

FRIDAY, MAY 12, 2017

PERSPECTIVE

State secrets trump all

The pieces are already in place for the government to avoid review of its actions against Muslims, or anyone else.

By Elizabeth Pipkin

In two recent U.S. Court of Appeals cases, the Department of Justice attempted to defend executive orders issued by President Donald J. Trump barring immigration by individuals from specific majority-Muslim nations. In both cases, judges viewed Trump's campaign comments that the government should bar Muslims from the United States and target American Muslims for surveillance as evidence of improper discriminatory intent.

Despite the judges' concern, under the "state secrets doctrine," actions such as Trump's travel bans may flourish under a veil of government secrecy. In past cases, government officials asserted a "state secrets" defense to prevent courts from determining whether FBI agents and immigration authorities discriminated against Muslims.

In *Fazaga v. FBI*, argued in the 9th U.S. Circuit Court of Appeals in 2015, the plaintiffs allege a well-publicized and disturbing series of events involving FBI surveillance of Muslim communities in Orange County in 2006 and 2007.

The FBI had recruited an informant, Craig Monteilh, and asked him to infiltrate local mosques. According to the complaint, the agents did not limit Monteilh to specific targets, but repeatedly made clear that they were interested simply in Muslims. They told him that "Islam is a threat to our national security," and that any leaders in the Muslim community were potential threats. During this same time period, the FBI's policies moved toward allowing reliance on religion as a basis for investigation.

Ultimately, members of targeted Muslim communities obtained a restraining order against Monteilh because of his violent rhetoric. The FBI has admitted that Monteilh was an informant, and Monteilh has given numerous public statements about his actions at the FBI's insistence.



New York Times News Service

President Donald Trump at the White House in Washington, April 12.

Despite the public record regarding Monteilh's extensive surveillance, when the *Fazaga* plaintiffs sued for the FBI's illegal and discriminatory actions, the government asserted a state secrets defense. The government relied on a declaration by the attorney general asserting that national security would be harmed if the government had to disclose the identities of individuals who were or were not the subject of counterterrorism investigations, the reasons why individuals were subject to investigation, and the particular sources and methods used in obtaining information for counterterrorism investigation.

The district court relied on the government's state secrets assertion to dismiss *Fazaga* before discovery. The 9th Circuit has not yet decided whether "state secrets" will keep the plaintiffs from their day in court.

The state secrets doctrine was created by the U.S. Supreme Court, which held that, in exceptional circumstances, courts must act in the interest of the country's national security to prevent disclosure of state secrets. *Totten v. United States*, 92 U.S. 105, 107 (1876). A court may determine that the case must be dismissed entirely (the "Totten bar") or that the state secret evidence is excluded entirely from the case ("the *Reynolds* privilege"). The *Reynolds* privilege, which comes from *United*

States v. Reynolds, 345 U.S. 1 (1953), may require dismissal of claims if necessary evidence is unavailable due to the privilege.

The government also asserted state secrets in a recent case alleging discrimination in the no-fly list. Rahinah Ibrahim, a Stanford Ph.D who is Muslim, was visited by an FBI agent and asked multiple questions about her religious practices and beliefs. The court found that Ibrahim was innocent and was wrongly placed on the no-fly list when the agent checked the wrong box on a government form.

Despite Ibrahim's innocence and the bureaucratic "mistake," the government fought to prevent her attorneys from discovering the facts of the case. Among the information the government attempted to hide was any explanation regarding why the FBI agent investigated her in the first place. The government asserted multiple government secrecy objections, including state secrets, shielding the agent's motives for targeting Ibrahim.

As in *Fazaga*, the government asserted the state secrets privilege. The government even asserted the state secrets privilege over information that was publicly available. Although Ibrahim was proven through documents obtained through a Freedom of Information Act request to have been the innocent subject of an international terrorism investigation, the government nonetheless refused to confirm or deny that fact because of "state secrets."

A 2009 Department of Justice policy says the department will not invoke state secrets to conceal violations of the law or prevent embarrassment. Despite this policy, the government asked the district court to dismiss Ibrahim based on state secrets even though it knew she was innocent.

In another case, *Mohamed v. Jeppesen Dataplan Inc.*, 614 F.3d 1070 (2010), the government successfully asserted "state secrets" to stop review of a case alleging abduc-

tions and torture of several residents of majority-Muslim countries by the CIA and its contractor. The plaintiffs alleged repeated beatings that broke bones, attaching of electric shock devices to their genitals, cuttings all over the body with a scalpel into which hot, stinging liquids were poured, undergoing long periods of sleep deprivation, and other torture methods. The 9th Circuit sustained the government's state secrets assertion and dismissed the case at the pleadings stage.

In March of this year, the Trump administration asserted the state secrets doctrine to bar CIA torture victims' cases against the psychologists who allegedly designed the torture programs.

In 2015, I wrote in this paper that it may seem impossible that the government would ever implement Trump's plan to target Muslims based solely on their religion. ["Surveillance of Muslim communities is already happening," Dec. 14, 2015.] I also wrote that unless the courts confine the application of the state secrets doctrine only to the narrowest of circumstances, the government has the power to immunize itself from prosecution for misbehavior targeting Muslims. The pieces are in place for the government to avoid review of its actions against Muslims, or against anyone else, under the guise of national security.

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