EVEN LIARS GET TO INVOKE STATE SECRETS

As the LAT first reported, Judge Cormac Carney has dismissed a suit, Fazaga v. FBI, brought by Southern California Muslims against the FBI for illegal surveillance. Carney actually made two rulings, one dismissing most of the suit on state secrets grounds and one dismissing part of the suit against the government—but not individual FBI officers—on FISA grounds.

The rulings are interesting for four reasons:

- Carney has basically accepted the government's claims in a case that is closely related to one where—three years ago—he called out the government for lying to him personally
- Carney overstates the degree to which the Administration appears to be adhering to its own state secrets policy
- The case is an interesting next step in FISA litigation
- Carney suggests the FBI now investigates people for radicalization

Liars get to invoke state secrets

Three years ago, Carney caught the government lying to him about what documents it had collected on Southern Californian Muslims in this and related investigations. In an unclassified version of his ruling released last year, he revealed part of the government's breathtaking claim.

> The Government argues that there are

> times when the interests of national security require the Government to mislead the Court. The Court strongly disagrees. The Government's duty of honesty to the Court can never be excused, no matter what the circumstance. The Court is charged with the humbling task of defending the Constitution and ensuring that the Government does not falsely accuse people, needlessly invade their privacy or wrongfully deprive them of their liberty. The Court simply cannot perform this important task if the Government lies to it. Deception perverts justice. Truth always promotes it.

Yet in finding the government's state secrets invocation here, he is effectively accepting the government's word—which in some way claims to have a real predicate for its investigation into Southern Californian mosques—over the word of their former informant, Craig Monteilh, who says he was instructed to collect information indiscriminately because "everybody knows somebody" who knows someone in the Taliban, Hamas, or Hezbollah.

Now, I'm not surprised by this outcome. Carney's earlier ruling basically held, correctly, that the government needs to share its top secret information with judges even if it plans to withhold it from ordinary citizens. So now that the government has started sharing classified information with him, I bet it puts more pressure on him to keep all this information secret by approving the state secrets invocation.

But Carney's plaintive insistence that this ruling doesn't amount to rubber-stamping abusive federal powers make it sound like he doubts his own decision.

> In struggling with this conflict, the Court is reminded of the classic dilemma of Odysseus, who faced the challenge of

> navigating his ship through a dangerous passage, flanked by a voracious six-headed monster, on the one side, and a deadly whirlpool, on the other. Odysseus opted to pass by the monster and risk a few of his individual sailors, rather than hazard the loss of his entire ship to the sucking whirlpool. Similarly, the proper application of the state secrets privilege may unfortunately mean the sacrifice of individual liberties for the sake of national security. El-Masri, 479 F.3d at 313 ("[A] plaintiff suffers this reversal not through any fault of his own, but because his personal interest in pursuing his civil claim is subordinated to the collective interest in national security.");
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> [snip]
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> Plaintiffs raise the specter of Korematsu v. United States, 323 U.S. 214 (1944), and protest that dismissing their claims based upon the state secrets privilege would permit a "remarkable assertion of power" by the Executive, and that any practice, no matter how abusive, may be immunized from legal challenge by being labeled as "counterterrorism" and "state secrets." (Pls. Opp'n to Gov't, at 20, 41–42.) But such a claim assumes that courts simply rubber stamp the Executive's assertion of the state secrets privilege. That is not the case here. The Court has engaged in rigorous judicial scrutiny of the Government's assertion of privilege and thoroughly reviewed the public and classified filings with a skeptical eye. The Court firmly believes that after careful examination of all the parties' submissions, the present action falls squarely within the narrow class of cases that require dismissal of claims at the outset of the proceeding on state secret grounds.

Carney, having been brought into the government's secret club is now complicit in choosing to sacrifice Muslims' First Amendment rights for the security of the nation.

Carney overstates the degree to which the government appears to be adhering to its own state secrets policy

That's made more interesting because Carney bases his acceptance of the government's state secrets invocation on part on their purported adherence to their own state secrets policy.

> Second, even before invoking the privilege in court, the government must adhere to its own State Secrets Policy, promulgated by the Obama administration in a memorandum by the Attorney General in September 2009, effective October 1, 2009.

It's not at all clear the government does adhere to this policy. As a threshold matter, the policy "commits not to invoke the privilege for the purpose of concealing government wrongdoing." But this case almost certainly involves activities—the surveillance of Americans in part because of First Amendment protected activities—that were not permitted until the FBI's Domestic Investigations and Operations Guide made them permissible at the end of 2008. Thus, the state secrets invocation serves, in part, to cover up the fact that FBI officers were spying on Muslims because they were Muslims at a time when that was prohibited by the department.

The policy also promises to refer credible allegations of wrong-doing—as this case involves—to Inspectors General for investigation. Maybe they are doing that. If so, they're not telling. DOJ wouldn't even tell Sheldon Whitehouse whether or not they were really following that practice, and the absence of any report on this matter suggests they didn't do so.

> "The Department's policy is not to disclose the existence of pending IG investigations. Consistent with that policy, we could not provide the number of cases, if any, that may have been referred to an IG pursuant to the Department policy on state secrets privilege."
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> "However, to the extent IG investigations are undertaken, the Government has typically released public versions of final IG reports," the DoJ reply stated.
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> No such public versions of final IG reports have been released in the Obama Administration, as far as could be determined.

Now, whether Carney is aware of these developments or not, he doesn't say. But he does admit that, even if DOJ violated its own state secrets policy (as they appear to have done), there's nothing he could do about it.

> The Court cannot and does not comment on whether the Government has properly adhered to its State Secrets Policy, as this is internal to the Executive branch, and the Policy does not create a substantive or procedural right enforceable at law or in equity against the Government. (See Holder Decl., Exh. 1 ¶ 7.)

Which says all you need to know about how much judges—particularly those who have been lied to on related issues—ought to take the state secrets policy requirements.

This case is the next step in FISA litigation

Carney may not have cited these recent developments in state secrets, but he is well aware of the latest developments in FISA law, because he points to the 9th Circuit's recent

decision in al-Haramain in throwing out the plaintiffs' suit against the government on FISA grounds. Based on the 9th Circuit's holding that the government enjoys sovereign immunity even when it illegally wiretaps someone, Carney threw out the part of the suit against the government for all the allegedly illegal wiretaps used here. The part of the case that remains is against the FBI officers for illegal wiretapping people. We shall see what becomes of that.

Carney suggests the FBI now investigates people for radicalization

Finally, I wanted to point to one passage in which Carney speaks in very general terms about what Eric Holder said about the surveillance program. Speaking in hypotheticals, Carney explains the scope of what might be an adequate predicate for an investigation.

> In the context of a counterterrorism investigation, subject identification may include information about persons residing in the United States or abroad, such as Afghanistan, Lebanon, the Palestinian Territories, Yemen, and other regions in the Middle East, whom law enforcement has and has not decided to investigate depending on their nexus to terrorist organizations, such as al Qaeda, the Taliban, Hezbollah, and Hamas. Subjects and their associates may also be investigated because they are suspected of or involved in the recruitment, training, indoctrination, or radicalization of individuals for terrorist activities or fundraising for terrorist organizations. More directly, individuals subjected to counterterrorism investigations may be involved in plotting terrorist attacks. [my emphasis]

Recruiting, training, and fundraising terrorists are all crimes, especially under Holder v. HLP.

But is “radicalization”? I don’t know the answer to that. But that seems to push the limits of even Holder v. HLP’s limits on First Amendment activities further than we’ve known.