

ACLU APPEALS 9TH CIRCUIT JEPPESEN DECISION TO SCOTUS

✘ When the original three member panel opinion in *Mohamed v. Jeppesen DataPlan, Inc.* was issued by the 9th Circuit in late April of 2009, it was a breath of fresh air. Judge Michael Hawkins authored a thoughtful, well reasoned and heartening opinion placing appropriate curbs on the ability of the Executive Branch to silence wronged plaintiffs via the interjection of state secrets. Civil liberties scholars stood up and cheered. Unfortunately, it did not last and thanks to a very unfortunate panel assignment for the *en banc* review in the 9th, Hawkins was reversed and an erratic and contorted decision put in its stead by Judge Raymond Fisher handing the President and Executive Branch carte blanche to assert state secrets at will, effectively even to hide government illegality and misconduct. Civil liberties adherents jeered.

Now the ACLU, who represents the plaintiffs in *Mohamed v. Jeppesen*, has appealed from the 9th Circuit *en banc* decision by petitioning the Supreme Court for certiorari. The ACLU's full petition is here. The ACLU press release reads, in pertinent part:

The American Civil Liberties Union late last night asked the U.S. Supreme Court to review a lower court decision dismissing its lawsuit against a Boeing subsidiary, Jeppesen DataPlan, Inc., for the company's role in the Bush administration's extraordinary rendition program. The ACLU and the ACLU of Northern California filed the lawsuit in May 2007 on behalf of five men who were kidnapped by the CIA, forcibly disappeared to U.S.-run prisons overseas and tortured. Although the federal government was not initially named in

the lawsuit, it intervened for the sole purpose of arguing that the case should be dismissed based on the “state secrets” privilege.

“To date, not a single victim of the Bush administration’s torture program has had his day in a U.S. court,” said Ben Wizner, Litigation Director of the ACLU National Security Project. “The government has misused the ‘state secrets’ privilege to deny justice to torture victims and to shield their torturers from liability. The Supreme Court should reaffirm our nation’s historic commitment to human rights and the rule of law by allowing this case to go forward.”

In April 2009, a three-judge panel of the U.S. Court of Appeals for the Ninth Circuit ruled that the government could not invoke the state secrets privilege over the entire lawsuit, but, instead, could only invoke the privilege with respect to specific evidence. The Obama administration appealed that ruling, and in December the case was reargued in front of a panel of 11 Ninth Circuit judges. The appellate court upheld the dismissal of the case 6-5.

“The government’s continued assertion of ‘state secrets’ to avoid judicial scrutiny of torture threatens the fundamental principle of separation of powers,” said Steven Watt, staff attorney with the ACLU Human Rights Program. “No court has yet fulfilled its critical constitutional function of ruling on the legality of the Bush administration’s torture policies. The Supreme Court should take this case and affirm that victims of torture are entitled to a remedy.”

“The Supreme Court has not reviewed the government’s use of the ‘state secrets’

privilege in more than half a century. In recent years, we have seen the executive branch engage in grave human rights violations, declare those activities 'state secrets,' and thus avoid any judicial oversight or accountability," said Steven R. Shapiro, Legal Director of the ACLU. "As the executive branch asserts the 'state secrets' privilege more and more often, for more and more reasons, it is critical that the Court examine its use. Under a system predicated on respect for the rule of law, the government has no privilege to violate fundamental human rights and evade judicial review."

The interesting question here is what does the ACLU think they can gain by approaching the Supremes? Elena Kagan will almost certainly recuse herself, so that leaves eight justices in play, the hard conservative bloc of Roberts, Alito, Thomas and Scalia, the liberal bloc of Ginsburg, Breyer and Sotomayor and Tony Kennedy. Only the three person liberal bloc would have much true interest in voting with the ACLU here; the best they can legitimately hope to do is pull Kennedy in, but that still leaves a 4-4 split affirming the horrid 9th Circuit *en banc* opinion by Fisher. The bottom line is, there is no path to a favorable merits opinion.

That said, why would the ACLU file the petition for certiorari? My guess is it is to keep the issue alive in the public conscience and to see if they can at least make some progress legally. While a 4-4 Supreme split would indeed leave the 9th *en banc* opinion intact, it would absolutely be a very strong message to the Executive Branch that there are real questions with the way they are using state secrets, and it would be a clear signal the issue would be quite ripe for another case to challenge. And the Obama Administration seems intent on asserting state secrets at every opportunity, so another case *will* come along.

Not to mention that the justices, especially

Kennedy, are undoubtedly aware of the actions of the Brits, not only in their courts, but also in direct government compensation of Binyam Mohamed and another plaintiff for the very same conduct complained of in this case. It is impossible to deny what occurred now, only possible to cravenly hide from it; of course that is the option the Obama/Holder DOJ will pick every time. That, coupled with the contentious and very unusual close 6-5 nature of the 9th Circuit split just may give some credence to the instant ACLU effort in the Supreme Court.

There is one other concern that may be in play here. Generally a party has to exhaust every possible remedy and level of access in a nation's court system before petitioning international tribunals for redress. The ACLU did exactly that in their Khaled El-Masri case, petitioning the Inter-American Commission on Human Rights (IACHR). So, I would hazard a guess insuring that all avenues are so exhausted in Mohamed/Jeppesen for this purpose as well.

It is a long war when it comes to protecting civil liberties and constitutional due process; clearly the ACLU is playing for the long run. Good for them.