ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

DANGEROUS DOCTRINE: THE ATTORNEY GENERAL'S UNFOUNDED CLAIM OF UNLIMITED AUTHORITY TO ARREST AND DEPORT ALIENS IN SECRET

A Joint Report by
Committee on Immigration & Nationality Law and
Committee on Communications & Media Law[*]

> "Domestically, the danger is that in pursuit of security, we end up sacrificing crucial liberties, thereby weakening our common security, not strengthening it – and thereby corroding the vessel of democratic government from within."
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> --UN Secretary-General Kofi Annan[1]

INTRODUCTION

The September 11, 2001 attacks on the World Trade Center and the Pentagon triggered seismic changes in the American legal landscape, many driven by the Attorney General's effort to identify and deter future terrorist attacks. All nineteen individuals responsible for the attacks on 9/11 were foreigners. The United States Department of Justice ("DOJ") moved swiftly to question thousands of immigrants, and in the process arrested and detained hundreds of Muslims for routine visa violations. In a brazen claim of executive branch power, the Attorney General then asserted the authority to deport or remove immigrants completely in secret, denying any right of the public to know what was being done and any power of the court to limit his exercise of authority.

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[*] Sections of this report are drawn from a broader analysis of public access to administrative proceedings completed earlier by the Committee on Communications & Media Law. "If it Walks, Talks, and Squawks . . . First Amendment Right of Access to Administrative Adjudications: A Position Paper" (June 2004).

[1] *Menace of Terrorism Requires Global Response, Says Secretary General, Stressing Importance of Increased United Nations Role,* United Nations Press Release SG/SM/8583 SC/7639, Jan. 20, 2003, *available at* http://www.un.org/Docs/sc/committees/1373/sgjan03.htm (last visited, Jan. 20, 2003).

The Attorney General claimed the power to designate any particular alien as being of "special interest," and thereby keep both the fact of the detention and the existence of any formal deportation or removal proceeding completely hidden from the public. While the extraordinary circumstances of 9/11 could well justify a need for extraordinary confidentiality in the investigation of suspected terrorists, the cloak of secrecy was invoked routinely for virtually every Muslim immigrant rounded-up for questioning in the aftermath of the events of 9/11. Even more alarming was the Attorney General's claim that he possessed the unilateral right to impose such secrecy over deportation hearings for any reason, or no reason at all.[2]

The Attorney General's claim of such sweeping executive branch power to act in secret is cause for great concern and plainly contradicts the constitutional right of public access – a right to attend, observe and report on government proceedings that is protected by the First Amendment. In the Attorney General's view, this First Amendment right does not extend to the executive branch at all, but in the *Pentagon Papers* case more than three decades ago, Justice Black emphasized that the First Amendment applies equally to the Executive, Legislative and Judicial branches: "The Bill of Rights changed the original Constitution into a new charter under which *no branch of government* could abridge the people's freedom of the press, speech, religion or assembly."[3] The Attorney General's approach fundamentally misconstrued the constitutional right of access, which is an integral and established element of the First

[2] *See, e.g.* Government's Brief on Appeal in *North Jersey Media Group Inc., v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002), at 18-38, 2002 WL 32103548, at *15 (arguing that the Constitutional right to public access to governmental proceedings is limited to the 6th Amendment right to a public criminal trial) [hereinafter "Gov. Br. in North Jersey appeal".]

[3] *New York Times Co. v. United States*, 403 U.S. 713, 716 (1971) (Black, J., concurring) (emphasis added).

Amendment. The Attorney General's position was properly rejected by the United States Courts of Appeals for both the Third and the Sixth Circuits.[4]

The secrecy imposed on deportation and removal proceedings raises additional issues for immigrants and immigration law. The unilateral actions taken by DOJ circumvent statutory procedures that Congress created specifically to remove suspected terrorists from the United States, bypassing checks and balances written into the law. Completely secret deportation hearings for immigrants from certain countries effectively deprive immigrants of access to counsel and due process of law in many cases, and increase the likelihood of erroneous removals. None of this can be monitored by the public or the press to protect against abuse.

Given the significant number of "special interest" immigrants that were held in federal detention facilities in New York,[5] and the presence in this city of the nation's leading news organizations, the Association of the Bar of the City of New York has a particular interest in both the treatment of the "special interest" immigrants and in safeguarding the right of the public and the press to attend deportation proceedings. Closing immigration hearings on a blanket basis, in the manner directed by the Attorney General, threatens to weaken the constitutional protection of access to essential government information, engender abuse, frighten the immigrant community, and ultimately "corrod[e] the vessel of democracy from within."

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[4] *See Detroit Free Press v. Ashcroft*, 303 F.3d 681, 696 (6th Cir. 2002) ("we believe that there is a limited First Amendment right of access to certain aspects of the executive and legislative branches"), *reh'g en banc denied*, 2003 U.S. App. LEXIS 1278; *North Jersey Media Group, Inc. v. Ashcroft*, 308 F. 3d 198, 221 (3d Cir. 2002) (rejecting claim that right of access does not extend to executive branch, but holding that the public possesses no right of access specifically to deportation proceedings), *cert. denied*, 538 U.S. 1056 (2003).

[5] *See* Tamara Audi, The Legal System: Secrecy Veils Arrests, Jailings in Terror Probe, The Detroit Free Press, Oct. 22, 2001, at 1A ("Lawyers in New York say people the government most suspects of being linked to terrorist organizations are sent to federal detention centers in New York. A hierarchy has developed, with the most serious suspects held in a Manhattan prison and lesser suspects in a Brooklyn prison. Those whom the government dismisses as having no connection to terrorism are sent to detention centers and courts in New Jersey . . . .")

I. SECRET PROCEEDINGS: THE ATTORNEY GENERAL'S RESPONSE TO 9/11

The adverse implications for open government are illuminated by a review of steps taken by the Attorney General and the Department of Justice in September 2001, first in rounding up more than a thousand Muslim immigrants and then by attempting to change the legal rules that would apply to them.

A. The Round-up of Hundreds of Muslims

Soon after the attacks on the World Trade Center and the Pentagon, the FBI questioned and detained an estimated 1,200 individuals, mostly Muslim men.[6] Detentions were justified by the initiation of immigration proceedings whenever any possible violation existed. Unlike typical immigration detentions, however, aliens arrested by the FBI after 9/11 were detained in secret – no information on an arrest was disclosed – and brought before immigration judges in secret hearings, held completely beyond the view of the public and the press.[7] Even the *existence* of the proceedings was withheld from public knowledge.

Many immigrants were held for weeks or months before being deported, having been designated by the Attorney General as "special interest" cases, a newly invented term without any basis in law; none was ever accused of any crime related to the 9/11 attacks.[8] Anyone with a possible connection to terrorism instead was held as a material witness or threatened with criminal prosecution. The hundreds of "special interest" deportations conducted in secret

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[6] *See Center for National Security Studies v. U.S. Dept. of Justice*, 331 F.3d 918, 921-22 (D.C. Cir. 2003) (over 700 individuals were detained on INS charges).

[7] *See* David G. Savage, *Critics Say Terror Probe Bends Immigrations Laws*, LA Times, Sept. 10, 2002, at 17, available at http://mediaguidetoislam.sfsu.edu/intheus/pdfs/E_ABS_LATimes.pdf (last visited May 19, 2004).

