September 8, 2010

Court Dismisses a Case Asserting Torture by C.I.A.

By CHARLIE SAVAGE

WASHINGTON — A federal appeals court on Wednesday ruled that former prisoners of the C.I.A. could not sue over their alleged torture in overseas prisons because such a lawsuit might expose secret government information.

The sharply divided ruling was a major victory for the Obama administration's efforts to advance a sweeping view of executive secrecy powers. It strengthens the White House's hand as it has pushed an array of assertive counterterrorism policies, while raising an opportunity for the Supreme Court to rule for the first time in decades on the scope of the president's power to restrict litigation that could reveal state secrets.

By a 6-to-5 vote, the United States Court of Appeals for the Ninth Circuit dismissed a lawsuit against Jeppesen Dataplan Inc., a Boeing subsidiary accused of arranging flights for the Central Intelligence Agency to transfer prisoners to other countries for imprisonment and interrogation. The American Civil Liberties Union filed the case on behalf of five former prisoners who say they were tortured in captivity — and that Jeppesen was complicit in that alleged abuse.

Judge Raymond C. Fisher described the case, which reversed an earlier decision, as presenting "a painful conflict between human rights and national security." But, he said, the majority had "reluctantly" concluded that the lawsuit represented "a rare case" in which the government's need to protect state secrets trumped the plaintiffs' need to have a day in court.

While the alleged abuses occurred during the Bush administration, the ruling added a chapter to the Obama administration's aggressive national security policies.

Its counterterrorism programs have in some ways departed from the expectations of change fostered by President Obama's campaign rhetoric, which was often sharply critical of former President George W. Bush's approach.

Among other policies, the Obama national security team has also authorized the C.I.A. to try to kill a United States citizen suspected of terrorism 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.

The A.C.L.U. vowed to appeal the Jeppesen Dataplan case to the Supreme Court, which would present the Roberts court with a fresh opportunity to weigh in on a high-profile test of the scope and limits of presidential power in counterterrorism matters.

It has been more than 50 years since the Supreme Court issued a major ruling on the state-secrets privilege, a judicially created doctrine that the government has increasingly used to win dismissals of lawsuits related to national security, shielding its actions from judicial review. In 2007, the Supreme Court declined to hear an appeal of a similar rendition and torture ruling by the federal appeals court in Richmond, Va.

The current case turns on whether the executive can invoke the state-secrets privilege to shut down entire lawsuits, or whether that power should be limited to withholding particular pieces of secret information. In April 2009, a three-judge panel on the Ninth Circuit adopted the narrower view, ruling that the lawsuit as a whole should proceed.

But the Obama administration appealed to the full San Francisco-based appeals court. A group of 11 of its judges reheard the case, and a narrow majority endorsed the broader view of executive secrecy powers. They concluded that the lawsuit must be dismissed without a trial — even one that would seek to rely only on public information.

"This case requires us to address the difficult balance the state secrets doctrine strikes between fundamental principles of our liberty, including justice, transparency, accountability and national security," Judge Fisher wrote. "Although as judges we strive to honor *all* of these principles, there are times when exceptional circumstances create an irreconcilable conflict between them."

Ben Wizner, a senior A.C.L.U. lawyer who argued the case before the appeals court, said the group was disappointed in the ruling.

"To this date, not a single victim of the Bush administration's torture program has had his day in court," Mr. Wizner said. "That 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. If this decision stands, the United States will have closed its courts to torture victims while providing complete immunity to their torturers."

Some plaintiffs in the case said they were tortured by C.I.A. interrogators at an agency "black site" prison in Afghanistan, while others said they were tortured by Egypt and Morocco after the C.I.A. handed them off to foreign security services.

The lead plaintiff is Binyam Mohamed, an Ethiopian citizen and legal resident of Britain who was arrested in Pakistan in 2002. He claimed he was turned over to the C.I.A., which flew him to Morocco and handed him off to its security service.

Moroccan interrogators, he said, held him for 18 months and subjected him to an array of tortures, including cutting his penis with a scalpel and then pouring a hot, stinging liquid on the open wounds.

Mr. Mohamed was later transferred back to the C.I.A., which he said flew him to its secret prison in Afghanistan. There, he said, he was held in continuous darkness, fed sparsely and subjected to loud noise — like the recorded screams of women and children — 24 hours a day.

He was later transferred again to the military prison at Guantánamo Bay, Cuba, where he was held for an additional five years. He was released and returned to Britain in early 2009 and is now free.

There were signs in the court's ruling that the majority felt conflicted. In a highly unusual move, the court ordered the government to pay the plaintiffs' legal costs, even though they lost the case and had not requested such payment.

Judge Fisher, who was a senior Justice Department official before President Bill Clinton appointed him to the bench in 1999, also urged the executive branch and Congress to grant reparations to victims of C.I.A. "misjudgments or mistakes" that violated their human rights if government records confirmed their accusations, even though the courthouse was closed to them.

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He cited as precedent payments made to Latin Americans of Japanese descent who were forcibly sent to United States internment camps during World War II. But the five dissenting judges criticized the realism of that idea, noting that those reparations took five decades.

“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 Michael Daly Hawkins wrote.

After the A.C.L.U. filed the case in 2007, the Bush administration asked a district judge to dismiss it, submitting public and classified declarations by the C.I.A. director at the time, Michael Hayden, arguing that litigating the matter would jeopardize national security.

The trial judge dismissed the case. As an appeal was pending, Mr. Obama won the 2008 presidential election. Although he had criticized the Bush administration’s frequent use of the state-secrets privilege, in February 2009 his weeks-old administration told the appeals court that it agreed with the Bush view in that case.

In September 2009, Attorney General Eric H. Holder Jr. issued a new state-secrets privilege policy requiring high-level approval, instructing officials to try to avoid shutting down lawsuits if possible, and forbidding its use with a motive of covering up lawbreaking or preventing embarrassment.

The administration told the court that using the privilege in the Jeppesen Dataplan case complied with that policy.

Judge Fisher agreed that “the government is not invoking the privilege to avoid embarrassment or to escape scrutiny of its recent controversial transfer and interrogation policies, rather than to protect legitimate national security concerns.”

Jeppesen Dataplan and the C.I.A. referred questions to the Justice Department, where a spokesman, Matthew Miller, praised its new standards.

“The attorney general adopted a new policy last year to ensure the state-secrets privilege is only used in cases where it is essential to protect national security, and we are pleased that the court recognized that the policy was used appropriately in this case,” Mr. Miller said.