

Court Backs Open Deportation Hearings in Terror Cases

by Adam Liptak

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The federal appeals court in Cincinnati declared yesterday that the Bush administration acted unlawfully in holding hundreds of deportation hearings in secret based only on the government's assertion that the people involved may have links to terrorism.

The decision, which was laced with stinging language questioning the administration's commitment to an open democracy, is the first major appellate ruling on the government's legal tactics concerning Sept. 11.

"Democracies die behind closed doors," wrote Judge Damon J. Keith for the unanimous three-judge panel of the United States Court of Appeals for the Sixth Circuit. The Bush administration has sought, the panel said, to place its actions "beyond public scrutiny."

"When the government begins closing doors," the panel continued, "it selectively controls information rightfully belonging to the people. Selective information is misinformation."

Barbara Comstock, a spokeswoman for the Justice Department, said the government had not decided whether to appeal.

"The Justice Department has an obligation to exercise all available options to disrupt and prevent terrorism within the bounds of the Constitution, and will review today's opinion in light of our duty to protect the American people," Ms. Comstock said in a statement.

The case was brought by four Michigan newspapers and Representative John Conyers Jr., Democrat of Michigan. They sought to attend deportation hearings concerning Rabih Haddad, a Muslim clergyman who had overstayed his tourist visa.

Mr. Haddad, a native of Lebanon and a resident of Ann Arbor, Mich., is the founder of the Global Relief Foundation, a Muslim charity whose assets were frozen after it came under federal scrutiny.

In April, a federal district judge in Detroit rejected the government's argument that it should be allowed to decide which hearings must be closed without presenting arguments and evidence to immigration judges. The judge, Nancy G. Edmunds, ruled that future hearings in Mr. Haddad's case must be open, and the government has released transcripts of the sealed hearings. Judge Edmunds was appointed by the first President Bush.

In similar decisions that have yet to be tested on appeal, trial court judges in Newark and Washington have also recently ordered the government to open hearings and release information about people held in connection with terrorism investigations.

According to information provided by the Justice Department last month, 752 people were detained on immigration violations in connection with Sept. 11 investigations. As of late June, 81 remained in custody. The rest were released or deported.

The appeals court in Cincinnati affirmed Judge Edmunds's decision with unusual speed, issuing its decision fewer than three weeks after it heard oral arguments.

"The panel was offended by the government's attempt to hide behind national security to strip us of our freedoms," said Herschel P. Fink, who represented *The Detroit Free Press* in the case.

Press lawyers were unrestrained in their enthusiasm for the decision.

"I want to weep it's so good," said Lucy Dalglish, the executive director of the Reporters Committee for Freedom of the Press.

Judge Keith, who was appointed to the appeals court by President Jimmy Carter, has a history of strong opinions on civil liberties. In 1971, as a district judge, he rejected an argument by Attorney General John Mitchell that wiretaps obtained without search warrants could sometimes be justified in the name of national security.

The appeals court panel also included Martha Craig Daughtrey, also of the United States Court of Appeals for the Sixth Circuit, and James G. Carr, a federal trial court judge from Toledo, Ohio, sitting as a visiting appellate judge. Judges Daughtrey and Carr were both appointed by President Bill Clinton.

A broader case on the same issues will be heard by the federal appeals court in Philadelphia next month. In that case, a Newark judge ordered that all deportations nationwide be opened to public scrutiny unless the government offered proof, case by case, of why secrecy was needed.

The Justice Department may be awaiting the outcome of that case before deciding whether to appeal in the Haddad case.

Yesterday's decision applied directly only to Mr. Haddad's case. Its reasoning, though, is binding on courts in Kentucky, Michigan, Ohio and Tennessee and may be cited as precedent elsewhere.

The recent judicial activity is part of a historical pattern, said Lee Levine, a Washington lawyer and the author of a treatise on access to government proceedings.

"Some momentous event happens," Mr. Levine said. "There follows a governmentwide tendency to defer to the executive branch. Then at some point when a calm distance has been achieved from the precipitating event, slowly but surely the judiciary rises from its slumber

and says, 'We've forgotten what we're fighting for.' "

The decision rejected administration arguments that tried to distinguish immigration hearings, which are conducted within the executive branch, from trials conducted by the judicial branch.

The court held that deportation hearings look and feel like trials. They are, Judge Keith wrote, "exceedingly formal and adversarial."

Indeed, said Lee Gelernt, a lawyer at the American Civil Liberties Union who represented some of the plaintiffs, "there is perhaps even greater reason to have public scrutiny of deportation hearings."

"There is no jury," Mr. Gelernt added, "and the defendants will often not have counsel. They're facing trained prosecutors, and they're often very literally sitting there all by themselves."

The appeals court decision was also notable, experts said, for a warm embrace of news organizations not seen in most courts since the Vietnam and Watergate eras. The public, the court wrote, has deputized the press "as the guardians of their liberty."

The panel emphasized that the government might well be able to meet its burden of persuading immigration judges case by case that given proceedings may be closed.

The panel wrote that the government has already outlined "compelling interests sufficient to justify closure."

Among the rationales for closing cited in government affidavits were physical danger and embarrassment to the detainees and people associated with them, along with the possibility of compromising investigations.

Ms. Comstock said the government was pleased with this aspect of the decision.

"As the Sixth Circuit Court of Appeals recognized today," she said, "the government has a compelling interest in preventing terrorism and closing immigration proceedings that could reveal information" that might help terrorists avoid detection.

The panel held that the general interest in preventing terrorism must be argued to and accepted by immigration judges in the context of particular cases. The judge in Mr. Haddad's case made no such findings. Rather, she relied on a blanket directive issued by the chief immigration judge, Michael J. Creppy. It instructed immigration judges to keep so-called special-interest cases secret.

"Each of these cases is to be heard separately from all other cases on the docket," Judge Creppy wrote. "The courtroom must be closed for these cases no visitors, no family, and no press."

"This restriction," he continued, "includes confirming or denying whether such a case is on the docket."

The appeals court panel said the directive violated the Constitution.

"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," Judge Keith wrote. "A government operating in the shadow of secrecy stands in complete opposition to the society envisioned by the framers of our Constitution."

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Further Reading:

- Information on Rabih Haddad , Ann Arbor Society of Friends' Peace and Social Concerns Committee.
- Homefront Confidential , How the War on Terrorism Affects Access to Information and the Public's Right to Know, prepared by The Reporters Committee for Freedom of the Press, Second Edition, Sept 2002