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FLAWS UNDERMINE USE OF ALIEN TERRORIST REMOVAL COURT

by

Steven R. Valentine

Partly in response to the first terrorist attack on the World Trade Center in 1993, Congress established the Alien Terrorist Removal Court as part of the Antiterrorism and Effective Death Penalty Act of 1996. The fact that the U.S. Department of Justice has never brought a case to the Removal Court during the intervening six years, however, indicates that the statutory restraints on the special tribunal make it effectively useless. During Congressional consideration of the United and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, the Justice Department expressed constitutional concerns about Senate language that would have addressed the Removal Court's flaws. A recent U.S. Court of Appeals decision, issued after the September 11th attacks, suggests that those concerns may be unfounded. Congress and the Bush Administration ought now to consider working towards fixing the procedural flaws of the Alien Terrorist Removal Court and make it an integral part of the new arsenal of legal weapons against terrorism.

President Ronald Reagan first proposed the creation of the Alien Terrorist Removal Court in 1988. The Reagan Administration's proposal was the result of a recurring problem experienced by the Department of Justice. Much of the information that the Federal Bureau of Investigation gathers in the course of antiterrorism investigations is classified in order to protect sources and methods. Sometimes, of course, lives hang in the balance because the failure to protect the identities of human sources of intelligence could get them killed. If the evidence against a particular alien is insufficient to support a successful criminal prosecution, deporting him often becomes the next best legal choice. Before 1996, however, the government was prohibited from using classified information to establish the deportability of alien terrorists. When the government possessed insufficient non-classified information to demonstrate an alien's deportability on terrorism grounds, the alien was able to remain in the United States provided that he was otherwise in compliance with the immigration laws. In such cases, the government effectively was powerless to act.

Steven R. Valentine is a partner in the law firm Preston Gates Ellis & Rouvelas Meeds LLP, Washington, D.C. From 1988 to 1993, Mr. Valentine served in the Reagan and George H.W. Bush Administrations as the Deputy Assistant Attorney General in charge of the Office of Immigration Litigation, Civil Division, U.S. Department of Justice. In the wake of the September 11, 2001, terrorist attacks on New York and Washington, Mr. Valentine was interviewed by and quoted in *The Wall Street Journal*, *U.S. News and World Report* and *Legal Times* on the relationship between terrorism and immigration. *The views expressed here are those of the author and do not necessarily reflect those of the Washington Legal Foundation. They should not be construed as an attempt to aid or hinder the passage of legislation.*

Under the Reagan Administration proposal, a new court, comprised of sitting U.S. District Court Judges designated by the Chief Justice of the United States, would be established. The new court would consider immigration cases against alleged terrorist aliens brought before it by the Justice Department. It would be empowered to order the deportation of such terrorist aliens based solely upon classified evidence. Although the alien would not be permitted to learn of the evidence against him, the proposal provided the protection afforded through independent review of the Justice Department's case by an Article III Federal Judge.

Congress failed to act on the Reagan Administration's proposal. Although the George H.W. Bush Administration adopted it, the plan continued to languish until after the first World Trade Center bombing in 1993. Invoking the memory of that bombing, Senator Robert Smith of New Hampshire offered an amendment to establish the terrorist removal court as part of the 1994 crime bill. Although the Senate passed it by voice vote, Smith's amendment was dropped during the Senate-House conference on the 1994 bill. Senator Smith introduced the proposal as a stand-alone bill in 1995, and it was eventually incorporated into the Antiterrorism Act of 1996.

The 1996 Act establishing the Alien Terrorist Removal Court sets forth an intricate series of procedures that must be followed in each case brought before the new tribunal. Each case brought to the Court must be personally certified by the Attorney General or the Deputy Attorney General. The Justice Department's application to the Court must establish probable cause that the alien is a terrorist who is physically present in the United States and with respect to whom the declassification of evidence would pose a risk to the national security. Provided that the Court grants its application to proceed with the case, the Justice Department then submits its classified information, *in camera* and *ex parte* to the Court. At the same time, the Justice Department provides the Court with an unclassified summary of the classified evidence against the alien. The Judge then approves and provides the alleged terrorist alien with the unclassified summary, so long as it is determined to be "sufficient to enable the alien to prepare a defense." After a hearing, the Judge can order the alien to be deported based on the classified evidence, taking into account the alien's defense based on the unclassified summary.