[8] *See id.* The only individual criminal charged by the United States in connection with the 9/11 attacks, Zacarias Moussaoui, was arrested on immigration law violations prior to the attacks. *See* John Bowman & Linda Ward, *Zacarias Moussaoui,* at http://www.cbc.ca/news/indepth/targetterrorism/backgrounders/moussaoui_zacarias.html (last modified July, 2002) (last visited May 20, 2004).

involved immigrants with no connection or information at all, who were unlucky enough to have been questioned by the FBI at a time when they had some visa problem. According to a *Los Angeles Times* report, administration officials acknowledged having used the immigration laws aggressively, "and they are proud of it."[9]

B. The Unilateral Imposition of Complete Secrecy

The Department of Justice, from the outset, sought to maintain complete control over all information relating to its terrorism investigation, and this included clamping a lid of secrecy around everything related to the immigrants rounded up by the Department. Guidelines previously issued by the Attorney General have long mandated that deportation hearings conducted by the Immigration and Naturalization Service ("INS") are to be open to the public, in almost all cases.[10] These guidelines reflect the long-standing practice of conducting such proceedings in public.[11] The guidelines do permit any given hearing to be closed "in the public interest," but the Department of Justice did not want to proceed on a case-by-case basis in closing the deportation hearings of aliens rounded up after 9/11. Therefore, on September 21, 2001, Chief Immigration Judge Michael Creppy of the Executive Office for Immigration

[9] Savage, *supra* note 7.

[10] Before the Homeland Security Act was adopted late in 2002, the INS was an agency within the Department of Justice, and guidelines promulgated by the Attorney General created a presumption of openness. *See* 8 C.F.R. § 246.16(a)(1965) ("Deportation hearings shall be open to the public, except that the special inquiry officer may, in his discretion and for the purpose of protecting witnesses, respondents, or the public interest, direct that the general public or particular individuals shall be excluded from the hearing in any specific case. Depending upon physical facilities, reasonable limitation may be placed upon the number in attendance at any one time, with priority being given to the press over the general public."); 8 C.F.R. § 3.27 (1997).

[11] *E.g.*, Administrative Procedure in Government Agencies, Report of the Committee on Administrative Procedure, Appointed by the Attorney General, at the Request of the President, to Investigate the Need for Procedural Reform in Various Administrative Tribunals and to Suggest Improvements Therein, S. Doc. No. 77-8, 77th Cong., 1st Sess. at 68 (1941) (noting that administrative hearings are almost invariably public). *See also Pechter v. Lyons,* 441 F.Supp. 115, 117-18 (S.D.N.Y. 1977) (noting longstanding public policy that trials at which an individual's "life or liberty" is at stake be open).

Review[12] issued a directive, popularly known as "the Creppy Memo," ordering immigration judges to follow new procedures whenever the Attorney General of the United States deemed an immigrant to be "of special interest."[13]

Those new procedures, effective immediately, required hearings in all "special interest" cases to be closed completely -- even to family members -- and even the existence of the proceeding kept secret. There could be no public docket or release of any information, not even to confirm or deny the existence of a proceeding.[14]

The Creppy Memo did not explain what standard the Attorney General would use in designating certain cases as "special interest" cases. It was later revealed, however, that "special interest" cases invariably involved persons who were either Muslim or Arab from a selected set of countries, most of which were Middle Eastern.[15] "Special interest" immigrants were arrested and tried in secret, while the Government refused to reveal their names or whereabouts, and their family and friends were often unable to locate them. Even when the immigrants had attorneys,

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[12] The Executive Office for Immigration Review ("EOIR") is part of the United States Department of Justice. EOIR is responsible for all deportation and removal hearings. EOIR is independent of the Immigration & Naturalization Service ("INS"). *See BIA Interim Decisions,* last modified Feb. 18, 2004, *at* http://uscis.gov/graphics/lawsregs/biadec.htm (last visited May 19, 2004).

[13] E-mail from Hon. Michael Creppy, Chief Immigration Judge, to All Immigration Judges and Court Administrators (Sept. 21, 2001, 13:20), *available* at http://news.findlaw.com/hdocs/docs/aclu/creppy092101memo.pdf (last visited May 29, 2004) [hereinafter, "The Creppy Memo"]. The Creppy Memo was immediately implemented, and its general terms were later made part of the Code of Federal Regulations. Protective Orders in Immigration Administrative Proceedings, 67 Fed. Reg. 36799 (May 28, 2002) (to be codified at 8 C.F.R. §§ 3.27, 3.31 & 3.46); see also Release of Information Regarding Immigration and Naturalization Service Detainees in Non-Federal Facilities, 67 Fed. Reg. 19508 (Apr. 22, 2002) (to be codified at 8 C.F.R. §§ 236.6 & 241.15).

[14] In ordering the new procedures, the Chief Immigration Judge purported to be acting pursuant to the regulatory authority to close a specific proceeding "in the public interest." 8 C.F.R § 3.27 (2002).

[15] *See e.g.,* Matthew Purdy, Our Towns; Their Right? To Remain Silenced, N.Y. Times, May 1, 2002, at B5 (recounting how an INS trial attorney told an immigration judge that a hearing was "special interest," and quoting a defense attorney as having said "That's a long way of saying he's Arab.")

the Government in many cases refused to tell the attorneys their clients' whereabouts.[16] Lawyers reported that the "special interest" immigrants were being "denied legal counsel, held indefinitely without charges, suddenly moved to new locations, or kept in prison even after a judge orders release."[17]

In an apparently typical case, Malek Zeidan, a Syrian who worked as an ice cream truck driver, was arrested on February 1, 2002.[18] He had entered the United States more than a decade ago on a visa, and had stayed well beyond his period of admission. INS came across him accidentally in the course of investigating another case, and held him in detention for about forty (40) days before releasing him.[19] Ultimately, he was freed on bail, but his removal hearing remained closed to the public. He had no known connections to terrorists of any kind, was not charged with a crime, and was apparently of so little danger to the safety of Americans that he was not kept in custody. His was labeled a "special interest" case, apparently for the sole reason that he is a Syrian national. When Mr. Zeidan sued to have his hearing opened to the public, DOJ suddenly redesignated his case so that it was no longer of "special interest," and avoided the legal challenge.[20]

Other "special interest" detainees have told similar tales. Mohammed Irshaid, a New York civil engineer, reported being arrested by federal agents, who accused him of being a terrorist, threw him in jail in Passaic, New Jersey, mistreated him badly, and then released him

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[16] *Inspector General Criticizes 9/11 Detentions,* 13 CQ Researcher No. 37, at 898 (Oct. 24, 2003), available at http://www.polisci.umn.edu/courses/fall2003/4303/001/kiosk/USAPatriotAct/CivilLiberties-CQ.pdf (last visited May 20, 2004).

[17] Audi, *supra* note 5, at 1A.

[18] Jim Edwards, Letter from Newark; keeping court proceedings secret at New Jersey immigration courts, The Nation Vol. 275 No. 19, Dec. 2, 2002, at 7; Rachel Elbaum, *Caught in the Dragnet: Arab-Americans swept up in the post-Sept. 11 maelstrom, at* http://www.msnbc.msn.com/id/3071555/ (last visited May 20, 2004).

