Washington Legal Foundation
Advocate for freedom and justice®
2009 Massachusetts Avenue, NW
Washington, DC 20036
202.588.0302

April 29, 2009

COURT REINSTATES CHALLENGE TO "EXTRAORDINARY RENDITIONS," REJECTING STATE SECRETS DEFENSE

(Mohamed v. Jeppesen Dataplan, Inc.)

In a rebuff to the Obama Administration, the U.S. Court of Appeals for the Ninth Circuit yesterday overturned dismissal of an ACLU lawsuit that challenges the CIA's "extraordinary rendition" program – the program under which suspected terrorists captured overseas are transported to other countries for purposes of interrogation.

The decision in *Mohamed v. Jeppesen Dataplan, Inc.* was a setback for the Washington Legal Foundation (WLF) which filed a brief urging affirmance. WLF argued that the CIA convincingly demonstrated that allowing the case to go forward would create unacceptable risks that highly classified information would be disclosed, and that the disclosure would cause serious damage to national security.

"The judicial branch is simply not the appropriate forum for airing these types of issues," said WLF Chief Counsel Richard Samp in response to the appeals court decision. "Those who disagree with the extraordinary rendition program should take their concerns to Congress or the Executive Branch. The CIA could not maintain the confidentiality of its affairs if those who oppose its policies were free to air their opposition in an open courtroom," Samp said. WLF urged the Obama Administration to appeal yesterday's decision and pledged to support any such appeal.

"What is most extraordinary about the court's decision is that the judges appear not to have bothered to read the confidential affidavit submitted to them by the federal government. That affidavit purported to demonstrate why continuation of this case poses serious national security concerns. But rather than taking those concerns seriously, the appeals court reinstated the case and returned it to the district court with instructions to treat the government's national security claims as a garden-variety matter of evidentiary privilege," WLF's Samp said.

The plaintiffs are five overseas aliens who allege that they were taken into custody and tortured in connection with the extraordinary rendition program. Three of the five allege that they were handed over to foreign governments for interrogation (two to Morocco, one to Egypt) and were tortured by agents of those governments. The other two allege that they were flown to Afghanistan and were tortured there by U.S. government officials. Three of the five have been released from custody. One is serving a nine-year prison sentence in Morocco, one

is serving a 15-year prison sentence in Egypt, and one was (until recently) being held by the U.S. at Guantanamo Bay, Cuba after having been designated an "enemy combatant."

The only defendant in the suit is Jeppesen Dataplan, Inc., a subsidiary of Boeing. The plaintiffs allege that the CIA hired Jeppesen to operate the aircraft used to transport suspected terrorists captured in connection with the extraordinary rendition program. They allege that Jeppesen provided its assistance with knowledge that they would be subjected to forced disappearance and torture. The plaintiffs filed their suit under the Alien Tort Statute, which grants federal courts jurisdiction over tort actions by aliens who claim a violation of their rights under customary international law.

Before Jeppesen answered the complaint, the United States intervened to argue that further litigation of the case was barred by the state secrets privilege. The district judge agreed and dismissed the complaint. Yesterday, the Ninth Circuit reversed that decision.

In its brief, WLF argued that when, as here, the very subject matter of a lawsuit is a matter of state secret, the suit must be dismissed at its inception without permitting any discovery. The Ninth Circuit disagreed, holding (in conflict with the Fourth Circuit) that the "very subject matter" defense only applies when the plaintiff has direct contractual relations with the government, as (for example) when the plaintiff has agreed to serve as a spy for the U.S.

The appeals court also held that the state secret doctrine does not apply simply because the lawsuit would necessitate the release of privileged *information*. The court held that while the government may prevent use of privileged *evidence*, "it does not protect disclosure of the underlying facts, so long as the underlying facts can be proven without resort to the privileged material," and so long exclusion of privileged evidence would not interfere with the mounting of "a valid defense that would otherwise be available to the defendant."

The Washington Legal Foundation is a public interest law and policy center with supporters in all 50 states. It devotes a considerable portion of its resources to promoting America's national security. WLF filed its brief on behalf of itself and the Allied Educational Foundation.

* * *

For further information, contact WLF Chief Counsel Richard Samp, (202) 588-0302. A copy of WLF's brief is posted on its web site.