In the six years since the Alien Terrorist Removal Court was established, the Justice Department has never brought a case before it. The Department evidently considers the procedures required under the Act to be unworkable. In particular, the problem seems to be the requirement that the alien must be provided with an unclassified summary of the classified evidence against him that is sufficiently detailed to enable the alien to prepare his defense. One can easily understand the "Catch-22" situation in which this places the United States. If the government prepares an unclassified summary of the evidence that is too vague and general, it will not be approved by the Judge. If, on the other hand, the evidence is too clear and specific, the classified evidence itself will be effectively disclosed, thus harming national security by compromising sources and methods of intelligence gathering.

In an attempt to address this apparently fatal flaw in the 1996 Act, during consideration of the PATRIOT Act, Senator Smith offered language that would remove the requirement of an unclassified summary from the procedures governing the Alien Terrorist Removal Court. The Justice Department indicated its disapproval of the Senator's proposal, however, based on constitutional concerns about the due process rights of aliens brought before the Court. Ultimately, Senator Smith won passage of a provision in the intelligence authorization act for fiscal year 2002 that requires the Attorney General to report to Congress on why the 1996 Act has never been used and what should be done to make it a workable antiterrorism tool.

The December 5, 2001, decision of the U.S. Court of Appeals in the case of *Kiareldeen v. Ashcroft*, 273 F.3d 542 (3d Cir. 2001), suggests that the Department's constitutional fears about Senator Smith's original proposal to delete the requirement of an unclassified summary are unfounded. In *Kiareldeen*, the alien filed a petition for a writ of *habeas corpus* in which he alleged that the United States used classified evidence obtained by the FBI's Joint Terrorism Task Force in administrative (non-judicial) proceedings, but failed to disclose its use to him. After the Court granted the alien's *habeas* petition, the alien moved for attorney's fees under the Equal Access to Justice Act (EAJA). The Court granted the motion and the Justice Department appealed. The Court of Appeals held that the United States was substantially justified in opposing the alien's *habeas* petition and thus reversed the District Court's grant of attorney's fees under EAJA.

Although, strictly speaking, the Third Circuit's ruling in *Kiareldeen* is about the alien's EAJA claim, the Court of Appeals commented extensively on the use of classified evidence to deport an alien. Writing for a unanimous three-judge panel, Judge Aldisert noted that although the Justice Department had provided the alien with an unclassified summary of the classified evidence against him in an administrative proceeding before a non-Article III immigration judge, the immigration judge had found the evidence to be "insufficient" to establish deportability. The U.S. District Judge in the *habeas* case determined the same unclassified summary to be "lacking in either detail or attribution to reliable sources." Commenting pointedly, Judge Aldisert observed, "That the FBI would be unwilling to compromise national security by revealing its undercover sources, is both understandable and comforting." "That a court would then choose to criticize the FBI for being unwilling to risk undermining its covert operations against terrorists," the Judge concluded, "is somewhat unnerving." The Court demonstrated a keen understanding of the Catch-22 situation that has crippled the Alien Terrorist Removal Court.

Judge Aldisert's opinion for the Court of Appeals in *Kiareldeen* also recognized the fundamental need for the judiciary to accommodate the grave national security threat posed by terrorism. "The district court, in its fact finding process, understandably felt shackled by the government's unwillingness to provide Kiareldeen the names and addresses of its counter-terrorism personnel, both in uniform and civilian clothes," the Judge commented. "Nonetheless," Judge Aldisert concluded, "the public fisc should not lightly be exposed to financial penalties when the war on terrorism is transferred from the domestic battlefield that our country has become, to the vacuum-sealed environment of a federal courtroom, with such civilized accouterments as burdens of proof and axioms of evidence."

Congress demonstrated its determination to provide the Bush Administration with the arsenal of legal weapons that it needs to fight terrorism by speedily enacting the PATRIOT Act. The Administration, in turn, showed its willingness to act aggressively and boldly in using the inherent constitutional powers of the Commander-in-Chief to establish military tribunals to try alien terrorists. As the Congress recognized when it created the Alien Terrorist Removal Court in 1996, the United States needs a means by which it can use classified evidence to remove alien terrorists it cannot successfully prosecute from our midst by deporting them. Now the Congress and the Bush Administration should work creatively together towards fixing the flaws of the Alien Terrorist Removal Court and add it to the Nation's legal infrastructure for fighting the clear and present danger of terrorism.

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