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Supreme Court Report: A Torturous Process

Tort suits prove inadequate to challenge anti-terror policies

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Despite a series of setbacks over issues surrounding the prison at Guantanamo, the Bush administration proved adept at fending off lawsuits seeking personal accountability for alleged abuses involving its war-on-terror policies. Moreover, the administration's lawyers did it in a way that many other attorneys might envy.

Rather than show in the court that the charges of abuse were false, they relied on procedural barriers to prevent the suits from gaining so much as a hearing.

This blocking strategy has held off suits alleging warrantless wiretapping, the CIA's torture of prisoners, the rounding up of hundreds of Muslim men after 9/11, and the torture and mistreatment of detainees at the Guantanamo Bay naval base. In each instance, suits were filed to challenge these policies as illegal or unconstitutional. Some were brought by private lawyers, but most were backed by groups such as the American Civil Liberties Union or the Center for Constitutional Rights.

And in each instance, the administration's lawyers invoked the attacks of 9/11 and the need for extraordinary steps to protect the nation's security. They also argued that the suits themselves would represent a threat to national security if they were allowed to go forward.

Frustrated plaintiffs lawyers called it a "catch-22 situation." Echoing that view, Harold Hongju Koh, Yale Law School's dean, faults the courts for allowing high government officials to escape accountability for their actions. "These procedural theories mean that you never get a ruling on the merits. They can say, 'You have to know it before you can plead it' even though you can get it only through discovery. Or they say, 'Even if we did it, it's a state secret.' Or they say, 'You have no standing' or 'We have immunity.' It is a catch-22," he says.

However, **Richard Samp, counsel for the Washington Legal Foundation**, questions whether private lawsuits against government officials are the means to achieve accountability. "If you are trying to uncover wrongdoing, tort suits are not the best way to do it," he says.

Washington, D.C., lawyer Eric Lewis, a partner at Baach Robinson & Lewis who sued the Pentagon's top officials on behalf of four former Guantanamo prisoners, agrees that a suit may not be the most effective way to expose high-level wrongdoing. He says he hopes the new Obama administration will pursue some form of accountability. "Maybe we need a 'Truth and Reconciliation Committee,' " Lewis says.

The Bush-era suits were tripped up by a wide variety of hurdles. The ACLU's suit against the National Security Agency and its terrorist surveillance program failed for a lack of standing. The plaintiffs were journalists and scholars who worked with others in the Mideast and said they had a "well-founded belief" their calls and e-mails had been intercepted. Although President George W. Bush acknowledged the surveillance did not comply with the warrant rules in the Foreign Intelligence Surveillance Act, the plaintiffs could not prove their calls had been intercepted. And for that reason, the 6th U.S. Circuit Court of Appeals at Cincinnati threw out the suit in 2007, and the U.S. Supreme Court refused last year to review the case.

MISTAKEN IDENTITY

A German car salesman who was wrongly abducted by the CIA under its "extraordinary rendition" program met a similar fate when he tried to sue then-CIA Director George Tenet. His suit was thrown out based on the "state secrets privilege." Khaled el-Masri, a German of Lebanese descent, was on a holiday tour bus in the Balkans in 2003 when he was pulled off for questioning at a border crossing. His passport was taken, and he was accused of being a terrorist. After 23 days of questioning, he was blindfolded, taken to the airport, chained to the floor of a military plane and flown to Afghanistan. For the next four months, el-Masri says, he was beaten and tortured by CIA agents.

Six months into his ordeal, U.S. officials finally realized he was not Khalid al-Masri, a German man who was sought for his role in the 9/11 attacks. Rather than admit the mistake and return el-Masri to Germany, he was blindfolded and flown back to the Balkans. He was driven at night and dropped along a road in Albania. He

eventually returned to Germany and sued the CIA with the help of the ACLU. He sought damages for his "unlawful abduction, arbitrary detention and torture by agents of the United States."

