

OPINION



Government Errors Are Shrouded in Secrecy

The last two administrations have unfairly used state-secrets privilege to cover for their mistakes.

BY LOUIS FISHER

A reliance on the state-secrets privilege is enabling the government to draw a cover over its mistakes so that no one can fully understand when it is at fault. Like all human institutions, governments make errors and injure innocent individuals. Why not admit error and demonstrate integrity, honesty and fairness, and at the same time build public trust?

The administration of President George W. Bush invoked the state-secrets privilege repeatedly to prevent private litigants from challenging executive actions that violated statutes, treaties and the Constitution. The law-

suits included warrantless surveillance by the National Security Agency and the practice of “extraordinary rendition” that sent suspects to other countries for interrogation and torture. In case after case, federal judges deferred to executive branch warnings that allowing a case to proceed would do grave danger to the nation.

As presidential candidate in 2008, Barack Obama criticized this emphasis on secrecy and promised to promote a more transparent administration if elected. In a major speech in May 2009, he said the state-secrets privilege “has been overused” and remarked: “We must not protect information

merely because it reveals the violation of a law or embarrassment to the government.” In September of that year, U.S. Attorney General Eric Holder said the administration would not invoke the state-secrets privilege to “conceal violations of the law, inefficiency, or administrative error.” Still, the record of the Obama administration over the past five years on state secrets mirrors that of the Bush administration.

Consider the case of Rahinah Ibrahim, a Malaysian Muslim pursuing graduate studies at Stanford University in construction, engineering and management. On Jan. 2, 2005, when she presented her ticket at the

San Francisco airport to fly to Malaysia, she discovered that her name was on the federal government's no-fly list. An agency that is a part of the FBI compiles the names placed on the list.

Although she was in a wheelchair recovering from a hysterectomy and recent complications, she was handcuffed and taken to the police station. Two hours later, the FBI told the police to release her. It was an apparent mistake by the federal government—and a good time for an apology. Obviously, the FBI did not regard her as a security risk because she was allowed to board a plane the next day to return to Malaysia.

But there would be no apology from the federal government, and the situation would grow worse. Ibrahim was scheduled to return to Stanford in March 2005 to complete her doctorate. When she went to Kuala Lumpur International Airport to fly back, she was not allowed to board. She did not realize the government had revoked her student visa.

Ibrahim filed a complaint in federal court in January 2006 to challenge the government's action and seek damages. At trial, the government conceded that she had no criminal record or links to terrorist activity. In a decision in December 2012, U.S. District Judge William Alsup was still unable to determine whether she was, or was not, on the no-fly list. The government wanted the case dismissed on the basis of secret evidence to be shared with the judge *ex parte*, with the records taken back to Washington after the court's review. He found that procedure unacceptable.

On April 23, 2013, Holder signed a declaration that claimed the state-secrets privilege over certain docu-

ments, warning that their disclosure "could reasonably be expected to cause significant harm to the national security." Alsup examined classified documents and allowed Ibrahim's attorneys to take three depositions, including of FBI Agent Kevin Michael Kelley. Only then did the government concede plain error.

WHEN DID THE ERROR OCCUR?

Alsup explained that Kelley in November 2004 recommended that Ibrahim be placed on a number of federal watch lists. But because he did not understand the form he filled out, her name ended up on the no-fly list. At trial, Kelley admitted he had checked the wrong box, filling out the form "exactly the opposite way" from the instructions given him. He said he did not know of his mistake until deposed in September 2013.

This part of the trial record does not make sense. The "truth" wasn't discovered in 2013. When the FBI in January 2005 ordered Ibrahim released from police custody at San Francisco, it knew it had erred. Ibrahim faced other problems. When she reapplied for a visa in 2009, it was denied under the section of the Immigration and Nationality Act that can refer to terrorism. In September 2013, she applied for a visa to attend her trial in California. That, too, was denied.

On January 14, 2014, Alsup ordered the government to remove all references to Kelley's mistaken designations, making clear they "were erroneous and should not be relied upon for any purpose." Also, he ordered the government to inform her of the specific subsection of the act that rendered her ineligible for a visa in 2009 and 2013.

Following the pattern of the Bush administration, Obama and the Justice Department have been willing at every step to invoke the state-secrets privilege to prevent any type of judicial relief for individuals wronged by the executive branch. It should not be difficult for the administration to admit error, issue an apology and reparations, and stop hiding behind the state-secrets privilege. Nothing in the government's conduct in the Ibrahim trial adds to national security. Instead, it merely builds greater distrust toward executive officials.

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