

US Supreme Court refuses to hear Arar case

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On June 14, the US Supreme Court denied the request of Maher Arar to review the dismissal by a federal appellate court of his civil suit against former Attorney General John Ashcroft and other US government officials, who conspired in his “extraordinary rendition” from New York to Syria, in order that he could be systematically interrogated there by torture. The highest court in the land has thereby let stand as law the appellate court ruling that such conduct cannot be compensated or even litigated in US courts.

Arar, a telecommunications engineer, is a dual Canadian and Syrian citizen who emigrated to Canada as a teenager. In September 2002, Arar stopped at New York’s John F. Kennedy Airport to change planes on his return to Canada from a Tunisian vacation. US immigration officials detained Arar, acting on a false tip from Canadian police that he was an “Islamic extremist” suspected of being linked to Al Qaeda.

FBI agents interrogated Arar for two days at the airport, during which time Arar was chained and shackled, verbally abused and denied food. Arar emphatically denied any connection to terrorism generally or Al Qaeda specifically. He was then transferred to solitary confinement in a federal jail for three more days, where he was strip-searched, and denied repeated requests for a telephone call and legal representation.

The US Immigration and Naturalization Service then filed deportation proceedings against Arar, even though he had been merely en route to Ottawa. A family member contacted the Canadian consulate and arranged legal representation for Arar, who then briefly met with his lawyer once.

The deportation proceedings nevertheless went forward without Arar’s lawyer being present, because US officials lied to the lawyer about their time and location. The regional immigration director determined that Arar was a member of Al Qaeda. Despite Arar’s request to be sent to Canada when he feared he would be tortured, the immigration official signed an order authorizing Arar’s removal to Syria without any further inquiry before or

review by an immigration judge.

Arar was in Syria for a year, imprisoned for the first 10 months in an underground cell located within Syrian Military Intelligence that Arar likened to a grave, measuring six feet long, seven feet high, and three feet wide.

The cell was damp and cold, contained little light, and was infested with rats. Cats urinated on Arar from above. He was allowed to bathe himself in cold water only once a week. The food provided was barely edible, so that Arar lost 40 pounds during his confinement.

During his first 12 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 and on his stomach, face and the back of his neck by his captors’ fists.

Arar 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.

Arar was never charged with any crime and never received any judicial review of his detention. In October 2003, Syria released Arar to Canadian officials in Damascus. He returned to Ottawa the following day and was finally reunited with his family.

In January 2004, Arar filed a civil action for damages in federal court against former US Attorney General John Ashcroft, FBI Director Robert Mueller, the US secretary of homeland security, and senior immigration and FBI officials. Arar alleged that the conditions of his detention while in the United States, and his removal to Syria with defendants’ knowledge or intention that he would be detained and tortured there, violated his rights under the US Torture Victim Protection Act, as well as his right to substantive due process under the Fifth Amendment to the US Constitution.

Arar’s complaint expressly challenged the covert US policy of extraordinary rendition, the removal of “non-

U.S. citizens detained in this country and elsewhere and suspected—reasonably or unreasonably—of terrorist activity to countries, including Syria, where interrogations under torture are routine...precisely because those countries can and do use methods of interrogation to obtain information from detainees that would not be morally acceptable or legal in the United States and other democracies.”

Such conduct, he alleged, violates the prohibition of Article 3 of the Convention Against Torture against “any state party to the Convention...expelling, returning or extraditing any person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”

In September 2006, a Canadian Government Commission of Inquiry issued three volumes of findings documenting Arar’s allegations and the complete absence of any link between him and Al Qaeda or terrorism. Canada’s prime minister formally apologized to Arar, who was paid just short of \$10 million as compensation for his mistreatment.

In November 2009, an expanded 11-judge “en banc” panel of the US court of appeals in New York nevertheless dismissed Arar’s federal lawsuit on a divided 7-4 vote.

The appellate court ruled the Torture Victim Protection Act could not afford Arar a remedy because it covered only the actions of foreign, not US government officials. This ignores that the US officials conspired with their Syrian counterparts to interrogate and torture Arar, gave the Syrians the questions to ask and received all information extracted. As the dissenting judges wrote, US law has long recognized that conspiring with persons who violate a statute provides a basis for suit.

The appellate majority also refused to permit Arar to sue directly under the US Constitution, writing that “the judicial review of extraordinary rendition would offend the separation of powers and inhibit this country’s foreign policy,” in that “such a suit unavoidably influences government policy, probes government secrets, invades government interests, enmeshes government lawyers, and thereby elicits government funds for settlement.”

Moreover, in order for Arar’s claims to proceed, “he must probe deeply into the inner workings of the national security apparatus of at least three foreign countries, as well as that of the United States, in order to determine the basis for his alleged designation as an Al Qaeda affiliate and his removal to Syria.”

Of course the “inner workings” of these national security operations are hardly secret at all, having already

been revealed in the 2006 Canadian Commission report. Their exposure would be a public service.

It is transparent that the court made these vague assertions of intrusive inquiry into government operations merely as a vehicle to cover up government misconduct in the “war on terror.” Suit for governmental violations of fundamental constitutional provisions concerning detention and physical mistreatment of prisoners always has the sort of effects identified by the appellate court, and, in theory, such suit has been permitted precisely in order to deter such egregious conduct in the future.

As the dissenting appellate judges correctly wrote, the ruling is tantamount to the judicial branch abdicating its constitutional role of reining in governmental intrusion upon such basic democratic rights. This, then, is the appellate decision that the US Supreme Court refused to take up and review on Monday.

At the time of the 2009 appellate court decision, Arar issued a statement that “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’s lead attorney, Georgetown law professor David Cole, then wrote, “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.”

In response to the Supreme Court action this week, Arar said the decision “eliminates my last bit of hope in the judicial system of the United States. “When it comes to ‘national security’ matters the judicial system has willingly abandoned its sacred role of ensuring that no one is above the law.”



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