

# Canada's Supreme Court rules foreign policy trumps citizens' rights

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All those concerned with the defence of democratic rights should ponder the significance of the recent unanimous decision of Canada's Supreme Court overturning the ruling of two lower courts that Canada's Conservative government must seek to repatriate Guantanamo Bay detainee Omar Khadr.

A Canadian citizen, Khadr has been held by the US military at its notorious Bagram and Guantanamo Bay detention centers since the summer of 2002 when he was just 15 years old.

Australia, Britain, indeed every other Western government, has prevailed on Washington to release into their custody those of their citizens who, in flagrant violation of international and US law, have been held at Guantanamo Bay.

By contrast, Canada, under a succession of Liberal and Conservative governments, has allowed Khadr to languish at Guantanamo Bay and done so knowing that the youth has been abused and tortured.

Now, with the enthusiastic support of Canada's Conservative government and the implicit sanction of Canada's highest court, Khadr is to be tried later this year on charges of murder and terrorism before a US military commission—a special court where elementary judicial norms, such as the inadmissibility of all hearsay and coerced evidence, do not apply.

In its January 29 ruling, Canada's Supreme Court conceded that the Canadian government has violated Khadr's rights under the Canadian constitution's Charter of Rights and Freedoms. It further found that the effects of this violation are ongoing.

Specifically, it admonished the government for having Canadian Security and Intelligence Service and Department of Foreign Affairs agents collaborate with US officials in interrogating Khadr at the Guantanamo Bay detention camp in 2003 and 2004 under conditions where the juvenile had been indefinitely detained without charge, had no recourse to legal counsel, and had otherwise been abused. The 2004 interrogation was undertaken although Canadian officials knew Khadr had been "softened up" for their encounter by three weeks of sleep deprivation.

But even as it concurred with the Federal Court and Federal Court of Appeal that the government has trampled on Khadr's basic rights, Canada's Supreme Court ruled that the two lower courts overstepped their authority in instructing the government to seek Khadr's repatriation.

In the name of upholding the government's prerogative to conduct foreign policy with only very limited judicial oversight, the court said the appropriate remedy for the abuse of Khadr's Charter rights was to provide "declaratory relief"—that is, to declare that Khadr had been wronged and leave it to the government to determine what action if any will be taken to redress the situation.

The government was quick to assert that the court ruling had vindicated its position.

"There's no shift in Canadian policy on this," crowed Prime Minister Stephen Harper's press secretary, Dimitri Soudas. "Their ruling said we

get to decide and we're saying that Mr. Khadr faces serious charges on a wide range of things... It's under the American administration's purview right now to pursue with the court case."

Khadr is being persecuted by US and Canadian authorities because his father was an associate of Al Qaeda leader Osama Bin Laden.

The US military was caught out trying to suppress evidence from within its own ranks that exculpates Khadr from the charge he killed a US Special Forces operative during a July 2002 firefight in Afghanistan. That firefight resulted in the death of Khadr's father and left the boy himself seriously wounded. But even were the claims of the US military true—something Khadr has always strenuously denied—he should, according to international law, be deemed a "child soldier," thereby exempting him from prosecution for alleged war crimes.

Horrendous as has been the Canadian state's treatment of Khadr, the implications of the Supreme Court's decision—legal and political—go far beyond his ordeal.

Some commentators have claimed that with its ruling on the Khadr case the Supreme Court has asserted a new power of constitutional oversight over the government's management of foreign affairs and that this represents a democratic advance.

Such claims are at best the product of naïveté.

In reality, the ruling further circumscribes the powers of the judiciary to ensure the constitutionality of the government's conduct of foreign policy.

While the court claimed to be merely interpreting the law, both the arguments it used to justify the reversing of the lower court's order to the government and its finding that "declaratory relief" was the "appropriate remedy" to the violations of Khadr's Charter rights establish a new precedent. They give flesh and blood or, more correctly, bones and entrails to what the Supreme Court describes as the judiciary's "narrow power to review and intervene on matters of foreign affairs to ensure the constitutionality of executive action."

The Supreme Court's ruling begins by reaffirming that Canada's Charter of Rights and Freedoms does not apply to most actions taken by the Canadian government and its representatives outside Canada.

An exception to the general rule that foreign policy decisions and actions are beyond the court's purview is "Canadian participation in the activities of a foreign state or its agents that are contrary to Canada's international obligations or fundamental human rights norms."

On this basis, the court asserted its right to review the Canadian government's involvement in Khadr's detention. But after concurring with the two lower courts in their finding that Khadr's rights were violated, Canada's highest court invoked two arguments to overturn the repatriation order.

The lower court, it ruled, was insufficiently deferential to the executive's prerogative to conduct foreign policy. "The remedy ordered" by the lower court, unanimously declared Canada's top judges, "gives too little weight to the constitutional responsibility of the executive to make

decisions on matters of foreign affairs in the context of complex and ever-changing circumstances, taking into account Canada's broader national interests."

