Policy Comment

Security with Transparency: Judicial Review in "Special Interest" Immigration Proceedings

Much of the debate regarding post-September 11 counterterrorism initiatives has centered on the potentially damaging effects of these policies on constitutionally protected rights. Many observers have weighed the balance that the government has struck between national security and civil liberties by determining the extent to which new law enforcement initiatives preserve or encroach upon these rights.[1]

While scholars debate the legality of the government's new tools, it is often more difficult to assess whether such initiatives enhance or undermine security. The war on terrorism relies largely on sensitive intelligence and covert operations, so "victories" often remain undisclosed. Yet such assessments will be crucial in defining the future direction of U.S. policy. If another terrorist attack takes place on American soil, lawmakers will be called upon to determine whether the attack occurred because law enforcement personnel were not given adequate tools to prevent it, or because those tools were used ineffectively. This assessment may determine whether policymakers rush to provide law enforcement with additional powers similar to those they already possess, or instead decide to refocus the nation's overall counterterrorism strategy.

In choosing between these options, it is critical to scrutinize whether limiting the checks on executive branch authority actually translates into enhanced security. This Comment takes one step in this direction by arguing that decreasing transparency through the blanket closure of "special interest" immigration hearings is unnecessary to preserve security and may undermine overall counterterrorism efforts. Part I argues that the

1. *See, e.g.*, David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1 (2003); Panel Discussion, *The USA-PATRIOT Act and the American Response to Terror: Can We Protect Civil Liberties After September 11?*, 39 AM. CRIM. L. REV. 1501 (2002).

closure policy casts an overly broad net by failing to require judicial determinations that individual aliens pose security threats. Part II evaluates an already-existing alternative that avoids this problem: the open hearings of the Alien Terrorist Removal Court (ATRC). Part III proposes a compromise scheme based on the ATRC model that allows closed hearings after case-by-case adjudications of whether particular aliens have terrorist ties. This compromise model provides a viable alternative that allows the government to conceal the identities of truly high-risk detainees while ensuring the valuable safeguard of judicial review. It also reduces the risk that categorical closure may undermine counterterrorism efforts by alienating immigrant communities that can serve as allies in intelligence gathering. Part IV concludes.

I

In immigration cases, the government ordinarily must seek protective orders from immigration judges to seal testimony that may reveal sensitive information.[2] However, ten days after the terrorist attacks of September 11, 2001, at the direction of the Department of Justice, Chief Immigration Judge Michael Creppy issued a directive instructing U.S. immigration judges to close to the press and public all portions of those deportation hearings designated as "special interest" by the Attorney General.[3] The Creppy directive does not list the criteria for determining which hearings are to be closed. Instead, it instructs immigration judges that "[i]f any of these cases are filed in your court, you will be notified by OCIJ [Office of the Chief Immigration Judge] that special procedures are to be implemented" and that "[a] more detailed set of instructions will be forwarded . . . to the judge handling the case."[4]

To justify closing these immigration proceedings, Dale Watson, the FBI Assistant Director for Counterterrorism and Counterintelligence, set forth a "mosaic" theory of intelligence. Watson argued that even information that seems innocuous in isolation, such as the names of those detained, might be pieced together by terrorist networks to the detriment of U.S. security interests.[5] Indeed, Watson stated that "the government cannot proceed to close hearings on a case-by-case basis, as the identification of certain cases

2. *See* 8 C.F.R. § 1003.46 (2004).

3. E-mail and Memorandum from Michael J. Creppy, Chief Immigration Judge, to All Immigration Judges and Court Administrators, Instructions for Cases Requiring Additional Security (Sept. 21, 2001), http://news.findlaw.com/hdocs/docs/aclu/creppy092101memo.pdf.

4. *Id*.

5. *See* Declaration of Dale L. Watson at 4-9, Detroit Free Press v. Ashcroft, 195 F. Supp. 2d 937 (E.D. Mich.) (Nos. 02-70339, 02-70340), *aff'd*, 303 F.3d 681 (6th Cir. 2002); *see also* Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice, 331 F.3d 918 (D.C. Cir. 2003), *cert. denied*, 124 S. Ct. 1041 (2004).

for closure, and the introduction of evidence to support that closure, could itself expose critical information about which activities and patterns of behavior merit such closure."[6]

But the very nature of the mosaic theory renders it overbroad. As the Sixth Circuit noted,

> [T]he Creppy directive does not apply to "a small segment of particularly dangerous" information, but a broad, indiscriminate range of information, including information likely to be entirely innocuous. Similarly, no definable standards used to determine whether a case is of "special interest" have been articulated. Nothing in the Creppy directive counsels that it is limited to "a small segment of particularly dangerous individuals." In fact, the Government so much as argues that certain non-citizens known to have no links to terrorism will be designated "special interest" cases. Supposedly, closing a more targeted class would allow terrorists to draw inferences from which hearings are open and which are closed.[7]

Such an overbroad and effectively unreviewable approach cries out for judicial oversight of the government's decision to treat an alien as a potential national security threat, particularly if the government's security interests can also be accommodated.