HUSH-HUSH

Bush administration lawyers said the suit must be dismissed without a hearing because it could reveal state secrets. They relied on *U.S. v. Reynolds*, the 1953 ruling that upheld the government's use of the state secrets privilege to block three widows from seeing the accident report on the crash of a B-29. Agreeing with the government, a federal judge in Virginia and the 4th U.S. Circuit Court of Appeals at Richmond dismissed el-Masri's complaint. The Supreme Court refused to review the case in 2007. "In a nation committed to the rule of law, the government's unlawful activity should be exposed, not hidden behind a state secrets designation," said Steven R. Shapiro, the ACLU's legal director, when the case was dismissed.

In December, the focus was on pleading standards when administration lawyers urged the Supreme Court to dismiss a lawsuit against former Attorney General John Ashcroft and FBI Director Robert Mueller. The pair were sued by Javaid Iqbal, a Pakistani native who worked as a "cable guy" on Long Island and was among the 700 Muslim men arrested and held after the 9/11 attacks. None was charged with terrorism offenses, although quite a few, including Iqbal, pleaded guilty to immigration violations. Iqbal was held in solitary confinement for more than five months, and he said he was strip-searched and beaten. He also alleged the Muslim men were singled out for harsh treatment because of their race and religion.

Iqbal's suit, which named dozens of low-level officials as well, fared much better than the others. A federal judge in Brooklyn and the 2nd Circuit at New York City refused to dismiss it. At the Supreme Court, Solicitor General Gregory Garre argued the pleadings were inadequate because they did not show direct evidence of "personal involvement" by Ashcroft and Mueller. He also relied on the court's recent ruling in *Bell Atlantic v. Trombley*, an antitrust case, holding that the pleadings must state a claim that is not just possible, but plausible.

The case of *Ashcroft v. Iqbal* raised an important question involving civil rights claims against government officials: How much direct evidence is needed at the pleading stage to bring a suit against high-level officials? The justices gave Garre's argument a sympathetic hearing. Garre said the court should set a high barrier against such claims so that top government officials do not have to work under a threat of future lawsuits and their burden of discovery. He said this is especially important when national security is at stake.

Lawyers for the plaintiffs, however, talked about the importance of justice and accountability. "Plaintiffs will never be able to provide the level of detail Ashcroft and Mueller would demand at the beginning of a lawsuit, because that information is in the exclusive control of the government and can only be accessed after a lawsuit has begun," says Rachel Meeropol, a lawyer for the Center for Constitutional Rights in New York City. "It's a catch-22 that would always let high-level officials off the hook," she says. The CCR brought a class action suit on behalf of the 700 Muslim men who were detained in New York. The suit was pending before a district judge while Iqbal's appeal was before the Supreme Court.

ANOTHER SHOT

The suit brought by the four ex-Guantanamo prisoners, all of whom were British citizens, was thrown out early last year by the U.S. Court of Appeals for the District of Columbia Circuit on the grounds these foreigners had no "clearly established" rights under the U.S. Constitution. The men said they had been abused and tortured at Guantanamo. They said they had been shackled in painful positions, threatened by dogs, and subjected to intense heat and cold. They also said they had been harassed during their daily prayers. The lead plaintiff, Shafiq Rasul, was also the lead plaintiff in the court's 2004 ruling that first held the Guantanamo detainees had the right to habeas corpus.

After the men were freed and returned home to England, they sued Pentagon officials, including former Defense Secretary Donald Rumsfeld. The suit appeared dead, but on Dec. 15, the Supreme Court revived it. In a one-line order, the appeals court ruling was vacated, and the case was sent back to be reconsidered under *Boumediene v. Bush*. That decision last year recognized that the Constitution's protections extend to Guantanamo.

"We are delighted," Lewis says. He called the court's action "a clear signal to the court of appeals that its decision, which refused to recognize a right not to be tortured and a right to religious freedom at Guantanamo, was plainly wrong and should be overturned."

David G. Savage covers the U.S. Supreme Court for the Los Angeles Times and writes regularly for the ABA Journal.