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Restoring the full rule of law to America: indemnify torture victims

By Owen Fiss

The fight against terrorism is not yet over. It predated the Bush presidency, and will continue long after. President Obama has openly assumed the burden of the fight. He has assured us that swift and decisive action will be taken against terrorists, although he also insisted that this action will be in accordance with the US Constitution. In his inaugural address he declared, "[a]s for our common defense, we reject as false the choice between our safety and our ideals."

A special test of these promises is now pending before the Second Circuit which sits in New York. It involves Canadian citizen Maher Arar, who was taken into custody by US officials at JFK airport in September 2002, and then transferred to Syria for interrogation under conditions of torture. At issue is the legality of the practice known as extraordinary rendition, the transportation of individuals suspected of terrorist activity to foreign countries for interrogation, sometimes torture. After a panel of three judges refused to reach the merits of Arar's claim, 12 judges of the Second Circuit, sitting en banc, reheard the case. They are expected to rule soon.

In this suit, Arar asked for monetary damages and a declaratory judgment that the law had been broken. On the first claim, the three-judge panel ruled that it did not have congressional authorization to give damages. Such a ruling seems odd in the extreme. It is not clear why Congress, a political body, must give the judiciary authorization before allowing damages for the violation of a constitutional right.

More importantly, even if the panel's unwillingness to award damages is sound, the declaratory judgment claim remains unaffected. A declaratory judgment simply declares what the law is. It requires no congressional authorization and does not penalize any past act. It is an exercise of the core judicial function. It enables the judiciary to remove any lingering uncertainty as to the legality of extraordinary rendition, and thus to restore the sovereignty of the Constitution.

Here, too, the Second Circuit three-judge panel hesitated and dismissed the declaratory judgment claim, this time on the theory that Arar lacked standing, the legal right of an individual to bring a lawsuit. To my mind, Arar suffered sufficient harm to meet the constitutional standing requirements. We all suffer when someone is tortured, because the basic law of the nation is compromised. But the victim of the rendition suffers in a distinct and very particularized way. His personal suffering constitutes an injury in fact and as such should entitle him to invoke the power of the federal judiciary. Arar has every incentive to make certain that the contentions of law and fact are vigorously presented. Moreover, the claim tendered - that the government acted in violation of the Constitution - respects the inherently legal function of the judiciary: to say what the law is.

The declaratory judgment does not contain the material component of a damages award, but much like a damages award, it speaks both to the world and to the victim. It says to the world that the government violated basic norms of the legal order - the Fifth and Eighth Amendments, which prohibit, respectively, deprivations of rights without due process and cruel and unusual punishment. It also addresses the rendition victim and tells him, in a direct and personal way, that he has been wronged - high American officials violated the basic law of their nation in sending him to Syria for interrogation under conditions of torture. Such a statement may have as much meaning to the victim and give him as much satisfaction as an award of damages. It helps restore his self-worth. It speaks to his soul, not his pocketbook, but there is nothing in the Constitution that prioritizes the material over the spiritual.

Obama has disavowed many of the policies of the Bush administration and assured the nation there will be no torture on his watch. Yet a willingness to speak only to the future is not sufficient. Not only must the new administration establish policies that preclude torture in the future; it must also account for the wrongs of the past. It must prosecute those who engaged in practices clearly understood to be torture and provide civil remedies to those who were in fact tortured.

The government is, of course, entitled to defend on the merits suits by victims of torture such as Arar, but should not hide behind the technical doctrines that have enabled the judiciary to avoid adjudicating the claims before it. The judiciary may have its own reasons for avoiding judgment on the merits, but it is doubtful that they would be sufficient in the face of the announced policy of the administration.

Such a stance would provide a measure of justice to the victims of torture, and not so incidentally, lend credence to the lofty rhetoric of President Obama about the future. It would bring to light the way the Constitution had been abused and enable the public to confront and acknowledge the violations of the Constitution committed in their name. The public would have an opportunity to say "Nunca Más." These proceedings would also allow the judiciary to affirm America's commitment to respecting human dignity and the constitutional norms to which it gives life, and to declare - in bold and clear terms - that these norms apply to American officials and their instrumentalities wherever they act and against whomever they act.

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