

Abou Elkassim Britel: A Significant US Court Victory

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This is an excerpt from *Obama's First 100 Days: Mixed Messages On Torture*, an article by Andy Worthington, journalist and author of *The Guantánamo Files: The Stories of the 774 Detainees in America's Illegal Prison* (Pluto Press) - site : <http://www.andyworthington.co.uk>

One example of the Obama administration attempting to block investigations into the torture policies of its predecessor concerned a case initially brought by the ACLU against Jeppesen Dataplan, Inc., a Boeing subsidiary, on behalf of five prisoners subjected to “extraordinary rendition” and torture (Binyam Mohamed, Ahmed Agiza, Abou Elkassim Britel, Mohamed Farag Ahmad Bashmilah and Bisher al-Rawi), who were suing the company for damages based on their involvement in their ordeal as the CIA’s “travel agent.” The Bush administration had intervened the first time round, invoking the little-used state secrets doctrine, and requesting a dismissal of the entire action before Jeppesen filed an answer to the complaint, and when the case was revived in February, the Obama administration again followed suit, slavishly copying its predecessor, as it did with Bagram.

To be fair, if the administration is determined not to hold operatives to account for crimes sanctioned at the highest level, then it was logical that it would intervene to prevent Jeppesen’s contractors from being held to account, but, when the case was reviewed by the Court of Appeals for the 9th Circuit, the judges -- led by Judge Michael Daly Hawkins, and also including Judges Mary M. Schroeder and William C. Canby, Jr. -- were not concerned with politics, but with the law, and they had no hesitation in demolishing the government’s case.

Jeppesen’s involvement in, and knowledge of the rendition program was actually revealed in an extraordinary declaration by Sean Belcher, a former employee, who stated that the director of Jeppesen International Trip Planning Services, Bob Overby, had told him,

We do all the extraordinary rendition flights,” which he also referred to as “the torture flights” or “spook flights.” Belcher stated that “there were some employees who were not comfortable with that aspect of Jeppesen’s business” because they knew “some of these flights end up” with the passengers being tortured. He stated that Overby had explained, “that’s just the way it is, we’re doing them” because “the rendition flights paid very well.”

This declaration was cited by the judges, without comment, in a footnote, but when it came the “relatively thin history” of the state secrets doctrine the judges were merciless, dismissing the government’s reliance on the two precedents -- one involving a secret agreement between the government and a spy in the nineteenth century, the other (from 1953) with the prevention of “discovery of secret evidence when disclosure would threaten national security” -- for their irrelevance to the Jeppesen case.

They did this first by pinpointing the “clear error” the District Court made when it initially dismissed the case, when the court declared, “inasmuch as the case involves ‘allegations’ about the conduct of the CIA, the privilege is invoked to protect information which is properly the subject of state secrets privilege,” and also declared that “the very subject matter of this case is a state secret.” In contrast, the Appeals Court judges insisted that “The subject matter ... is not a state secret, and the case should not have been dismissed at the outset.”

Dismissing the government's arguments, they concluded that, although the government may be entitled to protect certain evidence in the interests of national security, it has no justification for suppressing judicial scrutiny of the case as a whole, particularly because some information relating to the case is already publicly available, and also because what the government is actually trying to do, with no legal precedent whatsoever, is to impose a blanket ban on all discussion of potential government wrongdoing.

The ruling is peppered with passages chastising the government, and I recommend those with an interest to read the full ruling but the following is particularly sharp:

At base, the government argues ... that state secrets form the subject matter of a lawsuit, and therefore require dismissal, any time a complaint contains allegations, the truth or falsity of which has been classified as secret by a government official. The district court agreed, dismissing the case exclusively because it "involves allegations" about [secret] conduct by the CIA." This sweeping characterization of the "very subject matter" bar has no logical limit -- 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* (emphasis added).

Elsewhere, the judges drew on *Boumediene v. Bush*, in which the Supreme Court stated that, while "[s]ecurity depends upon a sophisticated intelligence apparatus," it "subsists, too, in fidelity to freedom's first principles [including] freedom from arbitrary and unlawful restraint and the personal liberty that is secured by the adherence to the separation of powers." They also drew on *Hamdi v. Rumsfeld*, another important Guantánamo case in the Supreme Court (in 2004), in which the justices stated, "Separation-of-powers concerns take on an especially important role in the context of secret Executive conduct. As the Founders of this nation knew well, arbitrary imprisonment and torture under any circumstance is a 'gross and notorious ... act of despotism.'"

I was also particularly impressed by the following passage:

If the simple fact that information is classified were enough to bring evidence containing that evidence within the scope of the [state secrets] privilege, then the entire state secrets inquiry -- from determining which matters are secret to which disclosures pose a threat to national security -- would fall exclusively to the Executive branch, in plain contravention of the Supreme Court's admonition that "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers" without "lead[ing] to intolerable abuses." ... A rule that categorically equated "classified" matters with "secret" matters would, for example, perversely encourage the President to classify politically embarrassing information simply to place it beyond the reach of judicial process.

What was notable about this passage was that it succinctly encapsulated the entire approach to "classified" information that was maintained by the Bush administration, and also mentioned invoking national security to prevent embarrassment -- or, it could be said, to prevent the disclosure of crimes.

This kind of hyperbole, exercised to prevent embarrassment (or worse), was, I thought, the hidden sub-text of a shrill submission by CIA director Michael Hayden, moving for dismissal of the original complaint, when he claimed that disclosure of information relevant to the Jeppesen case "could be expected to cause serious -- and in some instances, exceptionally grave -- damage to the national security of the United States," and the point was rammed home by the judges in a footnote

citing a 1953 letter to President Eisenhower from Attorney General Herbert Brownell, in which Brownell wrote that classification procedures were then “so broadly drawn ... as to make it possible for government officials to cover up their own mistakes and even their wrongdoing under the guise of protecting national security.”

It also brings me neatly to my conclusion. I understand that President Obama doesn't want to rock the boat, endangering a fragile peace with the Republican party, in order to secure as much consensus as possible when so many other major policy decisions need to be made (and, perhaps, members of his own party need to be shielded from revelations of their knowledge of the grisly details of the “War on Terror”). However, as the 9th Circuit Court of Appeals has just demonstrated so admirably, by setting new rules for appropriate conduct while holding at bay any accountability for the Bush administration's crimes, he is not only shielding those who are no longer in office from full disclosure of their activities -- from the embarrassing to the depraved -- but is also allowing himself to be infected by the same disdain for the separation of powers, and the same endorsement of unfettered Executive power, that was the Bush administration's most toxic legacy for the values on which the republic was founded.

I'm still erring on the side of presuming that this is more to do with pragmatism than it is with deliberate, coldly conceived policy, but, like the judges of the 9th Circuit Court of Appeals, I'm beginning to run out of patience.

Source : <http://www.andyworthington.co.uk/2009/05/07/obamas-first-100-days-mixed-messages-on-torture/>

The full ruling by the Court of Appeals for the 9th Circuit :
<http://www.ca9.uscourts.gov/datastore/opinions/2009/04/27/0815693.pdf>