II

Procedures are already in place for the use of a specialized court that can remove alien terrorists through open hearings. The Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996,[8] in conjunction with the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996,[9] created the ATRC to adjudicate the deportation of alleged terrorists.[10] Though the court has never been used and its procedures are not without flaws,[11] such a forum—as its name implies—appears at first glance to be tailor-made for terrorism-related cases.[12]

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6. Declaration of Dale L. Watson, *supra* note 5, at 8-9.

7. *Detroit Free Press*, 303 F.3d at 692.

8. Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 15, 18, 22, 28, 40, 42, and 50 U.S.C.).

9. Pub. L. No. 104-208, div. C, 110 Stat. 3009-546 (codified as amended in scattered sections of 8, 18, and 42 U.S.C.).

10. For the codification of the ATRC, see 8 U.S.C. §§ 1531-1537 (2000).

11. *See* Matthew R. Hall, *Procedural Due Process Meets National Security: The Problem of Classified Evidence in Immigration Proceedings*, 35 CORNELL INT'L L.J. 515, 518 (2002).

12. Nowhere in the Watson Declaration, *see* Declaration of Dale L. Watson, *supra* note 5, the Sixth Circuit's decision in *Detroit Free Press*, *see Detroit Free Press*, 303 F.3d 681, or the Third Circuit's decision involving the Creppy directive, *see* N. Jersey Media Group, Inc. v. Ashcroft,

Under ATRC procedures, the Attorney General is authorized to file an application to use the removal court, which is comprised of five district court judges selected by the Chief Justice of the United States.[13] One of the five judges then reviews any classified evidence submitted with the application, ex parte and in camera, to determine whether there is probable cause to believe that the alien has been correctly identified, that he is a terrorist, and that removal by normal proceedings would pose a threat to national security.[14] If the judge determines that normal proceedings would compromise security by revealing sensitive intelligence, the ATRC hears the case.[15] These hearings, though they preserve the secrecy of classified information, nonetheless remain open to the public, revealing the identity of the detainees.

Using the ATRC for special interest cases decreases the risk that aliens will be erroneously deported, because hearings remain open to the public and because ATRC judges are authorized to evaluate sensitive evidence. It also partly addresses the government's national security concerns by keeping the most sensitive intelligence evidence under seal.

Maintaining transparency in all phases of the immigration process is particularly important in the post-September 11 climate. After witnessing an attack, individuals may be "more willing to abridge the constitutional rights of people who are perceived to share something in common with the 'enemy,' either because of their race, ethnicity, or beliefs."[16] Therefore, the "[p]resence of the public and press . . . helps to assure that the immigration judge bases his or her opinion on the evidence presented, rather than on unsupported allegations or fears."[17] Such sentiments are in accord with the general practices of the Bureau of Citizenship and Immigration Services, which itself acknowledges the importance of transparency in immigration proceedings and requires immigration judges to open hearings to the public, with limited exceptions.[18]

Allowing a judge to view in camera the sensitive evidence used to close an alien's deportation hearing also may help safeguard that alien from being treated unjustly. The Creppy directive's "special interest" label uniquely undermines a judge's ability to evaluate whether an individual is a flight risk or threat to society. As Judge Edmunds of the Eastern District of Michigan noted, the special interest designation "taint[s] the immigration

308 F.3d 198 (3d Cir. 2002), *cert. denied*, 123 S. Ct. 2215 (2003), is the possibility of using the ATRC as an alternative to the Creppy directive procedures even mentioned.

13. *See* 8 U.S.C. § 1532(a).

14. *See id.* § 1533(c).

15. *See id.*

16. Haddad v. Ashcroft, 221 F. Supp. 2d 799, 804 (E.D. Mich. 2002), *vacated*, 76 Fed. Appx. 672 (6th Cir. 2003) (unpublished decision).