The Supreme Court's second grounds for overturning the repatriation order complemented the first. The court "necessarily" has an "incomplete picture of the range of considerations currently faced by the government" in determining its foreign policy and, more generally, the judiciary lacks competence in foreign affairs.

Historically, courts have acted to make it prohibitively costly for those in authority to abuse their power. Thus in Canada—although not as uniformly as in the US—evidence illegally obtained by the police and Crown is ruled inadmissible even when it provides compelling proof of an accused's guilt.

Failure to impose such penalties, courts, lawyers and civil rights activists have long argued, would effectively constitute license for the state to carry out illegal searches and seizures and otherwise trample over democratic rights in the name of fighting crime or terrorism.

Short of the Canadian government having connived in Khadr's murder, it is difficult to imagine a more serious violation of his basic rights. According to the Supreme Court itself, federal authorities have been complicit in the illegal detention, interrogation and torture of a juvenile. Yet in deference to the federal government's foreign policy powers and the purported unknown reasons of state that are guiding it, Canada's highest court squelched an order that the government take meaningful action to extricate Khadr from his ordeal and instead limited itself to "declaratory relief," which is little more than a verbal admonishment.

One might think that the US government's intention to have Khadr tried by a military commission not bound by traditional judicial principles would bolster the legal argument in support of the court ordering Canada's government to seek Khadr's repatriation.

The Supreme Court asserts the exact opposite. The fact that the US has singled Khadr out for special treatment by making him one of only six Guantanamo Bay detainees to be tried before a military commission—what the Court calls Khadr's "legal predicament"—is further reason, it says, for "caution in the exercise of the Court's remedial jurisdiction."

In other words, because Khadr is a person of special interest to the US, the courts should not be too insistent on vindicating his rights through orders to the federal government for fear it could damage Canada's "national interest."

The precedent is clear: foreign policy considerations trump citizens' rights. Violations of Charter rights in pursuit of foreign policy objectives and considerations will not result in meaningful remedial action.

The implications of this are ominous, and not only because the Canadian government is increasingly active in overseas wars and intelligence operations. The boundaries between foreign and domestic affairs are not airtight. On the basis of this judgment, could the executive not invoke foreign policy considerations—its relations with Washington or NATO, for example—to justify violating Canadians' rights within Canada?

Already, in the name of national security, the government is refusing to obey a House of Commons order that it turn over for parliament's scrutiny unredacted documents concerning the Canadian government's and Canadian Armed Forces' complicity in the torture of Afghan detainees.

In a February 4 article, the *Globe and Mail*, Canada's so-called newspaper of record, cited several legal experts who suggested that Canada's highest court did not instruct the government to seek Khadr's extradition because it anticipated that the Conservatives would simply refuse to implement such an order. Such defiance would result either in a diminishing of the court's authority or a constitutional crisis.

"You can issue all sorts of orders," Allan C. Hutchinson of Osgoode Hall Law School told the *Globe*. "But at some point, you have to enforce them.

"It is very dangerous making orders that you ultimately won't be able to enforce. You have to be prepared to precipitate a big constitutional crisis."

There may well be truth in the claim that the court's judgment in the Khadr case was crafted with a view to averting a constitutional clash.

Much the same has been said about Governor General Michaëlle Jean's decision to cede to Harper's request in December 2008 that she shut down or prorogue parliament so as to enable the minority Conservative government to escape defeat in an impending non-confidence vote.

Several leading constitutional experts have conceded that had Jean refused Harper's prorogation request, the prime minister would likely have publicly challenged her legitimacy and the legality of the opposition parties replacing his government with a Liberal-NDP coalition, intensified his appeals to anti-Quebec chauvinism, and otherwise provoked a wider political constitutional crisis. In a nationally televised address on the eve of his meeting with Governor General Jean, Harper had depicted the opposition's attempt to unseat his government as semi-treasonous and a threat to "national unity" and vowed to use all the legal powers at his disposal to fight it.

Writing as a supporter of the existing social-political order, constitutional scholar C.E.S. Franks deplores the "inflammatory and constitutionally incorrect rhetoric" Harper brandished in December 2008. Nevertheless, he insists Jean was right to cede to his demand that parliament be temporarily suspended and the opposition stripped of its constitutional right to defeat the government. For had she not done so, Harper and the Conservatives would have mounted an agitation that would "have split the country on east-west, linguistic, and perhaps other lines (for example socio-economic class)." (Russell and Sossin, eds., *Parliamentary Democracy in Crisis*, University of Toronto Press, 2009, p. 46).

Workers must take note: the Canadian's bourgeois pursuit of a program of social reaction at home and militarism abroad is increasingly causing it to break with traditional bourgeois democratic norms. This is resulting in tensions and behind the scenes conflicts between the branches of government and various state institutions—conflicts that are invariably being resolved at the expense of basic democratic rights.

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