[19] *See id.*

[20] *See North Jersey Media Group, Inc. v. Ashcroft*, 205 F.Supp.2d 288, 291 n.1 (D.N.J.), *rev'd*, 308 F.3d 198 (3d Cir. 2002), *cert. denied*, 538 U.S. 1056 (2003).

three weeks later, filing a minor immigration charge against him weeks after his release. Syed Jaffri, a Pakistani who had had a dispute with his Bronx landlord, reported being arrested, thrown into solitary confinement, beaten up, verbally abused, never advised of his right to a lawyer, and summarily deported (without his money or papers) to Canada after being held for six months.[21]

These examples reflect a larger pattern of improper behavior by Government agents in the wake of September 11.[22] Besides depriving the public of its constitutional right to know and monitor the conduct of government, the Creppy Memo operated to deprive immigrants of due process and their right to counsel. In deportation hearings aliens have the right to counsel, but, unlike in criminal court proceedings, the government is not obligated to provide immigrants with lawyers. Immigrants must locate, hire, and arrange to pay their own lawyers. Family members often must assist in locating an attorney, particularly if an immigrant is detained or unable to speak English. Even before September 11, this reality meant that many deportation proceedings were conducted with no one representing the immigrant, even though immigration law is often technical and complicated. The new rules imposed after 9/11 made this much worse and effectively prevented *pro bono* representation of detainees by volunteer attorneys.

Locked up in detention centers with only restricted access to the outside world, with their family and friends unable to obtain any information about when and where their relatives would be called before an administrative law judge, "special interest" immigrants found it uniquely difficult to obtain representation. Without a lawyer, and without access to their families and friends, many "special interest" immigrants were unable to offer a defense to the government's

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[21] Steven Brill, AFTER 145-46 & 404 (Simon & Schuster) (2003).

[22] *See generally* U.S. Department of Justice, Office of the Inspector General, THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS 195 (April 2003) (finding "significant problems" in the treatment of September 11 detainees), *available at* http://www.usdoj.gov/oig/special/0306/full.pdf (last visited May 20, 2004).

charges, and were unable or unwilling to appeal adverse rulings. As American Civil Liberties Union attorney Lee Gelernt described it, "special interest" immigrants were "literally [] sitting there all by themselves facing a trained INS prosecutor before a judge, often with language difficulties, while their liberty was at stake."[23] Given the adversarial nature of immigration court proceedings, neither the INS attorney nor the judge can be expected to look out for the interests of the immigrant, and the ability of immigrants to obtain fair hearings often depends on the public's knowledge of their cases – something the Creppy Memo expressly precluded.

II. THE CLAIM OF EXECUTIVE POWER TO ORDER SECRET DEPORTATION PROCEEDINGS

A. The Media's Challenge to Secrecy

The mandates for secret proceedings in cases designated by the Attorney General became the subject of two legal challenges by the press. In Michigan, the *Detroit Free Press* challenged its exclusion from a deportation hearing involving Rabih Haddad who had been detained for over-staying his visa.[24] Haddad's case gained attention because he was co-founder of an Islamic charity, the Global Relief Foundation, which had separately been accused by the Treasury Department of supporting terrorism and had its assets frozen.[25] By the time the *Detroit Free Press* learned about the government's efforts to deport Haddad, three secret hearings had already been held.

In the meantime, two local papers in New Jersey, had been trying to obtain information about a large number of aliens who were arrested in that State after 9/11. Unable to learn

[23] Remarks made at presentation to the Association of the Bar of the City of New York, September 18, 2002.

[24] *See Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002).

[25] *See Global Relief Found., Inc. v. O'Neill*, 315 F.3d 748, 754-55 (7th Cir. 2002) (rejecting claim that government lacked authority to freeze the foundation's assets).

anything about the status of these aliens, the papers filed a facial challenge to the Creppy Memo requiring all "special interest" proceedings to be secret.[26]

The two lawsuits brought by the press in Michigan and New Jersey framed the same issue: whether deportation hearings could be completely closed on the unilateral order of the Attorney General, without any review by a judge at any point. The newspapers argued that the blanket sealing of deportation hearings violated the First Amendment right of access to government proceedings, urging that a case by case inquiry was required to close specific deportation hearings. The newspapers also challenged the Attorney General's blanket approach to secrecy as ineffective in advancing security interests, because it barred the public from attending hearings before immigration judges, but left detainees free to disclose information to anyone they desired. Detainees actually connected to terrorist organizations were free to pass on information; only the public and press were kept in the dark.

B. The Overreaching Claim of Executive Power to Order Secrecy

The stated purpose for closing the deportation hearings was to avoid the possibility that potentially sensitive information would be disclosed to terrorists. Experts for the Department of Justice claimed that a blanket approach to secrecy was required because even routine information that appeared innocuous in isolation might prove valuable to terrorists as part of a broader "mosaic" of facts. For example, the Department was concerned that any details of how or why a "special interest" alien was detained "would allow the terrorist organizations to discern patterns and methods of investigation," and might reveal "what patterns of entry" to this country were most likely to succeed.[27]

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[26] *See North Jersey Media Group, Inc. v. Ashcroft*, 308 F. 3d 198, 203-04 (3d Cir. 2002).

[27] *Id.* at 203 (quoting from the appellant's papers).

Rather than simply claiming that these national security concerns justified secrecy in the cases designated by the Attorney General, the government took a far more extreme position to defend the actions by DOJ. The Government moved to dismiss the papers' claims for access by asserting that no constitutional right of access exists anywhere outside of Article III courts, suggesting that the right may even sweep no further than criminal proceedings.[28] This argument misstated both the constitutional source of the right of access and the Supreme Court's stated rationale in declaring the qualified right to be enforceable by the press and public.

The scope of the First Amendment right of access was defined by the Supreme Court in *Richmond Newspapers, Inc. v. Virginia*,[29] an appeal challenging the sealing of a whole criminal trial conducted in Virginia entirely in secret, under a statute that gave the judge discretion to do so. This secrecy was impermissible, Chief Justice Burger explained, because:

> [t]he explicit, guaranteed rights to speak and to publish concerning what takes place at a trial would lose much meaning if access to observe the trial could, as it was here, be foreclosed arbitrarily.[30]

The Court found a qualified right of public access to be implicit in the guarantees of free speech and press, just as the right of association, right of privacy, right to travel and the right to be presumed innocent are implicit in other provisions of the Bill of Rights.[31]

The *Richmond Newspapers* case "unequivocally holds that an arbitrary interference with access to important information is an abridgment of the freedoms of speech and of the press

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[28] Gov. Br. in North Jersey appeal, *supra* note 2, at 18-19.

[29] 448 U.S. 555 (1980).

[30] *Id.* 576-77 (plurality opinion by Burger, C.J.).

