court blocks lawsuit against extraordinary rendition and torture

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For the second time in two years a federal appellate court has denied Canadian citizen Maher Arar the right to sue former Attorney General John Ashcroft and other US government officials for money damages based on his "extraordinary rendition" to Syria, where he was imprisoned without due process and tortured for almost a year.

On November 2, a divided panel of eleven judges from the Second Circuit Court of Appeals, which reviews decisions from United States district courts in New York, Connecticut and Vermont, voted 7-4 that neither the Torture Victim Protection Act (TVPA) nor the Constitution itself provides a remedy for someone illegally seized by US authorities while traveling through the United States and sent halfway around the world specifically to be tortured into a confession. (The ruling in *Arar v. Ashcroft*, including its four separate dissenting opinions, totals 184 pages and can be read here).

Last year a three-judge Second Circuit panel reached the same conclusion by a 2-1 vote, affirming the district court's initial dismissal of Arar's lawsuit in 2006. The recent decision came about because a majority of the Second Circuit's judges voted to rehear the case "en banc." This means all the judges on the bench, rather than just a panel, hear the case.

The US government's violations of Arar's human rights are clearly documented in the three-volume findings of the Canadian Government's Commission of Inquiry, released on September 18, 2006. (See "Bush administration denies responsibility for torture of Canadian"). Canada subsequently issued a formal apology for its role and paid Arar $10.5 million in compensation.

Arar emigrated from Syria to Canada at age 17 and lived with his wife and children in Ottawa, where he was employed by a Massachusetts-based software company. On September 26, 2002, Arar, then age 32, landed at New York's John F. Kennedy Airport. While passing through immigration after disembarking a flight from Zurich to board a connecting flight to Montreal, a US official—acting on a supposed tip—accused him of "being a member of a known terrorist organization," a charge which Arar vehemently denied at the time and which has never been supported by any evidence.

Arar's arrest was followed by two days of interrogation, during which he was chained and shackled, verbally abused and denied food. Next Arar was transferred to a federal jail—the Metropolitan Detention Center in Brooklyn—where he was strip-searched and placed in solitary confinement for three more days. His repeated requests for a telephone call and legal representation were ignored.

After five days in custody, the US Immigration and Naturalization Service filed deportation proceedings against Arar, even though he had said from the beginning that he simply wanted to leave the United States and continue on his journey home to Ottawa.

After the deportation case was filed, Arar was finally allowed to call a family member, who immediately contacted the Canadian consulate and arranged legal representation. Arar met with his lawyer once, on October 5.

The next day, US officials resumed interrogations behind the back of his lawyer, who was repeatedly lied to about her client's circumstances. At 3:00 a.m. on October 8, Arar was awakened, taken from the jail and put on a small jet bound for Amman, Jordan, without any hearing on his deportation. The next day Jordanian authorities handed him over to Syria, which had refused to receive Arar directly from the US.

There, as described in the lead dissenting opinion, Arar "was placed in a 'grave' cell measuring six feet long, seven feet high, and three feet wide…. The cell was damp and cold, contained very little light, and was infested with rats, which would enter the cell through a small aperture in the ceiling. Cats would urinate on Arar through the aperture, and sanitary facilities were nonexistent. Arar was allowed to bathe himself in cold water once per week. He was prohibited from exercising and was provided barely edible food. Arar lost forty pounds.

"During his first twelve days in Syrian detention, Arar was interrogated for 18 hours per day and was physically and psychologically tortured. He was beaten on his palms, hips, and lower back with a two-inch-thick electric cable. His

captors also used their fists to beat him on his stomach, his face, and the back of his neck. He was subjected to excruciating pain and pleaded with his captors to stop, but they would not. He was placed in a room where he could hear the screams of other detainees being tortured and was told that he, too, would be placed in a spine-breaking 'chair,' hung upside down in a 'tire' for beatings, and subjected to electric shocks.

"To lessen his exposure to the torture, Arar falsely confessed, among other things, to having trained with terrorists in Afghanistan, even though he had never been to Afghanistan and had never been involved in terrorist activity."

After holding him in custody for almost a full year with no charges, on October 5, 2003, Syria released Arar to Canadian officials in Damascus. He was flown to Ottawa the following day and reunited with his family.

Writing for the seven-judge majority, Dennis Jacobs, a 1992 appointee of the first president George Bush, claimed that the TVPA did not apply because it covered only the actions of foreign governments, rejecting Arar's contention that the torturers were obviously acting in concert with and on behalf of the defendant US officials. As the dissenters explained, "the interrogations in the United States and Syria contained identical questions, including a specific question about his relationship with a particular individual wanted for terrorism. In return, Arar alleges, the Syrian officials supplied US officials with all information extracted from Arar."

The argument that the TVPA would not apply under such circumstances is tantamount to a sheriff in the Jim Crow South claiming to not be responsible for the murder of a prisoner because all he did was open the jail doors for the lynch mob.

Next, Jacobs wrote that the law did not allow Arar to sue directly under the Constitution—what the law refers to as a *Bivens* claim—because "the judicial review of extraordinary rendition would offend the separation of powers and inhibit this country's foreign policy."

Dissenting Judge Barrington D. Parker, Jr.—an appointee of the younger Bush—slammed this aspect of the ruling as an explicit abdication of the judiciary's role to check executive branch abuses by enforcing constitutional due process guarantees. "This view of the separation of powers, which confines the courts to the sidelines, is, in my view, deeply mistaken; it diminishes and distorts the role of the judiciary especially during times of turmoil."

Another dissenter, Clinton-appointee Guido Calabresi, was unusually emphatic. "I believe that when the history of this distinguished court is written, today's majority decision will be viewed with dismay," he said at the beginning of his dissenting opinion.

Arar responded to the ruling with a statement issued through his attorneys at the Center for Constitutional Rights in New York City: "After seven years of pain and hard struggle it was my hope that the court system would listen to my plea and act as an independent body from the executive branch. Unfortunately, this recent decision and decisions taken on other similar cases, prove that the court system in the United States has become more or less a tool that the executive branch can easily manipulate through unfounded allegations and fear mongering. If anything, this decision is a loss to all Americans and to the rule of law," Arar wrote.

Added Georgetown law professor, David Cole, who argued the case, "This decision says that US officials can intentionally send a man to be tortured abroad, bar him from any access to the courts while doing so, and then avoid any legal accountability thereafter. It effectively places executive officials above the law, even when accused of a conscious conspiracy to torture. If the rule of law means anything, it must mean that courts can hear the claim of an innocent man subjected to torture that violates our most basic constitutional commitments."

Sonia Sotomayor participated in the hearing on December 9, 2008, but was appointed to the Supreme Court before the opinion filed, and therefore had no role in the final decision. It seems likely that the Second Circuit delayed its ruling so that her vote in the case—whichever way it would have gone—would not be the subject of debate at her confirmation hearings.

In another case arising from the US government's "extraordinary rendition" program, the Ninth Circuit—which covers the western United States—has granted a request by the Obama administration for en banc review in *Mohamed v. Jeppesen Dataplan, Inc.*, vacating last April's ruling by a three-judge panel that five men can sue a Boeing subsidiary for allegedly flying them to secret prisons around the world. (See "Appeals court rejects Obama state secrets claim in rendition case")

A decision in that case, where the Obama Attorney General Eric Holder has mimicked Bush administration arguments that allowing the case to proceed would disclose "state secrets" about CIA torture programs, is expected next year.