On Wednesday, the 9th Circuit 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 tortures 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 judicial decisions, thus allowing the public to assess their soundness and legitimacy. 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, General Michael 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 re-affirmed 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, our examination 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 dismissed the lawsuit. The court offered no “detailed definition of what constitutes a state secret” beyond the danger 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 eleven 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, but not to simply terminate the lawsuit at this early 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 appealing to “national security” (whatever that means) and explaining the decision by essentially saying “trust us” – or, worse, “trust the CIA” (whose own people are charged with illegalities in the case). And this, on the strength of one of eleven votes.

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