TORTURE SECRECY Cloak of - Oregonian, The (Portland, OR) - September 12, 2010

September 12, 2010 | Oregonian, The (Portland, OR) | Ofer Raban is an associate professor of law at the University of Oregon.

TORTURE SECRECY **Cloak of national security obscures logic of ruling** OFER RABAN

On Wednesday, the 9th U.S. Circuit Court **of** Appeals dismissed a lawsuit against a Boeing subsidiary accused **of** arranging flights for the CIA in which terrorism suspects were flown to other countries to be tortured. The alleged **torture** included breaking bones and inflicting cuts with scalpels. The subsidiary was accused, among other things, **of** knowing that the detainees would be tortured.

The opinion dismissing these grave allegations makes for an odd reading. Judicial opinions are in the business **of** explaining their decisions, thus allowing the public to evaluate the soundness and legitimacy **of** the decision. Indeed, the obligation to explain judicial decisions lies at the heart **of** what we understand by the Rule **of** Law. But Wednesday's opinion allows for no such assessment. In fact, it is not even clear to what extent the 9th Circuit itself assessed the issue before it. The opinion progressed as follows:

1. There is a legal doctrine, said the opinion, called the State Secrets Doctrine.

2. According to that doctrine, perfectly correct legal claims can be thrown out **of** court without even being examined.

3. This happens whenever a court determines that "there is a reasonable danger" that evidence presented in the case "will expose . . . matters which, in the interest **of national security**, should not be divulged."

4. The opinion then noted that when the lawsuit was filed (at the time **of** the Bush administration), the government submitted two declarations by the then-director **of** the CIA, Gen. Michael V. Hayden. The first alleged that the lawsuit, if allowed to proceed, would endanger U.S. **national security**. The second contained secret information. These two declarations were later reviewed and reaffirmed by the Obama administration.

5. We should carefully and critically examine, said the opinion, the government's claim **of** danger to **national security**.

6. However, "we acknowledge the need to defer to the Executive on matters **of** foreign policy and **national security** and surely cannot legitimately find ourselves second guessing the Executive in this arena."

7, Moreover, said the court, the decision should be made "without forcing a disclosure **of** the very

thing the privilege is designed to protect. . . . Too much judicial inquiry into the claim of privilege would force disclosure of the thing the privilege was meant to protect. . . ."

The court then concluded that allowing the lawsuit to proceed "would create an unjustifiable risk of revealing state secrets," and it dismissed the lawsuit. The court offered no "detailed definition of what constitutes a state secret" beyond the vague appeal to "national security" and added that it was "necessarily precluded from explaining precisely why" it decided as it did.

What are we to make of such a bizarre opinion (beyond noting that it is a slap in the face of the Rule of Law)? We can hardly evaluate the soundness of its reasoning, since we are not privy to the facts on which it relies. But we do know that five of the 11 judges in the case (this was a 6-5 decision), who were privy to that information filed a dissenting opinion in which they characterized the government's claims as "broad and hypothetical." The dissenting judges would allow the government to object to the introduction of specific pieces of evidence, not to simply terminate the lawsuit at this stage.

Perhaps it is sometimes necessary to violate Rule of Law principles; even for courts. Still, it is a sad day when one of our highest courts denies plaintiffs who were allegedly tortured their day in court by deciding that there is reasonable danger to "national security" (whatever that means) and explaining that decision by essentially saying "trust us" --or, worse, "trust the CIA" (whose people are charged with illegalities in the case). And this, on the strength of one of 11 votes.

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