

Appeals court rejects Obama state secrets claim in rendition case

John Andrews
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On April 28, a three-judge federal appellate court unanimously reinstated the lawsuit brought by five men against a Boeing subsidiary for allegedly flying them to secret prisons around the world to be tortured as part of the CIA's "extraordinary rendition" program. The Ninth Circuit Court of Appeals rejected arguments by lawyers, first from the Bush administration and later from the Obama administration, that the so-called "state secrets" doctrine bars the plaintiffs' claims.

The five men, Ahmed Agiza, Abou Elkassim Britel, Binyam Mohamed, Bisher alRawi, and Mohamed Farag Ahmad Bashmilah, sued Jeppesen Dataplan, Inc., under the Alien Tort Statute, which allows foreign citizens to file against US corporations in US courts for money damages based on human rights violations committed overseas. The case was brought in San Jose, the center of California's high-tech industry, because Jeppesen maintains its headquarters there.

Before the company was required to respond, Bush administration lawyers intervened, filing a motion to dismiss supported by affidavits of then-CIA director Michael Hayden—one public and one classified. The public affidavit stated that "disclosure of the information covered by this privilege assertion reasonably could be expected to cause serious—and in some instances, exceptionally grave—damage to the national security of the United States and, therefore, the information should be excluded from any use in this case."

United States District Judge James Ware dismissed the lawsuit, ruling that it could not proceed because "the very subject matter of this case is a state secret." The plaintiffs appealed and Bush administration lawyers filed briefs defending the ruling.

By the time of the February 9 oral argument, however, Barack Obama had assumed the presidency and appointed Eric Holder as attorney general.

Despite Obama's repeated campaign pledges to repudiate the Bush administration's grotesque human rights violations

and promote governmental "transparency," lawyers from his Department of Justice defended the lower court ruling at oral argument. Afterwards, Ben Wizner, the American Civil Liberties Union (ACLU) lawyer representing the plaintiffs, told the press, "We are shocked and deeply disappointed that the Justice Department has chosen to continue the Bush administration's practice of dodging judicial scrutiny of extraordinary rendition and torture." (See "Obama administration defends torturers")

The *World Socialist Web Site* is neither shocked nor disappointed. Throughout the recent presidential campaign the WSWWS warned that an Obama administration would defend the same social and class interests as the previous one, and would use similar methods.

Last week's decision, authored by Clinton appointee Michael D. Hawkins—considered a Ninth Circuit moderate—squarely rejected the lower court's "subject matter" argument, but left open the possibility that the US government could still refuse to turn over evidence to protect "state secrets," forcing a later dismissal of the case if the evidence was essential either for the plaintiffs' proof or Jeppesen's defense.

Hawkins began his written opinion by presenting a record of stomach-churning abuses, perhaps unprecedented in any US judicial precedent addressing the consequences of actions taken by US government agents.

Agiza, an Egyptian, was arrested by Swedish authorities, transferred to US custody and then flown to Egypt. Held for five weeks "in a squalid, windowless and frigid cell," Agiza was beaten and "subjected to electric shock through electrodes attached to his ear lobes, nipples, and genitals." After two-and-a-half years of detention, he received a six-hour trial in a military court and was sentenced to 15 years imprisonment. The Swedish government has publicly acknowledged Agiza's rendition and torture.

Britel, an Italian citizen of Moroccan origin, was captured in Pakistan, turned over to US officials, and flown to Morocco. While being held incommunicado, "he was beaten, deprived of sleep and food, and threatened with

sexual torture, including sodomy with a bottle and castration. After being released and re-detained, Britel was coerced into signing a false confession, convicted of terrorism-related charges, and sentenced to 15 years in Moroccan prison.”

Mohamed, an Ethiopian citizen and legal resident of the United Kingdom, was also arrested in Pakistan and flown to Morocco, where he was subjected to “severe physical and psychological torture,” such as cuts “with a scalpel all over his body, including on his penis,” followed by the pouring of “‘hot stinging liquid’ into the open wounds.” After 18 months, US officials flew him to a CIA “dark prison” in Afghanistan, “where he underwent further torture, including being kept in ‘near permanent darkness’ and subjected to loud noise, such as the screams of women and children, for 24 hours per day.” Finally, Mohamed was transferred to Guantánamo Bay, where he remained for nearly five years, until his release and return to the United Kingdom on February 23 this year.

AlRawi, an Iraqi with legal residence in the United Kingdom, was arrested in Gambia while on a business trip and flown to Afghanistan. “Detained in the same ‘dark prison’ as Mohamed, loud noises were played 24 hours per day to deprive him of sleep. AlRawi was eventually transferred to Bagram Air Base, where he was ‘subjected to humiliation, degradation, and physical and psychological torture by U.S. officials,’ including being beaten, deprived of sleep, and threatened with death.” AlRawi was finally sent to Guantánamo, released on March 30, 2007, and returned to the United Kingdom.

Bashmilah, a Yemeni, was arrested while visiting his sick mother in Jordan, and turned over to US officials who flew him to Afghanistan, where he “was placed in solitary confinement, in 24hour darkness, where he was deprived of sleep and shackled in painful positions. He was subsequently moved to another cell where he was held in 24hour light and loud noise. Depressed by his conditions, Bashmilah attempted suicide three times. Later, Bashmilah was transferred by airplane to an unknown CIA ‘black site’ prison, where he ‘suffered sensory manipulation through constant exposure to white noise, alternating with deafeningly loud music’ and twentyfourhour light.” Finally returned to Yemen, Bashmilah “was tried and convicted of a trivial crime, sentenced to time served abroad, and released.”

According to the allegations of the complaint, Jeppesen provided flight planning and logistical support services to the aircraft and crew on all of the flights transporting the plaintiffs to the various locations. These were referred to within the company as “torture flights” and “spook flights.” In most instances, the plaintiffs were dressed “in a diaper and overalls, and shackled and blindfolded.” Company

officials justified their participation in these atrocities, according to an affidavit filed by one ex-employee, because “the rendition flights paid very well.”

That such a litany of horrors could even be found in a precedent of the second-highest court in the United States, in connection with a dispute over whether the executive branch has the right to engage in such conduct, is enough to cause a reader rub his or her eyes with astonishment.

The Obama administration’s assertion of the power to shut down a private lawsuit against a private company solely because the case threatens to expose US involvement in such activities underscores the extraordinary degree to which broad sections of the US ruling elite long ago abandoned any respect for the most basic human rights—freedom from arbitrary detention and torture.

“This sweeping characterization of the ‘very subject matter’ bar has no logical limit,” Hawkins wrote, “it would apply equally to suits by US citizens, not just foreign nationals; and to secret conduct committed on US soil, not just abroad. According to the government’s theory, the Judiciary should effectively cordon off all secret government actions from judicial scrutiny, immunizing the CIA and its partners from the demands and limits of the law.”

“Separation-of-powers concerns take on an especially important role in the context of secret Executive conduct,” Hawkins stated. “As the Founders of this Nation knew well, arbitrary imprisonment and torture under any circumstance is a gross and notorious act of despotism.”

Nevertheless, Hawkins left the door wide open for the Obama administration to assert claims of state secrets with respect to specific evidence, such as the contracts for the extraordinary rendition flights. The lower court can then decide to uphold the state secrets and dismiss the case on a finding that the “evidence is indispensable either to plaintiffs’ prima facie case or to a valid defense otherwise available to Jeppesen.”

The Obama administration is expected to seek review of the decision by an expanded 15-judge Ninth Circuit panel. If such review is denied, or the ruling upheld, the next step would be for the Obama administration to file a petition in the Supreme Court.



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