[31] *See id.* at 577 (plurality opinion) ("the right of access to places traditionally open to the public . . . may be seen as assured by the amalgam of the First Amendment guarantees of speech and press" and as related to "the right of assembly"); *id.* at 585 (Brennan, J., concurring) ("the First Amendment—of itself and as applied to the States through the Fourteenth Amendment—secures such a public right of access to trail proceedings."); *id.* at 583 (Stevens, J., concurring) (stating that "an arbitrary interference with access to important information" abridges the First Amendment).

protected by the First Amendment."[32] The First Amendment right of access is an affirmative individual right, enforceable by any member of the public or the press against abuse and over-reaching by those in power.[33]

DOJ sought to severely limit this Constitutional right, by theorizing that it does not extend to the "political branches" because Articles I and II of the Constitution supposedly contain their own specific "access" requirements (an unusual characterization of the President's obligation to report on "the State of the Union" and Congress' obligation to publish a "regular Statement and Account" of all public monies).[34] Given these express "access" obligations, DOJ contended, the Constitution must be read to foreclose other access obligations and "leave[ ] to the democratic processes" the regulation of the political branches.[35] This novel contention ignored that the Supreme Court located the right of public access in the First Amendment, which applies equally to all branches of government, and did so precisely because the access right is a necessary tool in the hands of voters if those "democratic processes" are to function effectively. As the Court put it in *Globe Newspaper Co. v. Superior Court*,[36] the First Amendment right of access to criminal trials is based upon,

> the common understanding that a 'major purpose of that Amendment was to protect the free discussion of governmental affairs'. By offering such protection, the First Amendment serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government.[37]

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[32] *Id*. (Stevens, J., concurring).

[33] *E.g., Matter of Search of Office Suites for World and Islam Studies Enterprise,* 925 F.Supp. 738, 739 (M.D, Fla. 1996) ("The press has standing to challenge an order sealing court documents.").

[34] Gov. Br. in North Jersey appeal, *supra* note 2, at 21-22.

[35] *Id.* at 22.

[36] 457 U.S. 596 (1982).

[37] *Id.* at 604 (citation omitted). *See also, Richmond Newspapers, Inc.,* 448 U.S. at 587 (Brennan, J., concurring) ("But the First Amendment embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a *structural* role to play in securing and fostering our republican system of self-

The DOJ's whole-cloth argument continued that the right of access supposedly had been found to exist in the judicial branch alone because the absence of any express "access" provision in Article III combined with the Sixth Amendment guarantee of a "public trial" together supported the inference of a right of access to judicial proceedings.[38] The *Richmond Newspapers* holding, however, had nothing to do with "access" obligations — missing or present — in Articles I through III. And, the Supreme Court just one year before *Richmond Newspapers* specifically rejected the notion that the Sixth Amendment creates any public right of access at all, finding the "public trial" guarantee to be an individual right extended only to criminal defendants.[39]

In short, DOJ was entirely off-base in claiming that administrative proceedings should not even be subject to evaluation under *Richmond Newspapers*. It argued that the Founders would never have contemplated any public access to the operations of administrative agencies.[40] In point of fact, "[t]he Framers, who envisioned a limited Federal Government, could not have anticipated the vast growth of the administrative state."[41] As the Supreme Court has explained, "formalized administrative adjudications were all but unheard of in the late 18th century and early 19th century."[42]

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government."); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 517 (1984) (Stevens, J., concurring) (stating that the right of access furthers the "core purpose" of assuring free communication about the functioning of government, quoting *Richmond Newspapers, Inc.*, 448 U.S. at 575 (plurality opinion) [herinafter, "Press-Enterprise I"].

[38] Gov. Br. in North Jersey appeal, *supra* note 2, at 21.

[39] *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979); *see Press-Enterprise I*, 464 U.S. at 516 (Stevens, J., concurring) (stating that the right of public access to criminal trials is not founded upon "the public trial provision" of the Sixth Amendment); *United States v. Criden*, 675 F.2d 550 (3d Cir. 1982) (public has no rights of access under the Sixth Amendment).

[40] Gov. Br. 23.

[41] *Fed. Mar. Comm'n v. S. Carolina State Ports Auth.*, 535 U.S. 743, 755 (2002).

[42] *Id.*

The Court has also explained that the "vast expansion" of administrative regulation through which the Government now operates is possible under our system only by adherence to certain "basic principles," and these include an obligation for quasi-judicial administrative proceedings generally to be "fair and open."[43] The Court long ago described a "fair and open" administrative hearing as:

> essential alike to the legal *validity* of administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process. Such a hearing has been described as an "inexorable safeguard."[44]

This rationale has propelled the "prevailing" rule that administrative hearings are typically open, "if not by statutory mandate, then by regulation or practice."[45]

The DOJ finally argued that INS deportation proceedings should be exempt from the First Amendment right of access, even if it applies to some executive branch proceedings, because the "power to expel or exclude aliens" is a sovereign power,[46] characterizing the Creppy Memo as a "*bona fide* immigration regulation."[47] Yet, Congress also has broad power over the military but, under a *Richmond Newspapers* analysis, the right of access has been held to attach to court martial proceedings.[48] Congress, under Article II, Section 8, has power over "the subject of Bankruptcies," yet access rights attach to bankruptcy proceedings, including creditors'

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[43] *Morgan v. United States*, 304 U.S. 1, 14 (1938).

[44] (*Id.* citation omitted, emphasis added.)

[45] *Fitzgerald v. Hampton*, 467 F.2d 755, 764 (D.C. Cir. 1972) *citing* Administrative Procedure in Government Agencies, Report of the Committee on Administrative Procedure, Appointed by the Attorney General, at the Request of the President, to Investigate the Need for Procedural Reform in Various Administrative Tribunals and to Suggest Improvements Therein, S. Doc. No. 77-8, 77th Cong., 1st Sess., (1941), *supra* note 11.

[46] Gov. Br. in North Jersey appeal, *supra* note 2, at 48.

[47] *Id.* at 18.

[48] *E.g., United States v. Hershey*, 20 M.J. 433 (C.M.A. 1985); *United States v. Scott*, 48 M.J. 663, 665 (A. Ct. Crim. App. 1998) ("The right of public access to criminal trial applies with equal validity to trials by courts-martial.")

meetings.[49] And, even accepting that Congress' plenary power over immigration is exceptionally broad, it is not exempt from constitutional constraints.[50] In the case of deportations, this means "the Government must respect the procedural safeguards of due process" in exercising its right to remove aliens.[51]

C. The Legal Framework That Was Available to Impose Necessary Secrecy

The DOJ's effort to create for the Executive branch a wholesale exemption from the First Amendment right of access is particularly problematic because it could readily have defended the need for secrecy after 9/11, without making this frontal assault on the right of access. DOJ had available other arguments to defend much of the secrecy it imposed, without advancing the extreme position that no right of access exists at all within the Executive branch. First, DOJ could more narrowly argue (and did successfully in the Third Circuit) that the right of access does not apply to deportation proceedings, in specific, because public access to such proceedings provides no structural benefit to the operation of government. In defining the scope of the right of access, the Supreme Court has said it only attaches to those government proceedings where there has been a tradition of openness that provides "structural" benefits to the operation of that proceeding.[52] This analysis requires a consideration of whether there exists a "tradition" of public access to a type of proceeding that carries "the favorable judgment of experience," and

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[49] *In re Astri Inv. Mgmt.& Secs. Corp*., 88 B.R. 730 (D. Md. 1988); *In re Symington*, 209 B.R. 678 (Bankr. D. Md. 1997).