17. *Id.*

18. *See* 8 C.F.R. § 1003.27 (2004).

judge's decision" and "inevitably suggest[s] a link between [the detainee] and terrorists or terrorism or, more specifically, the attacks of September 11."[19] Thus, those without connections to terrorism may be implicated erroneously by the nonreviewable special interest label. The designation is based solely on the discretion of the Attorney General and is applied based on evidence not disclosed to aliens, their attorneys, or the judge hearing the case.[20] Regardless of the strength of the evidence that detainees present demonstrating that they pose no security threat, the risk remains that the Attorney General's label will be ingrained in a judge's mind.

Furthermore, even if a large majority of the special interest cases involve detainees with terrorist ties, it remains unclear whether a blanket policy addresses concerns about the disclosure of intelligence and methods of investigation. The policy is not necessary to secure deportation, since the government need not present classified information to remove terrorists guilty of visa violations. Deportation proceedings only require the government to demonstrate violations of immigration law.[21] In at least one instance, the government has conceded that it used no classified evidence in a special interest hearing.[22]

While the use of the ATRC would provide more transparency than the Creppy directive procedures, it would fail to address one of the government's major security concerns: Open hearings would disclose to terrorist networks the identities of those detained.

It is fair to ask whether this concern is valid, since the Creppy directive may not completely prevent the disclosure of detainees' identities. First, it is possible that aliens may disclose their own identities. In fact, subsequent to his detention, at least one detainee spoke with his attorney, his family, and members of the press—and even had excerpts of a letter describing the conditions of his detention published in a Detroit newspaper.[23] In this respect, the Creppy directive is underinclusive, because it fails to protect what the government considers sensitive information. Although the Department of Justice attempted to remedy this problem by issuing a rule prohibiting detainees from disclosing hearing-related information sealed

19. *Haddad*, 221 F. Supp. 2d at 804 (Edmunds, J.).

20. *See* Detroit Free Press v. Ashcroft, 303 F.3d 681, 710 (6th Cir. 2002) ("The task of designating a case special interest is performed in secret, without any established standards or procedures, and the process is, thus, not subject to any sort of review, either by another administrative entity or the courts. Therefore, no real safeguard on this exercise of authority exists.").

21. *See id*. at 709.

22. *See* Press Release, U.S. Dep't of Justice, Statement of Associate Attorney General Jay Stephens Regarding the Sixth Circuit Decision in the *Haddad* Case (Apr. 19, 2002), http://www.usdoj.gov/opa/pr/2002/April/02_ag_238.htm (stating that no evidence was presented during closed hearings that threatened the safety of the American people).

23. *See Detroit Free Press*, 303 F.3d at 707.

under a court-issued protective order,[24] this rule fails to prevent detainees, their family members, and their acquaintances from disclosing sensitive information in the form of the detainees' identities.[25] Furthermore, nothing prevents detainees from revealing this information after they are deported.[26]

Second, even if terrorists are unable to communicate with their cohorts, their failure to contact other terrorists might itself signal their capture. If, as the government claims, networks such as al Qaeda are sophisticated enough to piece together bits of information to discern patterns of investigation, it would seem that they would be capable of determining whether or not their operatives have been caught.

Despite these possible alternative means of identity disclosure, the government's concerns with open hearings remain valid. By opening hearings, the government would be voluntarily providing terrorist networks with potentially valuable information that they would otherwise have to acquire on their own. Acknowledging this concern, the D.C. Circuit recently upheld the government's refusal to disclose the names of most of those it had detained since September 11, finding that "[a] complete list of names informing terrorists of every suspect detained . . . would give terrorist organizations a composite picture of the government investigation, and . . . . could allow terrorists to better evade the ongoing investigation and more easily formulate or revise counter-efforts."[27]

III

In examining these alternative alien terrorist removal procedures, it appears that the Creppy directive is overly broad, and the ATRC, while providing case-by-case judicial review, fails to address the government's concerns of identity disclosure. The ATRC model, however, can be used to craft a compromise proposal that finds the proper balance between national security and civil liberties. This proposed solution would use an Article III judge to review the government's decision to designate an alien's immigration proceedings as special interest. Just as the government must

24. *See* Protective Orders in Immigration Administrative Proceedings, 67 Fed. Reg. 36,799, 36,799-800 (May 28, 2002) (codified at 8 C.F.R. §§ 1003.27, 1003.31, 1003.46 (2004)).

