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Let Judges Be Judges

By Bruce J. Einhorn

"There are times when the old bunk about an independent and fearless judiciary means a good deal." - Judge Learned Hand

In 1992, I was assigned as the fourth trial judge to preside over the federal government's deportation proceedings against Khader Hamide and Michel Shehadeh. These two proceedings involved members of the "L.A. Eight," whom the Department of Justice (and later, the Department of Homeland Security) tried to expel from the United States for their activities and/or advocacy work with the Popular Front for the Liberation of Palestine.

In January 2007, just before my retirement from the immigration bench and after 15 years of hearings before me - and extensive litigation delays caused by collateral court and appellate proceedings - I issued my third and final order dismissing the Hamide and Shehadeh cases. This time, the order was based on the government's unconstitutional and otherwise-illegal refusal to disclose or identify what, if any, exculpatory or favorable evidence it possessed regarding the two men. On Oct. 30, 2007, the Department of Homeland Security finally ended its efforts to deport Hamide and Shehadeh.

The deportation proceedings against Hamide and Shehadeh, both permanent residents of the United States, were originally filed in Immigration Court in Los Angeles in 1986, then filed again in 1987. The Justice Department, specifically the now-defunct Immigration and Naturalization Service, charged that as supporters of the Popular Front, the two men were subject to deportation for allegedly advocating certain political views, including communism, anarchy or the propriety of overthrowing the United States government (or all government).

Following amendments to the Immigration Act in the 1990s, the INS added to its filings against Hamide and Shehadeh the charges that the two were subject to deportation for their alleged engagement in terrorist activity, based on their involvement with the organization. At no time did the Justice or Homeland Security departments ever say that Hamide or Shehadeh had planned or participated in any terrorist or violent act anywhere in the world.

After I had taken hundreds of hours of testimony and received thousands of pages of proposed evidence in the two cases (which all the

parties agreed should be heard together), in 1995 the 9th U.S. Circuit enjoined any further action to deport Hamide and Shehadeh. In collateral proceedings brought by the American-Arab Anti-Discrimination Committee, the 9th Circuit ruled that the government had selectively targeted both men for prosecution because of their Palestinian Arab origins (and had not done the same to other alleged terrorists with different national origins). According to the 9th Circuit, such action by the government violated the men's equal-protection rights as embodied in the Due Process Clause of the Fifth Amendment to the U.S. Constitution.

Several years later, however, in 1999, the U.S. Supreme Court, by a 5-4 vote in the case of Reno v. American-Arab Anti-Discrimination Committee, reversed the 9th Circuit and reinstated Hamide and Shehadeh's deportation proceedings. The Supreme Court majority wrote that the attorney general's decision to engage in selective prosecution in deportation proceedings was not unconstitutional, so long as those placed in such proceedings were guaranteed fair and impartial hearings. When the Supreme Court remanded the responsibility to conduct those hearings, I was back on the cases.

Following remand, I twice dismissed the terrorism charges against Hamide and Shehadeh. Among other, more technical grounds, I ruled that theses charges were based on a retroactive application of the 1990 amendments to the Immigration Act, which had been specifically prohibited by the amendments themselves. While that ruling was on appeal, the U.S.A. Patriot Act was itself specifically amended to allow for the ex post facto application of the 1990 terrorism provisions to any pending deportation proceedings. Because the Hamide and Shehadeh proceedings were the only ones affected by that new portion of the Patriot Act, it became clear to even the most myopic observer that Congress and the president had acted to specifically interrupt the traditional appeals process and overrule me. Osama Bin Laden was a dangerous man whom the government could not find. Apparently, I was one whom it could. Once again, the cases of Hamide and Shehadeh were back in my court.

On June 16, 2005, I issued a written order for the government to search its agencies and turn over to respondents any potentially exculpatory evidence regarding the allegations and charges of deportability made against the two men. My order hardly came as a shock to the parties. A similar order was issued by a previous immigration judge in the Hamide and Shehadeh cases back in February 1987. Indeed, I had issued similar orders in October 1992 and June 1993.

The purpose of the June 2005 order was to ensure that, after so many years, the government would update and discharge its responsibility to provide exculpatory evidence now that all collateral litigation and

legislative action had ceased and the time to continue and complete the deportation hearing was coming near. My order gave the government 60 days to comply with my instructions.

It was only on March 1, 2006 - nine months after the disclosure deadline had passed - that the government responded at all to my June 2005 instructions. The response was not just late; it was equally inadequate, and arrogantly so.

Much of the response was in the form of a letter, dated Jan. 23, 2006, from John Clarkson III, assistant general counsel of the national security law branch of the Federal Bureau of Investigation. In his letter, Clarkson essentially rewrote and narrowed to nothing the parameters of the court's disclosure instructions. He dropped any reference to the government's obligation to identify and produce "potentially" exculpatory evidence, declined to have his agency search for exonerative information on Hamide and Shehadeh dated before Sept. 10, 1993, and denied any obligation to "provide information which could not be lawfully disseminated." As to the latter, Clarkson's position ignored previous orders of mine that would have protected classified information from overexposure by confining it to in camera review by the court and redaction to summaries before distribution to the defense.

Moreover, Clarkson would not even state whether exculpatory but sensitive information about Hamide and Shehadeh existed! Wrapping himself firmly and self-righteously in the bloody shirt of 9/11, he refused to comply with the June 2005 order as it had been written. Notwithstanding the tone and substance of the Clarkson letter, the lawyers for the Department of Homeland Security, who in 2002 began to represent the government in the Hamide and Shehadeh proceedings, had not objected to having the FBI address "the existence or not of potentially exculpatory evidence."

On Jan. 29, 2007, I issued a written decision which in all respects terminated the proceedings against Hamide and Shehadeh. I concluded that, after 20 years of litigation, the government's refusal to identify, much less produce, potentially exculpatory evidence about the two men was constitutionally unconscionable, "a festering wound on the body of these respondents, and an embarrassment to the rule of law."

The full and fair hearing guaranteed to Hamide and Shehadeh by the Fifth Amendment's Due Process Clause, and indeed by the Immigration and Nationality Act, could not be accomplished in the wake of official noncompliance with lawfully issued judicial instructions.

Indeed, as I also wrote in my order of termination, that noncompliance raised serious questions about the overall credibility of the government's case against both men: "[A] reasonable argument could be made that, if Hamide and Shehadeh have engaged in terrorist activity, particularly in the context of today's world, then the government would be prepared to move heaven and earth - not to mention some mounds of paper - to complete the trial and deportation of these respondents."

The government's recent decision to pull the plug on its prosecution of Hamide and Shehadeh is not just a long-delayed mercy killing of two calamitous cases. It is not just a recognition that, like human beings, litigation must have a beginning and an end and that finality is a vital principle on which the credibility of case law resides. The end of these cases is also a victory for the continuing independence of judges to be judges - to resist the political winds and, in the words of the late and great New York Sen. Elihu Root, to recognize "a right in the weak which the strong are bound to respect."

Without judges emancipated from the tyranny of partisan rhetoric and political sound bites like "national security" and the "war on terror," the encroaching power of government in the name of freedom will make us all less free. In the end, my decision to dismiss the cases against Hamide and Shehadeh was not all about them but much about us, about our right to restrain the ambitions of an imperial and imperious executive.

In this epoch, as in all periods of national stress, our self-preservation requires much struggle and sacrifice - but never, ever must it steal from us our constitutional soul. If we become soulless, we will never be safe, from enemies foreign or domestic. Rather, we will be the walking dead, without a democratic destiny.

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