

ELENA KAGAN AND MAHER ARAR

☒ Remember how I suggested one of the bright sides of Elena Kagan's nomination to SCOTUS would make Republican heads explode when they realize Hamdan lawyer Neal Katyal may be Acting Solicitor General?

Well, keep your eye out for splattered fearmonger brains, because Katyal just signed a document as the Acting Solicitor General.

Though perhaps their heads won't explode.

Because, as Lyle Denniston points out, Katyal's assumption of the Acting role here significantly diminishes Maher Arar's chances of getting his suit against the federal government for his rendition to Syria and torture heard by the Supreme Court.

The Supreme Court has not yet scheduled Arar's case for its initial examination. The Justices are expected to do so, however, before the current Term ends in late June. Justice Sonia Sotomayor, who as a Second Circuit judge had taken part in the lower court's *en banc* hearing (but not its decision) has not yet indicated whether she would take part in the case as it proceeds in the Supreme Court. So far, the Court has not issued any orders in the case that would show whether she had opted to take part. Her recusal, however, appears likely.

If the Court were to grant review of the case, it would not be heard and decided until the next Term, starting Oct. 4. Justice John Paul Stevens will no longer be on the Court then, and Kagan, if approved by the Senate, could be on the bench by then.

The Court's changing membership, and the

prospect that Justice Sotomayor would not participate in the *Arar* case, might not only have an impact on how the Court would rule if it took on the case, but may well influence whether it is willing to grant review at all. If, as expected, the case is put to an initial vote this Term on the question of review, the Justices could be deterred from voting to grant because of the possibility of a 4-4 split were the case to be decided. assuming Sotomayor's recusal. (Justice Stevens is expected to be on hand for that initial vote.)

If the case were granted, the question would arise whether a new Justice Kagan (assuming Senate confirmation) would take part in the decision. Although she did not sign the U.S. brief filed Wednesday, it seems highly likely that she had participated in internal discussions of the position the government would take in that brief, and thus might feel compelled to disqualify herself from its consideration by the Court. That would raise the prospect of a 4-3 split, with the Court's four most conservative Justices in the majority. That is a prospect that perhaps could lead those four to vote for review, but could lead the Court's more liberal Justices to refrain from supporting review. (Both a 4-4 split, without Sotomayor, and a 4-3 split, without Sotomayor and Kagan, would probably result only if Justice Anthony M. Kennedy declined to side with his more conservative colleagues and voted with the more liberal Justices.)

This elaborates on a point that Michael Isikoff already wrote about—the way in which Kagan's nomination and probable confirmation increases the chances that SCOTUS will back Bush and Obama Administration policies on counterterrorism.

Whatever her merits as the next Supreme Court justice, Elena Kagan's selection provides a hidden benefit for President Obama's national-security team: it significantly boosts its chances of prevailing in controversial claims to the court involving the war on terrorism.

The reason: Kagan will inevitably have to recuse herself from an array of cases where she has already signed off on positions staked out by the Obama administration relating to the detention of terror suspects and the reach of executive power. As a result, the seat occupied by Justice John Paul Stevens—the most forceful advocate on the court for curbing presidential power—will be replaced by a justice who, on some major cases over the next few years, won't be voting at all.

"If you are litigating on behalf of Bagram detainees, the skies just got a lot darker today," said Ben Wittes, a legal-affairs analyst at the Brookings Institution.

Now, there is an exception to this premise: those cases coming out of the 9th Circuit (which might include the Jeppesen suit, the al-Haramain case, and the Padilla-Yoo suit). If the 9th circuit rules in favor of the plaintiffs in any of these cases, and Kagan's likely recusal were to create a tie in SCOTUS (assuming Kennedy voted with the liberal judges, which might be even more likely for cases coming through the 9th), that would leave the 9th circuit decision intact.

Nevertheless, none of that is going to help Maher Arar obtain some kind of justice for his kidnapping and torture at the hands of Americans.

Oh, and on whether or not the fearmongers' heads

will explode at Katyal's involvement? The brief signed by Katyal contends that the torture of Arar is incidental to this suit.

This case does not concern the propriety of torture or whether it should be "countenance[d]" by the courts. Pet. 14. Torture is flatly illegal and the government has repudiated it in the strongest terms. Federal law makes it a criminal offense to engage in torture, to attempt to commit torture, or to conspire to commit torture outside the United States. See 18 U.S.C. 2340A. The President has stated unequivocally that the United States does not engage in torture. See May 21, 2009 Remarks by the President on National Security; cf. Exec. Order No. 13,491, § 3, 74 Fed. Reg. 4894 (Jan. 22, 2009) (directing that individuals detained during armed conflict "shall in all circumstances be treated humanely and shall not be subjected to violence to life and person (including murder of all kinds, mutilation, cruel treatment, and torture))."

I'm particularly bemused by Katyal's reliance on Obama's repudiation of torture. I realize that Obama's repudiation is somewhat more credible than the many times that Bush claimed we did not torture (though less and less so of late). But it would seem particularly relevant that even while Bush was proclaiming his opposition to torture, detainees in our custody and held overseas at our behest were being tortured during **precisely** the same time period that Arar was rendered to be tortured in Syria.

Nevertheless, Hamdan attorney and now Acting Solicitor General Neal Katyal says that the issue is not Arar's torture, but narrow questions of whether Arar can even ask for some relief in the US Courts.