[50] *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001) (Congress' plenary power over immigration "is subject to important constitutional limitations"); *Yamataya v. Fisher*, 189 U.S. 86, 99-100 (1903) (Congressional immigration authority is limited by the due process clause of the 5th Amendment).

[51] *Galvan v. Press*, 347 U.S. 522, 531 (1954).

[52] *E.g. Press-Enterprise Co. v. Superior Court*, 478 U.S. 1,8 (1986) (*"Pres- Enterprise II"*) (stating that many government processes operate best under public scrutiny).

"whether public access plays a significant positive role in the functioning of the particular process in question."[53]

Second, DOJ could argue (and did as an alternative position) that "special interest" deportation proceedings properly could be closed because the right of access is a qualified right that must give way to legitimate national security concerns. Whether the qualified right of access may be restricted in a given instance is resolved by a consideration of four specific factors laid down by the Supreme Court in *Richmond Newspapers* and its progeny:

1. whether an open proceeding is substantially likely to prejudice another transcendent value;[54]

2. if so, whether any alternative exists to avoid that prejudice without limiting public access;[55]

3. if not, whether the limitation of access is narrowed (in scope and time) to the minimum necessary;[56] and,

4. whether the limitation of access effectively avoids the prejudice it is intended to address.[57]

This four-part test requires only that a particularized showing be made to justify any denial of access on a case-by-case basis.[58]

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[53] *Id.*

[54] *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606-607 (1982) (right of access must be weighed against risk of disclosure of sensitive information)*; Press-Enterprise I*, 464 U.S. at 510.

[55] *Press-Enterprise II*, 478 U.S. at 14; *Publicker,* 733 F.2d at 1070.

[56] *Press-Enterprise I,* 464 U.S. at 510; *United States v. Antar*, 38 F.3d 1348, 1363 (3d Cir. 1994) (stating that the court must ensure "that the limitation imposed is the least restrictive means possible.").

[57] *Globe Newspaper*, 457 U.S. at 610; *In re Charlotte Observer*, 882 F.2d 850, 855 (4th Cir. 1989) ("Where closure is wholly inefficacious to prevent a perceived harm, that alone suffices to make it constitutionally impermissible."). The "effectiveness" factor flows from the proposition that First Amendment rights will not be abridged for an idle purpose. *See Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976) (rejecting a prior restraint in part because it might not have fulfilled its intended goal); *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 105 (1979 ("[e]ven assuming a state interest of the highest order, [the statute] does not accomplish its stated purpose.").

[58] *Globe Newspaper*, 457 U.S. at 608.

In the two court challenges to the DOJ's imposition of total secrecy on the "special interest" deportation proceedings, both the Sixth Circuit and the Third Circuit rejected the Attorney General's breathtaking claim that the Executive branch was not bound by the First Amendment right of access. The Sixth Circuit, in *Detroit Free Press v. Ashcroft*,[59] faced an appeal of the district court's preliminary injunction striking down the closure of the "special interest" hearing of Rabih Haddad. Finding that DOJ's actions violated the First Amendment right of access, the opinion strongly endorsed the importance of openness as a check upon the abuse of governmental power:

> Today, the Executive Branch seeks to take this safeguard away from the public by placing its actions beyond public scrutiny. Against non-citizens, it seeks the power to secretly deport a class if it unilaterally calls them "special interest" cases. The Executive Branch seeks to uproot people's lives, outside the public eye, and behind a closed door. Democracies die behind closed doors. The First Amendment, through a free press, protects the people's right to know that their government acts fairly, lawfully, and accurately in deportation proceedings. When government begins closing doors, it selectively controls information rightfully belonging to the people. Selective information is misinformation. The Framers of the First Amendment "did not trust any government to separate the true from the false for us." [Citation omitted] They protected the people against secret government.[60]

The court examined both the tradition of openness in deportation proceedings and the structural benefit of open deportation hearings. The court rejected the government's insistence that there must be a historical tradition dating back to the time "when our organic laws were adopted"[61] before a First Amendment right could be found. It noted that *Press-Enterprise II* and several circuit courts' holdings "relied exclusively on post-Bill of Rights history,"[62] and found

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[59] 303 F.3d 681 (6th Cir. 2002).

[60] *Id.* at 683.

[61] *Id*. at 700 (quoting *Richmond Newspapers*, 448 U.S. at 569).

[62] *Id.*

that deportation proceedings had for the most part been conducted openly since the enactment of the first immigration statute in 1882.[63] The court said it "should look to proceedings that are similar in form and substance" and found that deportation hearings '"walk, talk and squawk' very much like a judicial proceeding" and are comparable to a statutory criminal sentencing statute authorizing removal.[64]

The Court of Appeals had little difficulty concluding that access would play "a significant positive role" in deportation proceedings – noting that "the press and the public serve as perhaps the only check on abusive government practices."[65] The court noted that additional benefits of public[66] proceedings included improved government performance, a "cathartic" effect on the community, the "perception of integrity and fairness," and a more informed public. The Government, according to the Court of Appeals, had not identified "one persuasive reason why openness would play a negative role in the process."[67] Thus, the Sixth Circuit found the right of access to attach to deportation proceedings.

Taking up the question of whether the qualified access right was overcome on the facts presented by the government, the court concluded it was not. Although the government had demonstrated a compelling interest in preventing the disclosure of information that might impede its ongoing anti-terrorism investigation, its blanket ban on access to all "special interest" hearings failed to satisfy two other requirements mandated by the First Amendment: that the closure order be narrowly tailored and that it be based on individualized "specific findings on the record so that a reviewing court can determine whether closure was proper and whether less

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[63] *Id.* at 701.

[64] *Id.* (citing 8 U.S.C.A. § 1228(c) (2002)).

[65] *Id.* at 703-04.

[66] *Id.* at 704-05.

[67] *Id.* at 705.

restrictive alternatives exist."[68] The opinion characterized open deportation proceedings as a vital demonstration of democratic values "that Americans should not discard in these troubling times."[69]

The Third Circuit decided *North Jersey Media Group v. Ashcroft*[70] six weeks later, also rejecting the contention that the First Amendment right of access has no application to the Executive branch. In applying the two-prong test for determining whether the right of access attached specifically to deportation hearings, however, Chief Judge Becker took a strict view of the "tradition" requirement. Disagreeing with the Sixth Circuit, the Third Circuit majority noted that Congress had never explicitly guaranteed public access to deportation hearings, and viewed the "rebuttable presumption of openness" created by 1964 INS regulations to be too recent and too qualified to establish the type of "unbroken, uncontradicted history" of openness present in *Richmond Newspapers*.[71] Although Judge Becker considered a "1000-year history" unnecessary, he rejected the position that a court could rely solely on the "structural benefits" of open hearings in a given context, so long as there was no history of closed proceedings[72]—an approach taken in several Third Circuit cases involving modern criminal procedures.[73] Judge Becker concluded that a strict demonstration of a history of openness was required in order to "preserve administrative flexibility and avoid constitutionalizing ambiguous, and potentially unconsidered, executive decisions."[74]

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[68] *Id.* at 707.

[69] *Id.* at 711.

[70] 308 F.3d 198 (3d Cir. 2002), *cert. denied*, 533 U.S. 1056 (2003).

[71] *Id.* at 212.

[72] *Id.* at 213.