25. In a recent decision upholding the government's refusal to reveal information regarding post-September 11 detainees, Judge Sentelle of the D.C. Circuit recognized, "In sum, each of the [INS, criminal, and material witness] detainees has had access to counsel, access to the courts, and freedom to contact the press or the public at large." Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice, 331 F.3d 918, 922 (D.C. Cir. 2003), *cert. denied*, 124 S. Ct. 1041 (2004).

26. In discussing the Justice Department rule, Judge Keith of the Sixth Circuit wrote, "At this juncture [the end of deportation proceedings], nothing precludes the deportee from disclosing . . . information [like his name or the date and place of his arrest]. Thus, the interim rule does not remedy the under-inclusiveness of the Creppy directive." *Detroit Free Press*, 303 F.3d at 708.

27. *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 928.

ordinarily request that immigration judges keep sensitive information under seal in immigration hearings,[28] the government should also be required to submit its designation request to an Article III judge.

As under the ATRC's procedures, the reviewing judge would close the hearings of those posing a national security threat if he had probable cause to believe that "the alien who is the subject of the application has been correctly identified and is an alien terrorist present in the United States" for whom removal pursuant to open hearings would "pose a risk to the national security of the United States."[29] ATRC procedures mandate using a preponderance standard to determine whether an alien should be deported because he is a terrorist;[30] application of this standard to the initial closure decision can be debated and later adopted if the probable cause threshold proves to be too low. In any event, the proceedings following the special designation would take place, as previously, before an immigration judge.

The government has until now argued that immigration judges lack necessary expertise in national security to make case-by-case determinations regarding which immigration hearings should be closed. But even under current regulations, the government can seek protective orders from immigration judges to seal evidence whose revelation could harm national security.[31] This history of reliance on immigration judges undermines the government's contention that only the Attorney General is qualified to make such intelligence assessments. Furthermore, under this Comment's compromise, any Article III judges who are experienced in handling sensitive security matters could be called upon to review special interest cases. Such judges could include Foreign Intelligence Surveillance Court judges, who are specifically named as possible candidates in the ATRC statute.[32]

This proposal also avoids a significant security concern associated with the Creppy directive's procedures. The perception among immigrant communities that those who are guilty of violating their visas are categorically placed in secretive proceedings and deported may make it unlikely that they will come forward with useful intelligence that can assist counterterrorism investigations. The safeguard of judicial review can provide some reassurance to these communities that the government must demonstrate that aliens have terrorist ties before subjecting them to secret proceedings.

Because members of "sleeper cells" often blend in with immigrant communities, one effective way of foiling terrorists is to maintain open

28. *See* 8 C.F.R. § 1003.46.
29. 8 U.S.C. § 1533(c)(2) (2000).
30. *See id*. § 1534(g).
31. *See* 8 C.F.R. § 1003.46.
32. *See* 8 U.S.C. § 1532(a).

lines of communication with communities that may be aware of terrorists within their ranks. Deputy Attorney General Larry Thompson stressed the importance of working with these communities in September 2002, while describing the arrest of six suspected al Qaeda operatives in Lackawanna, New York.[33] Thompson stated that the immigrant community provided "extraordinary cooperation," and that "[t]he assistance of Muslim-Americans in this case has helped to make the Buffalo community and our nation safer."[34] Law enforcement officials have also successfully recruited members of immigrant communities to serve as translators for the CIA and other intelligence agencies.[35] The possibility of alienating these immigrant groups and losing a potentially valuable ally in counterterrorism efforts raises a significant policy concern: The success of such efforts may be undermined by applying the Creppy directive's overbroad procedures to noncitizens without links to terrorist activity.

IV

Since September 11, much has been made of the difficulty of creating policies that protect both national security and the rights of immigrant groups in the United States. Providing judicial review modeled after the ATRC's procedures in special interest immigration cases will help ensure that transparency is curtailed only in cases involving terrorists and their affiliates. Such an approach both respects the government's concerns regarding identity disclosure and honors the critical role intelligence gathering will continue to play in the war on terrorism.

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33. *See* News Conference of Larry Thompson, Robert Mueller, and George Pataki (Sept. 14, 2002), LEXIS, News Library, FDCH Political Transcripts File (remarks of Larry Thompson, Deputy Attorney General).

34. *Id*.

35. *See* David Johnston, *F.B.I. Is Accused of Bias by Arab-American Agent*, N.Y. TIMES, July 20, 2003, at 16; David Shepardson, *Feds Boost Michigan Terror Fight*, DETROIT NEWS, May 29, 2002, at A1.