

Amnesty International/Reprive conference: Maher Arar and Extraordinary Renditions

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Presentation by Maria LaHood, Center for Constitutional Rights, at the Amnesty International/Reprive Conference: The Global Struggle Against Torture: Guantánamo Bay, Bagram and beyond, 19-21 November 2005

While transiting through a New York airport on his way home to Canada in September 2002, Canadian citizen Maher Arar was detained and interrogated by FBI and immigration officials for nearly two weeks. They then took him from his cell in shackles at 4:00 in the morning and advised him that based on classified evidence he was found to be a member of Al Qaeda, and that he was being removed to Syria rather than Canada. Maher was taken on a private jet to Jordan, where he was beaten for eight hours, and then delivered to Syria, where he was beaten and interrogated for 18 hours a day for a couple of weeks. He was whipped on his back and hands with a two inch thick electric cable. For over ten months he was held in an underground dark, damp grave-like cell – 3 x 6 x 7 feet – where he could hear others being tortured. After a year in Syria, Maher was released without any charges and is back home in Canada with his family.

The Center for Constitutional Rights (CCR) represents Maher in U.S. court against the US officials who sent him to Syria to be tortured, including former Attorney General Ashcroft, former Deputy Attorney General Larry Thompson, FBI director Robert Mueller, and several immigration officials. The lawsuit not only seeks compensation, but to expose the truth about what the officials did to Maher, known as an "extraordinary rendition", and to put a stop to this practice through which the Government abducts people and delivers them to other countries to be interrogated through torture. The Government officials have moved to dismiss the case, arguing essentially that even if they conspired with Syrian officials to have Maher tortured, they can't be liable, because the decision to send Maher to Syria was a discretionary immigration decision – a mere deportation - that the court cannot review. They also argue that no non-U.S. citizen transiting through the U.S. has constitutional rights except *at most* a right to be free from gross physical abuse, and that Maher had no constitutional rights in Syria, even if he was held at the behest of the U.S. They further claim that they can't be held liable because they didn't torture Maher themselves and he wasn't in their custody, and because their decision purportedly related to national security concerns. The judge heard oral argument on the motions to dismiss in August 2005, but has not yet issued a decision.

The Government has also asserted the "state secrets" privilege, asking the court to dismiss Maher's case because the reasons they deemed him a member of Al Qaeda and sent him to Syria instead of Canada are so-called state secrets. They contend that litigating the case would disclose these state secrets, revealing intelligence gathering methods and harming national security and foreign relations. Aggravating the fact that the U.S. Government labeled Maher a member of Al Qaeda is the fact that it continues to maintain that claim, despite the fact that the Syrian and Canadian Governments have said he has no links to Al Qaeda, and despite the fact that it's never provided any evidence that he does.

Former Attorney General Ashcroft has noted that even whether the U.S. obtained diplomatic assurances would be considered a state secret. Of course even if diplomatic assurances are obtained, they're not monitored and they're not enforceable. Even our current Attorney General Alberto Gonzalez has admitted that they can't control what countries do to someone once they have them, and that he didn't know if countries actually comply with the assurances.

CCR has argued that Maher should at least be able to try to prove his case with non-privileged information – there's an enormous amount of public information that continues to be made available – and that he should also have a right to obtain non-privileged information from the Government. The Government has responded that even if the information is public, forcing them to admit it could cause harm to national security and foreign relations. Furthermore, although it seems clear that the reason the U.S. sent Maher to Syria was so that he would be detained and interrogated through torture, whatever reason they say they sent him there does not change what they did. Regardless of their reasons, they knew or should have known that it was likely Maher would be tortured in Syria, and at the very least they were deliberately indifferent to that fact.

Finally, even if the judge thought the Government's privileged evidence should be kept secret and could provide a defense, the case can't be dismissed unless there are no procedural safeguards that would protect the information while allowing the case to move forward. Such safeguards could include protective orders, national security clearance for the attorneys, and in camera hearings. However, two U.S. courts of appeals have recently affirmed outright dismissals of cases based on the Government's state secrets assertion, and on November 28th, the Supreme Court declined to review one of those decisions, and has yet to decide if it will review the other.

If the Government's state secrets assertion is accepted, then its practice of covertly kidnapping people and sending them to other countries to be detained and tortured would not be reviewable by a court. Such an assertion could also prevent adjudication of the use of secret prisons, torture, or even assassinations anywhere around the world. In the name of national security, the Government could shield any of its human rights violations from judicial scrutiny, and further expand its power to act outside the law.

The U.S. Government has also refused to cooperate with the Canadian Inquiry, which the Canadian Government launched to investigate the role of Canadian officials in what happened to Maher. Evidence released through the Inquiry has shed some light on the events. It has revealed that Maher had been identified as a witness, not a suspect, of a Canadian investigation in which the U.S. was a part. The Canadian investigators called Maher to come in for questions, and he called a lawyer, who put some standard conditions on the interview. The Canadian officials didn't bother to pursue the interview, but let U.S. officials know that Maher didn't want to be interviewed without an attorney. So in September 2002, when Maher was on the flight to New York, U.S. officials called Canada and said send us that list of questions you wanted answers to.

Information has also been revealed because courageous people like Abdullah Almalki have come forward with their stories. While Maher was detained in New York, Mr. Almalki was being interrogated and tortured in Syria and was specifically questioned about Maher – he was asked isn't it true Maher went to Afghanistan or Pakistan, and then told that Maher would soon be there anyway. Clearly the U.S. and Syria were exchanging information.

Another Canadian, Ahmed El Maati, was picked up after U.S. officials found an Ottawa tourist map in his employer's truck. When Mr. El Maati was detained and tortured in Syria he ended up falsely "confessing" to planning to drive a truck of explosives into Canadian parliament buildings, and that he had seen Maher and Mr. Almalki in Afghanistan. When Mr. El Maati was released from Syria in August 2002 he told the Canadian Government he had been tortured and had made a false confession, which the U.S. likely knew when they detained Maher a month later. This has not stopped U.S. officials from claiming that intelligence from Syria thwarted a terrorist attack that would have killed a lot of people in Ottawa. Newspaper reports have cited to Flint Leverett, formerly with the CIA and the National Security Council, as the source for this information, but Flint Leverett recently testified at the Canadian Inquiry that he had no knowledge that any attack had really been averted.

The Canadian Government's position in the Inquiry has in some respects mirrored the U.S. Government's position regarding national security and foreign relations. Maher and his Canadian attorneys have been excluded from in camera hearings, and when the Commission tried to issue a summary of the role of Canadian Intelligence, the Canadian Government redacted it. When the Commission stated that the Canadian Government had censored information not conceivably related to national security, the Canadian Government sued the Commission to stop it from releasing the summary. Maher has never testified before the Commission because it deemed it would be unfair to have him testify until the interim report is issued and he can confront the evidence. Although the interim report is due to be issued to the Canadian Government at the end of March, it can prevent its disclosure if information relates to national security or was obtained from a foreign entity.

So both the U.S. and Canadian Governments are essentially claiming to protect themselves and each other, but I'm hopeful that the more we expose the truth about what our governments are doing, and the more we come together as an international community, as we are here, we can begin to erode this concept of "national" security, and the notion that human rights are secondary to this concept, thereby eroding the unchecked power of the U.S. Government.