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Justice Denied After Seven Years of Pain and Struggle

Imagine its September 2002 and you are at JFK Airport changing planes on your way home to Canada, after a vacation in Tunisia. To your surprise, you are detained by U.S. authorities and interrogated for...13 days. The Bush administration labels you a suspected member of Al Qaeda and sends you against your will to Syrian intelligence authorities renowned for torture. You are tortured, interrogated and detained in a tiny underground cell for nearly a year before the Syrian government releases you, stating they had found no connection to any criminal or terrorist organization or activity. An exhaustive investigation by the Canadian government finds you innocent of terrorism or other wrongdoing and that government apologizes for its minor role. *Arar v. Ashcroft*, No 06-4216-cv.

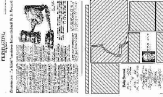
Wouldn't you expect American law to afford you due process and a judicial forum in which to hold those who committed these outrageous violations of your constitutional rights fully accountable?

That's what Maher Arar, a 39-year old Canadian citizen, expected when he was subjected to these outrages. But as of this week, the doors of American justice have been slammed in Arar's face.

On Monday, a sharply divided federal Court of Appeals, by a vote of 7 to 4, dismissed Arar's case, concluding that it raised too many sensitive foreign policy and secrecy issues to permit any relief.

"After seven years of pain and hard struggle" Arar said upon learning of the ruling, "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 unannounced allegations and rear mongering. If anything, this decision is a loss to all Americans and to the rule of law."

Georgetown law professor David Cole, who argued the case, said "This decision 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 com-



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mitments."

In January 2004, just three months after he returned home to Canada from his ordeal, the Center for Constitutional Rights filed a suit on Arar's behalf against John Ashcroft and other U.S. officials, the first to challenge the government's policy of "extraordinary rendition," also known as "outsourcing torture."

Two congressional hearings in October 2007 dealt with his case. On Oct. 18, 2007 Arar testified via video at a House Joint Committee Hearing convened to discuss his rendition by the U.S. to Syria for interrogation under torture. During that hearing - the first time Arar testified before any U.S. governmental body - individual members of Congress publicly apologized to him, although the government still has not issued a formal apology. The following week, Secretary of State Condoleezza Rice admitted during a House Foreign Affairs Committee Hearing that the U.S. government mishandled his case.

In strongly worded dissents, the four judges who would have allowed Arar's case to go forward based on long-standing authority under *Bivens v Six Unknown Named Agents*, 403 U.S. 388 (1971), criticized the majority for its "utter subservience to the executive branch."

Judge Barrington D. Parker, calling the dismissal a "miscarriage of justice," noted that Arar "credibly alleges that United States officials conspired to ship him from American soil, where the Constitution and our laws apply, to Syria, where they do not, so that Syrian agents could torture him at federal officials' direction and benefit." The majority "distorts the system of checks and balance essential to the rule of law, and it trivializes the judiciary's role in these arenas." He added that being always mindful that "in times of national stress and turmoil the rule of law is everything [and] our role is to defend the Constitution."

Judge Guido Calabresi wrote that "when the history of this distinguished court is written, today's majority decision will be viewed with dismay." He complained that due to the majority bowing to the executive branch, "a person, whom we must assume (a) was totally innocent and (b) was made to suffer excruciatingly (c) through the misguided deeds of individuals acting under color of federal law - is effectively left without a U.S. remedy."

This injustice cannot be the last word. The Supreme Court should immediately review the Arar case and allow it to proceed. Ironically, Justice Sonia Sotomayor, who would presumably be alert to the injustices Arar has suffered, may recuse herself since she heard oral argument in this case while sitting on the Court of Appeals. A four to four split in the Supreme Court would leave this week's ignominious opinion in place.

That leaves Congress and the American people. The majority tried to soften its decision by pointing out that "the elected members of Congress" can "decide whether an individual may seek compensation" from officials for constitutional violations. Anyone who cares about the rule of law needs to urge the Obama administration and their elected officials to correct this miscarriage of justice for Maher Arar and for all those who have suffered at the hands of our government.