[73] *See e.g., United States v. Criden*, 675 F.2d 550, 555-57 (3d Cir.1982).

[74] *North Jersey Media Group, Inc.*, 308 F.3d at 216.

With regard to the structural benefits prong of the test, the Third Circuit first noted that it "does not do much work" because no case had yet found an access request that satisfied the "experience" test, but failed the "logic" test.[75] It then read the *Press-Enterprise II* formulation of "whether public access plays a significant positive role in the functioning of the particular process in question" to require an examination of the "flip side" of that inquiry: "the extent to which openness impairs the public good."[76] Judge Becker criticized the lower court for not fully crediting the declaration of the FBI's Counterterrorism Chief outlining how disclosure of seemingly minor and innocuous information about a deportation proceeding could be valuable to a person within a terrorist network, and could thwart the government's efforts to investigate and prevent future acts of violence.[77] In a confusing conclusion, however, the Court seemed to limit its analysis to "special interest" deportation hearings only. "On balance," stated Judge Becker, "we are unable to conclude that openness plays a positive role *in special interest deportation hearings* at a time when our nation is faced with threats of such profound and unknown dimension."[78]

In a vigorous dissent, Judge Sirica found that the two-step analysis for the existence of the First Amendment right was plainly satisfied. He found an adequate historical record of open

[75] *Id.* at 217.

[76] *Id.* Judge Becker recognized that considering evidence of how open deportation hearings could threaten national security as part of the threshold inquiry into the existence of a presumptive access right created an "evidentiary overlap" with the "compelling government interest" analysis that is taken up to decide whether a proceeding could be closed, but felt that "the inquiries are not redundant because it is possible for openness to serve a positive role under a balanced logic prong even though the government has a compelling interest in closure. This would simply require that the policy rationales supporting openness be even more compelling than those supporting closure." *Id.* at 217 n. 13.

[77] *Id.* at 218-19.

[78] *Id.* at 220. (emphasis added).

proceedings, and relied on cases applying the Supreme Court precedents to civil trials as equally applicable given the similar procedures used at deportation hearings.[79]

The Supreme Court denied *certiorari* in the Third Circuit case,[80] and none was sought by the government from the Sixth Circuit ruling, so the split decision over the validity of the Creppy Memo stands for now. Both courts, however, squarely rejected the dangerous doctrine advanced by the Attorney General – that the Executive branch is exempt from any constitutional right of access. This extreme position is unsupportable in law or logic, and was properly denounced by the courts.

III. SHORTCOMINGS OF THE THIRD CIRCUIT APPROACH TO SECRET DEPORTATION HEARINGS

Departing from the approach of the Sixth Circuit, the Third Circuit accepted a blanket closure of "special interest" immigration hearings.[81] As noted, the Third Circuit rejected application of the right of access to deportation proceedings largely because it found a lack of evidence establishing a long history of open proceedings.[82] The Third Circuit approach is seriously flawed. *Press Enterprise II* establishes that it is not necessary to demonstrate a historical practice pre-dating our country's founding to find a constitutional right of access to a government proceeding.[83]

Indeed, few aspects of modern criminal prosecutions can boast a pedigree of public access dating back to the Founders and beyond, yet lower courts have widely found a right of access to phases of criminal proceedings that have no specific historical counterpart─such as

[79] *Id.* at 222-25 (Scirica, J., dissenting).

[80] *North Jersey Media Group, Inc. v. Ashcroft,* 123 S. Ct. 2215 (2003).

[81] *North Jersey Media Grou, Inc. v. Ashcroft,* 308 F.3d 198 (3d Cir. 2002).

[82] *Id.*

[83] *See* 478 U.S. 1, 7-9; 478 U.S. at 21 (Stevens, J., dissenting) ("a common law right of access did not inhere in preliminary proceedings at the time the First Amendment was adopted").

plea hearings, pretrial suppression hearings, and motions for judicial disqualification.[84] Some courts have cited a consistent modern practice of openness as sufficient under the *Press Enterprise II* analysis, while others have concluded that the "favorable judgment of history" is not necessary where the structural benefits of openness are irrefutable.[85] For example, in *Seattle Times Co. v. United States District Court*,[86] the Ninth Circuit reasoned that introduction of new procedures that did not exist at common law by the Bail Reform Act of 1984, rendered "the historical tradition surrounding bail proceedings … much less significant."[87] As the Fifth Circuit similarly noted, First Amendment access rights "should not be foreclosed because these proceedings lack the history of openness relied on by the *Richmond Newspapers* court."[88]

The Third Circuit also went off the tracks with its analysis of the "structural benefits" inherent in the recognition of a qualified right of access to deportation hearings. This analysis is

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[84] *See, e.g.*, *United States v. Haller*, 837 F.2d 84, 86 (2d Cir. 1988) (plea hearings "have typically been open to the public"); *Washington Post v. Robinson*, 935 F.2d 282, 288 (D.C. Cir. 1991) ("plea agreements have traditionally been open to the public"); *In re Providence Journal*, 293 F.3d 1, 9 (1st Cir. 2002) (documents submitted in criminal proceedings); *United States v. Presser*, 828 F.2d 340, 344 (6th Cir. 1987) *(Application of NBC)*(pretrial motion to disqualify judge, citing Sixth Circuit practice from 1924-1984).

[85] *See, e.g.*, *United States v. Cojab*, 996 F.2d 1404, 1407 (2d Cir. 1993) (pretrial hearing); *United States v. Criden*, 675 F.2d 550, 555 (3d Cir. 1982) ("societal interests" rather than historical analysis should determine First Amendment right of access to suppression hearing); *Id*. ("We do not think that historical analysis is relevant in determining whether there is a first amendment right of access to pretrial criminal proceedings").

[86] 845 F.2d 1513, 1516 (9th Cir. 1988).

[87] *See also United States v. Chagra*, 701 F.2d 354, 362-64 (5th Cir. 1983) (noting increased significance of bail procedures, citing the significance of Bail Reform Act of 1966); *Criden*, 550 F.2d at 555 ("We do not think that historical analysis is relevant to determining whether there is a first amendment right of access to pretrial criminal proceedings."). How the proceeding at issue is defined greatly affects the outcome of the historical analysis, and judges in several cases both in the Supreme Court and lower courts have differed on the proper approach. For example, although Justice Brennan in the majority opinion in *Globe Newspapers* alluded to the openness of criminal trials generally (*Globe Newspaper Co. v. Super. Court for County of Norfolk* 457 U.S. 596,605 (1982)), Chief Justice Burger in his dissent found the more relevant comparison in that case to be trials involving sex crimes against a minor, which he asserted were traditionally shielded from view. *Id. at*, 614 (Burger, C.J., dissenting). Similarly, there is little uniformity in geographical scope of judicial sources of "experience." Some courts have looked only at the "experience" of their own jurisdiction. *See, e.g., United States v. Presser*, 828 F.2d 340, 345 (6th Cir. 1987) (*Application of NBC)*. Others courts have looked beyond their own jurisdiction for guidance. *See, e.g., Rivera-Puig v. Garcia-Rosario*,983 F.2d 311 (1st Cir. 1993). (although Puerto Rico typically held preliminary hearings in private, *Press Enterprise II* "refers to the experience in that type or kind of hearing throughout the United States, not the experience in only one jurisdiction").

