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OPINION | COMMENTARY

How a Pointless Lawsuit Took Off

An error put Rahinah Ibrahim on the no-fly list. The government fought her for 14 years.

By Alex Kozinski

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Imagine going to board a flight and getting arrested instead. You are released a few hours later but told that your name appears on the government's no-fly list: You are barred from U.S. airlines and airspace for as long as you live. Can you find out why? Can you challenge the decision? Can you show they made a mistake? No.

It happened in 2005 to Rahinah Ibrahim, a Malaysian national and Stanford doctoral candidate in construction engineering. After trying in vain for a year to get off the no-fly list, she filed a lawsuit in federal court. The government argued she had no recourse because the decision to put her on the list was judicially unreviewable, a position the Ninth U.S. Circuit Court of Appeals rejected in a 2008 opinion I wrote. The litigation stretched on for another decade, with the government throwing up every conceivable roadblock, from standing to state-secret privilege.

Ms. Ibrahim prevailed, but her saga consumed 14 years and \$3.6 million in attorney fees. The government had put her on the no-fly list by mistake. An agent of the Federal Bureau of Investigation meant to *exclude* her from the list, but indicated otherwise when he misread a poorly designed form. The agent admitted this when examined under oath by Ms. Ibrahim's lawyers. What's more, government officials knew about the mistake almost from the day of her arrest.



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Which raises a troubling question: Why not admit and correct the error? Once the government found out Ms. Ibrahim was not a terrorist, it should have simply removed her name from the no fly-list, saving millions of taxpayer dollars and preserving any state secrets that might have been jeopardized by the litigation. Admitting and correcting the error would also have been the decent thing to do. And with an advanced degree and a U.S.-citizen daughter, Ms. Ibrahim seems like the kind of person America ought to welcome.

This is not an isolated case. During my decades on the bench, I encountered similar litigation excesses by federal, state and local government entities with disturbing frequency, in civil and criminal cases alike. This is not because government lawyers are bad actors, though a few may be. Rather, it is because they're unconstrained by the economic considerations that affect lawyers for private clients. Clients may misjudge the likely costs of litigation or their prospect of success, but few will fund litigation for years knowing that they have nothing to gain. Paying legal bills focuses the mind, so that pointless cases are dropped or settled.

Government lawyers face no such reality check. Their salaries get paid regardless of outcome, and the costs of litigation are picked up by the taxpayers. If a lawsuit drags on for years, the lawyers suffer no adverse consequences: They don't lose the client, their legal fees are not withheld, there is no discipline of any kind. Litigating for the

government thus poses a moral hazard for lawyers: A victory, no matter how Pyrrhic, delayed or pointless, enhances their careers, whereas a loss—even a finding of bad faith—carries little risk.

Facing an adversary with an unlimited budget and no rational decision maker to monitor cost-effectiveness poses a daunting challenge. Ms. Ibrahim was lucky to find a law firm to handle her case. Along the way, she opened up a legal pathway for others to challenge their inclusion on the no-fly list. But why have this fight at all? What conceivable purpose was there in stubbornly defending a decision caused by a clerical error? This is a mystery that 13 years of litigation and millions of dollars of attorney fees have failed to solve. It is a mystery that keeps arising in cases litigated by government lawyers on the taxpayers' dime.

What is needed is a way to replicate the incentives that drive most cases between private parties to a reasonable resolution. Congress should amend the Equal Access to Justice Act, the statute under which Ms. Ibrahim's lawyers will get paid for the time they spent waging this pointless fight with the government. Upon a finding of bad faith, the responsible government attorneys should be held personally liable for a modest share, say 1%, of the attorney's fees the government must pay to a prevailing party—in this case at most \$36,000. This will incentivize government lawyers to conduct litigation fairly and responsibly, starting with the basic question: Is this fight worth taking on?

Mr. Kozinski is a retired Ninth Circuit judge.

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