

# Why Courts Matter: National Security

Since 9/11, the U.S. government's national security efforts have at times infringed on the privacy, due process and First Amendment rights of Americans. Federal courts serve as a last resort in striking a balance between security and civil liberties. Who sits on these courts matters, and current vacancies must be filled with judges who understand that national security policies must be consistent with the Constitution. Consider a few areas of national security in which federal courts play a key role.

## Discrimination and racial profiling

Federal courts sometimes step in to protect the rights of Americans who are racially profiled and discriminated against in the name of national security.

- On Sept. 11, 2012, a federal agent ordered U.S. citizen Shoshana Hebshi off an airplane, handcuffed her and took her to a jail cell, where she was forced to strip naked, squat and cough while an officer looked at her. Hebshi, a 36-year-old American woman who is of Arab and Jewish descent, was detained with two South Asian men she sat next to on the plane but did not know. During the flight, passengers complained the two men went to the restroom and looked of "Arab descent." Hebshi and both men were released from custody within hours for no wrongdoing. Hebshi filed a lawsuit against the airlines and government officials in U.S. District Court for the Eastern District of Michigan in January 2013. The case is pending.
- The government's secretive No Fly List consists of thousands of people who have been banned from commercial air travel without any explanation for why or any way to clear their names. A lawsuit was filed in the U.S. District Court for the District of Oregon in 2010 against the Justice Department, the FBI and the Terrorist Screening Center on behalf of ten U.S. Citizens and permanent residents who cannot fly to or from the U.S. In May 2011, the district court dismissed the case, but the 9th Circuit unanimously reversed that decision in May 2012 and ordered the district court to move forward with the case.

## Surveillance and privacy

Mass surveillance can undermine an individual's right to privacy, and freedoms of speech, association and religion. The federal courts are often the only recourse for preserving these rights.

- The NYPD has built a program dedicated to conducting surveillance of Muslims in the New York City area, monitoring restaurants, bookstores and mosques and creating detailed records of conversations. The Associated Press exposed in 2012 that the NYPD also sent paid infiltrators into mosques and student associations to take pictures, write down license plate numbers and take notes. Legal documents were filed in the U.S. District Court for the Southern District of New York in February 2013 seeking to stop the NYPD's practice of investigating Muslim New Yorkers when there is no reason to believe they are engaging in unlawful activity. The papers added to the record in a decades-long federal case, *Handschu v. Special Services Division*, which has produced a series of court orders regulating NYPD surveillance of political and religious activity.

## Transparency

The government generally has not been accountable for its unlawful torture and targeted killings practices. When the government refuses to turn over information about these practices to the public, federal courts have the final say in whether it becomes available.

- The government refused to release more than 2,000 photographs depicting detainee abuse in U.S. facilities in Iraq and Afghanistan. The U.S. District Court for the Southern District of New York upheld the government's decision in 2011.
- The government refused to release information about the targeted killings of three U.S. citizens in Yemen. The U.S. District Court for the Southern District of New York threw out a lawsuit seeking disclosure of the document. That decision is on appeal to the 2nd Circuit.

### The D.C. Circuit's Unique Role in National Security Cases

In 2008, the U.S. Supreme Court ruled that detainees held at Guantanamo Bay, Cuba are constitutionally entitled to pursue habeas corpus relief in the federal courts. The Supreme Court implied that there was only one appropriate venue for these suits – the D.C. District Court and the D.C. Circuit Court of Appeals. Since then, the D.C. federal courts have exercised essentially exclusive jurisdiction over cases arising from Guantanamo. Since 2008, the D.C. Circuit has adopted holdings that almost never grant habeas relief.

- The D.C. Circuit has refused to affirm a single district court holding granting habeas relief.
- The D.C. Circuit's pro-government rulings were overturned in each of the Guantanamo cases taken by the Supreme Court.