[88] *United States v. Chagra*, 701 F.2d 354, 363 (5th Cir. 1983).

intended to focus on whether access plays a positive role in the functioning of the proceeding itself.[89] Because a deportation hearing is conducted in the form of a trial, the value of openness to the "very process" itself is the same as in a judicial trial, and supports the existence of a constitutional right of access.

Immigration hearings are presided over by hearing officers, who are not judges but who are "neutral,"[90] and have authority to make binding decisions, subject only to limited review.[91] In fact, for most of the century, the hearing officers were INS employees,[92] but that structure was routinely criticized and, in 1983, the arrangement ended.[93] Although the hearing officer may take an active role in questioning a witness – as Federal Rule of Evidence 614 permits a judge to do during a civil trial – in practice, they rarely do so.[94]

Just like Article III judicial proceedings, immigration proceedings are adversarial.[95] Over time, the INS has developed a specialized staff of attorneys who are responsible for the prosecutorial functions of a removal or departure hearing, and these attorneys generally present the case to the hearing officer. An alien has a right to counsel in removal proceedings under the

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[89] *E.g., Richmond Newspapers v. Virginia,* 448 U.S. 555,587 (Brennan, J., concurring).

[90] The Department of Justice has declined the extension of immigration proceedings to ALJs, perhaps because Supreme Court decisions permit it and DOJ can keep its hearing officers in closer check than ALJs. *See* Paul R. Verkuil, *Reflections Upon the Federal Administrative Judiciary*, 39 U.C.L.A. L. Rev. 1341, 1358-1360 (1992).

[91] An alien may file a motion to reopen before the immigration judge or the Board of Immigration Appeals. 8 C.F.R. § 103.3 (2003). An alien may also appeal a removal order directly to the Court of Appeals, within 30 days of the removal order's issuance. 8 U.S.C.S. § 1252 (2004)

[92] This practice was upheld in *Marcello v. Bonds*, 349 U.S. 302 (1955).

[93] 8 C.F.R. § 1003 (2003). Confirming their judicial role in the deportation and removal process, responsibility for supervising immigration judges shifted to the Executive Office for Immigration Review and, more recently, to Bureau of Homeland Security under the Homeland Security Act.

[94] *See* 8 U.S.C.S. § 1229 INA § 240(b)(1) (2003); 8 C.F.R. §§ 240.2 (2003). Note that this was redesigned and duplicated as chapter V, part 1240, Feb. 28, 2003, 68 F.R. § 9824; part 1240 was further amended to change reference citations, Mar. 5, 2003, 68 F.R. § 1240.2.

[95] 8 U.S.C.S. 1229(a) (2004).

Fifth Amendment's due process clause, and the INS must also give the alien a list of attorneys in the area.[96]

Although the formal rules of evidence do not apply, INS regulations take care to ensure that only reliable evidence will be considered. Unauthenticated documents, hearsay, and other information that are not inherently trustworthy can be considered only after the hearing officer finds the specific evidence to be probative *and* reliable.[97] The different burdens of proof and levels of proof required track the structure of civil cases in Article III courts.[98]

The decisions made in immigration proceedings have a significant impact on the individual subject, usually far more than a civil lawsuit seeking only financial compensation. As a consequence, to ensure fairness and conformance with constitutional due process requirements, immigration proceedings, although conducted under the auspices of the executive branch's administrative apparatus, act and look very much like judicial proceedings.[99] In such a

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[96] 8 U.S.C. S. §1229 (2004).

[97] 8 C.F.R. § 240.7(a); *See Bustos-Torres v. INS*, 898 F.2d 1053, 1055-56 (5th Cir. 1990). *But see Cunanan v. INS*, 856 F.2d 1373, 1374-75 (9th Cir. 1988) (alien wife's affidavit excluded where INS had not attempted to produce her as a witness); *Iran v. INS*, 656 F.2d 469, 472-73 (9th Cir. 1981) (unauthenticated INS form and consulate letter inadmissible).

[98] In most civil trials, the burden of proof on most issues is a "preponderance of the evidence." *See, e.g., Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 622 (1993). In some instances, however, the burden of proof is higher. *See New York Times v. Sullivan*, 376 U.S. 254 (1964) (requiring proof of actual malice by "clear and convincing" evidence). Similarly, in removal proceedings, burdens of proof vary depending on a variety of factors including whether the alien has been admitted into the United States. *See* INA § 204(c) (2003). The regulations now provide that:

> [T]he Service must first establish the alienage of the respondent. Once alienage has been established, unless the respondent demonstrates by clear and convincing evidence that he or she is lawfully in the United States pursuant to a prior admission, the *respondent* must prove that he or she is clearly and beyond a doubt *entitled to be admitted* to the United States and is not inadmissible as *charged*.

8 C.F.R. § 1240.8(c) (2003) (emphasis added). Although not explicit, the statute suggests that the INS must show that the person is an alien by "clear and convincing" evidence. INA § 240(c)(3)(A) (2003). Once the alien establishes admission or entitlement to admission, "the Service has the burden of establishing by clear and convincing evidence that, in the case of an alien who has been admitted to the United States, the alien is deportable. No decision on deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence." *Id*.

[99] *See generally*, Verkuil, *supra*, n.90.

proceeding, the First Amendment right plainly exists. If a proceeding "walks, talks and squawks very much like a lawsuit…[i]ts placement within the Executive Branch cannot blind us to the fact that the proceeding is truly an adjudication."[100]

The Third Circuit not only misperceived the nature of the "structural benefits" analysis, it found that the standard was not satisfied because in a narrow category of deportation hearings – "special interest" cases involving national security – the public interest may be threatened by open hearings. This concern, however, does not address the value of openness of deportation hearings in general, but only the need to restrict openness in specific types of cases; and the question remains whether the Attorney General should have the unreviewable power of closure. This analysis should more appropriately have been applied to decide whether a particular proceeding *should* be closed, after concluding, as did the Sixth Circuit, that a qualified right of access to deportation hearings indeed exists. In this regard, the Sixth Circuit's conclusions about the value of access to deportation proceedings rests on much more solid constitutional ground than the Third Circuit's logically flawed approach of wholesale abdication to the Executive's whims.

The Third Circuit ridiculed the Sixth Circuit's statement that "democracies die behind closed doors," pointing out that the Constitutional Convention of 1787 was held behind closed doors, and that "is where democracy was born."[101] The Third Circuit's ridicule is inappropriate. The Constitutional Convention did not make determinations behind closed doors as to whether a particular individual should lose his life or liberty. In fact, making such decisions behind closed

[100] *S. Carolina State Ports Auth. v. Fed. Mar. Comm'n,* 243 F.3d 165, 174 (4th Cir. 2001), *aff'd*, 535 U.S. 743 (2002) (holding that sovereign immunity bars claims under the Shipping Act).

[101] Morning Edition: Whether the press and public should be allowed to attend deportation hearings (National Public Radio Broadcast, Sept. 18, 2002) (quoting Third Circuit judge Morton Greenberg). (transcript on file with Committee).

doors would have been anathema to the Founders, who would have called it a "Star Chamber," and who wrote the right to a speedy and public trial into the Bill of Rights. The Third Circuit judges, in questioning "how they could possibly rule against the government when national security and human lives were at stake,"[102] seem to have overlooked that the lives of immigrants and the cohesion of immigrant families are at stake in immigration court hearings.

