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'State secrets' defense makes law a 'tool of oppression'

Claire Schaeffer-Duffy | Oct. 13, 2010 NCR Today

On Oct. 2, fourteen anti-torture activists picketed outside the Justice Department in Washington, D.C. to call attention to -- among other things -- the Obama administration?s use of the state secrets defense to dismiss lawsuits brought by men kidnapped and tortured by the U.S. government.

Instituted in 1953 during the Cold War case of *Reynolds vs. the United States*, the state secrets privilege allows the executive branch to refuse to produce evidence for a court case on the grounds that the evidence is secret and would jeopardize national security interests and foreign relations if disclosed.

The ?privilege,? which was invoked only four times between 1953 and 1976, is fast becoming the Justice Department?s standard response to cases calling for investigation into government abuses of terrorism suspects.

Formerly used to exclude specific evidence from a trial, ?state secrets? is now invoked to shut down cases altogether.

The government used the defense at least four times in the past month in an attempt to quash cases investigating some of the more nefarious practices of the Bush administration. Here are details on three of those cases:

- On Sept. 8, the Ninth Circuit Court of Appeals ruled 6-5 in favor of the government?s use of the state secrets privilege to dismiss a lawsuit against Jeppesen Dataplan Inc., filed by the American Civil Liberties Union (ACLU), on behalf of victims of extraordinary rendition.

  Jeppesen, as subsidiary of Boeing, contracted with the CIA to provide plans and logistical support for what a Jeppesen executive later called ?torture flights? or ?ghost flights.?

  That Jeppesen?s connection to the CIA flights was already well-reported apparently didn?t matter to the six judges. They ruled that even if the detainees? lawyers relied only on evidence not covered by ?state secrets? protection, the case still could not go forward because of risks secrets might come out in pre-trial discovery motions or during trial questioning. The best the court could offer the detainees for their claim of harm was financial compensation or the option to sue.

- On Sept. 25, the government moved to dismiss a civil lawsuit challenging the Obama administration?s decision to target Anwar Al Awlaki -- a U.S. citizen -- for assassination.

  The suit was filed by the Center for Constitutional Rights and the American Civil Liberties on behalf of Dr. Nasser Al Awlaki, Anwar?s father and also an American citizen.

  By many accounts, Anwar Al Awlaki, a Muslim cleric now hiding out in Yemen, is not a nice guy. Media reports have linked him as the inspirational source for the plot to blow up the Detroit-bound airliner last

Christmas and the more recent Times Square bombing.

Earlier this year, the CIA and Special Forces placed him on their ?kill? list. In these instances, sentence precedes charge, trial, or conviction. Al Awlaki is reportedly the first U.S. citizen to be so listed.

Outside of armed conflict, the U.S. Constitution and international law prohibit the targeted killing of civilians except to prevent imminent physical harm. With Al Awlaki?s case, ?the courts are being asked to disclose the standards it uses to place U.S. citizens on government kill lists,? writes journalist Nat Henthoff.

Does the executive branch have the authority to bump off U.S. citizens suspected of terrorism and residing far from any field of conflict? According to the government?s Sept. 25 motion for dismissal, such questions are beyond judicial review and to litigate them risks disclosure of ?state secrets.?

For more on the Al Awlaki case, I recommend the writings of Henthoff and Glenn Greenwald's blog [1], over at *Salon.com* *[2]*.

- On Sept. 29, the U.S. District Court affirmed its decision to dismiss *Al Zahrani vs. Rumsfeld*, a civil lawsuit brought by family members whose loved ones died while detained at Guantanamo.

  Yasser Al-Zahrani and Salah Ali Abdullah were two of three detainees who died suddenly and violently on the night of June 9, 2006. The US military reported the deaths as suicides. An expose in *Harper?s Magazine* (March 2010) by Scott Horton [3] suggests the men were murdered at a ?black site? within the Guantanamo detention facility.

  The court admitted the government?s effort to conceal ?virtually all information? about the detainees? death was ?disturbing.? It even acknowledged that details about a ?likely cover-up of a ?black site? at Guantanamo are now emerging.? Nonetheless, the court agreed with the government?s argument that national security considerations prohibited an examination of the families? claims of unlawful imprisonment and wrongful death.

None of these rulings bode well for the political health of the country.

In past struggles for justice ?the courts were our only friends,? said Jeremy Varon, a history professor at New School University in New York City and one of the activists at the Oct. 2 protests. ?Now the law is becoming an instrument of oppression itself.?

Blogger Glenn Greenwald suggests that judicial support for executive secrecy in the Al Alwaki case merits a new motto for the façade of the U.S. Supreme Court: *Just Trust Us: He?s Guilty*.

But blind faith in the executive branch is not what the times demand. Instead, we need to reckon with what has been done to those tagged as our ?enemies? in this never-ending war on terror. The law, when fairly applied, can provide a forum for such an examination -- albeit an imperfect one. Eviscerate its impartiality and you stoke militancy.

Links:

[1] http://www.salon.com/news/opinion/glenn_greenwald/index.html
[2] http://www.salon.com
[3] http://www.harpers.org/archive/2010/03/0082865