



Written by [Jack Kenny](#) on September 9, 2010

Appeals Court Bars Suits on Government Torture

The court ruled that victims of the U.S. government's policy of "extraordinary rendition," whereby terrorist suspects in U.S. custody are sent overseas for interrogation by foreign governments or by CIA officials in foreign prisons, may not sue in federal court because a court case would compromise government secrets needed to protect the nation. Writing for the majority in the 6-5 decision, Judge Raymond C. Fisher described the case as "a painful conflict between human rights and national security." But the court assigned all the pain to human rights and all the security to government officials who imprisoned and allegedly had suspects tortured without the legal protections generally referred to as "due process of law."



The court dismissed a lawsuit filed against Jeppesen Dataplan, Inc., a Boeing subsidiary accused of arranging flights to transport captives to other countries for imprisonment and interrogation. Five former prisoners alleged they were tortured during their overseas imprisonment and claimed Jeppesen was complicit in the abuse. The case was brought by the American Civil Liberties Union, which won a favorable ruling last year from a three-judge panel of the same court, allowing the suit to proceed. The government appealed and Wednesday's ruling overturned the panel's decision. The case appears headed to the U.S. Supreme Court, giving the nation's highest tribunal the opportunity to decide the limits of a President's power to restrict litigation that could result in the revealing of state secrets.

The appeals court Wednesday ruled in favor of the U.S. Department of Justice's plea to dismiss the suit. The DOJ under President Obama has taken a position identical to that of the arguments the department made on behalf of the George W. Bush administration in defense of the state secrets privilege. In what might be described as a polite understatement, the *New York Times* reported on September 9 that the Obama administration's "aggressive national security policies have in some ways departed from the expectations of change fostered by President Obama's campaign rhetoric, which was often sharply critical" of Bush's approach. The *Times* noted that Obama's national security team "has also authorized the C.I.A. to try to kill a United States citizen suspected of terrorist ties, blocked efforts by detainees in Afghanistan to bring habeas corpus lawsuits challenging the basis for their imprisonment without trial, and continued the C.I.A.'s so-called extraordinary rendition program of prisoner transfers — though the administration has forbidden torture and says it seeks assurances from other countries that detainees will not be mistreated."

That raises a number of political questions about whether the Obama administration, now in its 20th month, represents the "hope and change" Obama promised or more of the same policies carried out by the previous administration, whose unpopular programs and policies almost certainly contributed to the



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defeat of Republican John McCain and the election of Obama and the Democrats in November, 2008. More importantly, it leaves in limbo a question the Supreme Court has not adjudicated in half a century: How far may the executive branch extend the state secrets privilege to prevent alleged victims of government actions from having access to the courts for redress of grievance and possible compensation? In 2007, the *Times* noted, the Supreme Court refused to hear an appeal of a ruling by an appeals court in Richmond, Virginia in a similar rendition and torture case.

The lead plaintiff in the case the appeals court dismissed on Wednesday was Binyam Mohamed, an Ethiopian citizen and legal resident of Great Britain who was arrested in Pakistan in 2002. Mohamed claimed he was turned over to the C.I.A., then flown to Morocco, where he was turned over to that nation's security service. He told of being subjected to a variety of tortures during his 18 months in Morocco, including wounds inflicted with a scalpel and the pouring of hot burning liquid into the open wounds. He claimed he was again tortured, and also fed sparingly and kept in darkness while subjected to continuous loud, screaming noises during a later imprisonment in Afghanistan. He was held an additional five years at the U.S. detention center at Guantanamo Bay, Cuba before being released and returned to Great Britain in 2009.

The closeness of the 6-5 vote reflected the conflict the court experienced in reaching its decision. While Judge Fisher ultimately came down on the side of protecting government secrets for national security reasons, he also urged both the executive branch and Congress to find a way to compensate torture victims when the record substantiates their claims, even if the courts are closed to their appeals. But Judge Michael Daly Hawkins warned of letting the executive branch become a law unto itself.

"Permitting the executive to police its own errors and determine the remedy dispensed would not only deprive the judiciary of its role, but also deprive plaintiffs of a fair assessment of their claims by a neutral arbiter," Judge Hawkins wrote.

The ACLU was clearly displeased with the outcome and promised to pursue an appeal to the Supreme Court. What the lawyers could not argue, however, is that the rulings of the courts thus far have been inconsistent during the Bush and now the Obama administrations.

"To this date, not a single victim of the Bush administration's torture program has had his day in court," said Ben Wizner, the ACLU lawyer who argued the case before the appeals court. "This makes this a sad day not only for the torture survivors who are seeking justice in this case, but for all Americans who care about the rule of law and our nation's reputation in the world." Should the decision stand, Wizner said, "the United States will have closed its courts to torture victims and while providing complete immunity to their torturers."

Photo: Protestors demonstrate the use of water boarding to volunteer Maboud Ebrahim Zadeh, Nov. 5, 2007, in front of the Justice Department in Washington.: AP Images



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