

Federal Appeals Court Adopts Obama “State Secrets” Doctrine to Block Torture Case

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The US Ninth Circuit Court of Appeals on Wednesday dismissed a lawsuit by five victims of the CIA’s “extraordinary rendition” program against Jeppesen Dataplan, a unit of Boeing. The six-five ruling adopts as a rationale the anti-democratic “state secrets” doctrine advocated by the Obama administration.

The American Civil Liberties Union brought the suit in May 2007, charging that defense contractor Jeppesen Dataplan knowingly facilitated the renditions, known as “spook flights” or “torture flights,” by providing flight planning and logistical support to CIA personnel.

The suit, *Mohamed v. Jeppesen Dataplan, Inc.*, threatened to expose a tangled and dirty web of connections between top executives of defense corporations, foreign intelligence agencies, and the US government. It also threatened to reveal that major defense corporations were participating in and profiting from torture.

The ACLU pointed to a report in the *New Yorker* magazine that, at an internal corporate meeting, a senior Jeppesen official had said, “We do all of the extraordinary rendition flights—you know, the torture flights. Let’s face it, some of these flights end up that way.”

The Ninth Circuit’s ruling argued that “there is precious little Jeppesen could say about its relevant conduct and knowledge without revealing information about how the United States government does or does not conduct covert operations.” On this basis, the court dismissed the case.

The *Jeppesen Dataplan* case has an important history. Immediately after the suit was initiated in May 2007, the Bush administration, which was not a party to the case, intervened. The Bush administration asserted that if the case was allowed to go forward, disclosures associated with it “reasonably could be expected to cause serious—and in some instances, exceptionally grave—damage to the national security of the United States.” In February 2008, the Bush administration secured a dismissal on those grounds.

The ACLU appealed. While the case was pending, Obama took office following the November 2008 elections, appointing Eric Holder as attorney general. However, the Obama administration took exactly the same position as the outgoing Bush administration: that the case should be dismissed on the grounds of the “state secrets” privilege.

In April 2009, a three-judge panel of the Ninth Circuit ruled against the Obama administration. Writing for the panel, Judge Michael D. Hawkins wrote that the “state secrets” doctrine advocated by the administration “has no logical limit.” “As the Founders of

this Nation knew well,” Hawkins wrote, “arbitrary imprisonment and torture under any circumstance is a gross and notorious act of despotism.”

The Obama administration sought review of Hawkins’ decision by the entire Ninth Circuit (*en banc*). Yesterday’s decision, authored by liberal Raymond C. Fisher, overturns the decision of Judge Hawkins.

While couching his opinion in language of “balancing” national security against individual liberties, Judge Fisher concluded, “Courts must act in the interest of the country’s national security to prevent disclosure of state secrets, even to the point of dismissing a case entirely.”

The Obama administration, Judge Fisher claimed, “is not invoking the privilege to avoid embarrassment or to escape scrutiny of its recent controversial transfer and interrogation policies.”

The “state secrets” privilege is an anti-democratic legal doctrine that is routinely invoked to shield the abuses and crimes of the US government from scrutiny. Here, the invocation of the privilege by the Obama administration is transparently spurious. The “extraordinary renditions” of the five victims in the case are largely already a matter of public record.

Among the victims is Ethiopian citizen Binyam Mohamed, who in July 2002 was the subject of an “extraordinary rendition” to Morocco. Mohamed’s rendition has already been the subject of major public revelations. (See [Britain: Government crisis deepens over Binyam Mohamed torture revelations](#).)

Mohamed and the other victims—Abou Elkassim Britel, Ahmed Agiza, Mohamed Farag Ahmad Bashmilah, and Bisher al-Rawi—were “disappeared” between 2001 and 2003 into the secret US-led network of “black site” torture facilities without trial or charges.

The victims report the same now-familiar pattern of abuses: the victims were chained, shackled, stripped, drugged, and dressed in diapers and hoods before being smuggled onto secret intercontinental flights. Deep inside secret facilities in Morocco, Egypt, and Afghanistan, they were relentlessly interrogated and tortured.

Sexual torture features prominently in the litany of horrors described by the victims, revealing the extreme state of backwardness that prevails inside US intelligence agencies and their foreign collaborators. Mohamed’s torturer systematically cut him with a razor blade on his genitals and elsewhere. Agiza was subjected to electric shocks by means of wires attached to his ear lobes, nipples, and genitals. Britel was threatened with sodomy with a bottle and castration.

The decision by the traditionally liberal Ninth Circuit Court of Appeals underscores the complicity of the entire political establishment in the policy of rendition and torture. Since coming to office, Obama has continued in all its essentials the anti-democratic policies of his predecessor, while at the same time expanding US wars abroad.

Under the slogan of “looking forwards, not backwards,” Obama has consistently blocked investigations and litigation that threaten to reveal torture. The administration is well aware that the Democratic Party knew about these actions and is complicit in them. At the same time the Democratic administration is determined to continue these practices.

By blocking any court challenge to the criminal policies of the US government, yesterday's decision sets a profoundly anti-democratic precedent.

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