There are of course legitimate national security concerns that can come into play in deportation or removal hearings, and those concerns may well require closure of particular hearings. There is no logical reason, however, to conclude that there is no right of access to *any* deportation hearing, or even to sanction secret proceedings in an entire class of cases, upon the unsupported allegation that "national security" is implicated because an alien is from a particular country. Under traditional First Amendment principles, the Government should be required to make a case-by-case showing of why a particular hearing must be closed, and denied the power to close categories of hearing unilaterally.

IV. CLOSED HEARINGS CIRCUMVENT THE LAW, VIOLATE DUE PROCESS AND ARE BAD PUBLIC POLICY[103]

A. Closed Hearings Defeat the Purpose of the Alien Terrorist Removal Court

DOJ's policy of blanket closure of certain "special interest" immigration cases does an end-run around the existing statutory mechanism for deporting immigrants suspected of terrorist connections. In 1996, as part of the Illegal Immigration Reform and Immigrant Responsibility Act,[104] Congress enacted a statutory scheme to remove from the United States those persons

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[102] *Id.*

[103] The following sections concerning issues of immigration law and policy are authored solely by the Committee on Immigration and Nationality Law.

[104] Pub. L. 104-208, 110 Stat. 3009 (Sept. 30, 1996) (codified in scattered sections of 8 & 18 U.S.C.).

suspected of being terrorists. Congress created a new court to hear these terrorist removal cases – the Alien Terrorist Removal Court.[105] Through these new procedures and this new court, Congress expanded the government's power to conduct deportation hearings with the use of secret evidence to target suspected terrorists.[106] The Alien Terrorist Removal Court, composed of five (5) United States district court judges appointed by the Chief Justice of the U.S. Supreme Court, is the proper court to be used to deport suspected terrorists.[107] The Court's rules create special protections for the rights of those brought within its jurisdiction.[108] To date, however, INS has chosen not to use this new court.[109]

Prior to 9/11, the INS[110] ignored this court, choosing instead to try persons suspected of being terrorists or linked to terrorists in regular deportation or removal proceedings.[111] At these proceedings, INS chose to introduce "secret evidence," which INS refused to show judges, aliens or their counsel. Often, when this "secret evidence" was later revealed, it proved to be so faulty as to cause the agency to become something of a laughingstock in the intelligence community.[112]

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[105] 8 U.S.C §§1531-1537 (2004).

[106] *Id.* The use of secret evidence against foreigners suspected of being a danger to national security is not new, but dates back at least fifty (50) years to World War II. *See Knauff v. Shaughnessy*, 338 U.S. 537 (1950) (discussing theuse of secret evidence against aliens during World War II).

[107] *See* 8 U.S.C. § 1532 (2004).

[108] *See* 8 U.S.C. §1534 (2004).

[109] *See, generally,* Martin Schwartz, Niels Frenzen, & Mayra L. Calo, *Recent Developments on the INS's Use of Secret Evidence Against Aliens,* 2 IMMIGRATION & NATIONALITY LAW HANDBOOK 300-11 (2001 ed.).

[110] The Immigration and Naturalization Service (INS), formerly an agency of the Department of Justice, has since been divided up, on March 1, 2003, with the creation of the Department of Homeland Security. The immigration prosecutorial functions are now with US Immigration and Customs Enforcement (USICE) while the Immigration Court and Board of Immigration Appeals remain with the Department of Justice.

[111] *Id.* at 309 ("In recent years the INS has used secret evidence, with a few exceptions, primarily against Arabs and Muslims.").

[112] *See, e.g.,* Andrew Cockburn, *The Radicalization of James Woolsey*, N. Y. TIMES, July 23, 2000 (describing how former CIA Director James Woolsey defended Iraqis whom INS attempted using "secret evidence") ("Finally free to read what the government had fought to conceal, he was astonished to discover that the case against his clients was, as he put it, 'a joke.'").

In the post-September 11 world, DOJ has again attempted to disregard Congress's statutory scheme for deporting terrorists, instead invoking its regulatory powers to create secret proceedings for deporting immigrants. This end-run around existing statutes should not be allowed.

B. Closing Hearings Deprives Immigrants of Due Process

While immigration court proceedings are administrative, they implicate the most serious of interests – life and liberty.[113] An immigrant may face death in his native country, should he be deported. Certainly, at a minimum, he has a liberty interest. Under the venerable *Matthews v. Eldridge* test,[114] blanket closure of hearings is an unconstitutional violation of procedural due process because it serves to deprive immigrants of notice of the charges against them and a meaningful opportunity to be heard.

Mathews v. Eldridge requires that when the Government seeks to deprive persons of their life, liberty, or property, the Government must consider three distinct factors when determining how the deprivation may be carried out: first, the Government must consider the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[115] In the case of immigration detainees, the private interest in preventing an improper deportation can be a matter of life and death. When secret hearings are held and an

[113] "[Deportation] may result also in loss of both property and life; or of all that makes life worth living." Ng Fung Ho v. White, 259 U.S. 276, 284 (1922).

[114] 424 U.S. 319 (1976).

[115] *Id.*

immigrant is deprived of the presence of her family, her witnesses, and her lawyer, there is a grave risk of an error; the value of additional procedural safeguards is great, and is also likely to save the Government time and money (for example, the involvement of a lawyer may clarify the facts more quickly). Third, while the Government's interest in deporting immigrants is often significant, there is little fiscal or administrative burden in requiring individual, case-by-case analysis of whether a hearing should be closed. Thus, the *Mathews v. Eldridge* test argues against the blanket hearing closure policy used by the DOJ after September 11.

It has become increasingly obvious, however, that the Government has paid scant attention, to the procedural due process rights of immigrants in the post-September 11 world. The media have reported that "the handling of Muslims arrested on immigration charges after September 11 has been fraught with delay and sloppy bookkeeping and that due process [has been] shortchanged . . ."[116] Immigrants have been held for months without being charged.[117] At least one detainee has died while in custody, apparently as a result of the stress of being detained.[118] "[D]etainees the government suspects least end up being held longest since they are low on the list of priorities. In the meantime, reputations are ruined, jobs are lost, families are kept apart, and lives are turned upside down."[119] While being held in detention, a number of detainees were abused. [120] The Office of the Inspector General of the Department of Justice issued a supplementary report at the end of 2003, after an in-depth investigation, concluding that "officers slammed detainees against the wall, twisted their arms and hands in painful ways,

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[116] Jim Edwards, *Data Show Shoddy Due Process for Post-Sept. 11 Immigration Detainees: Some 'Special Interest List' inmates held for months without charges*, N.J. LAW J., Feb. 4, 2002.

[117] Id.

[118] Somini Sengupta, *Ill-Fated Path to America, Jail & Death,* N.Y. TIMES, Nov. 5, 2001 (describing how a Pakistani detainee died of a heart attack after being inexplicably held in US jail after he agreed to depart the United States).

[119] Audi, *supra* note 5.

[120] Evan *Thomas* & Michael Isikoff, *Justice Kept in the Dark*, NEWSWEEK, Dec. 10, 2001, at 37.

stepped on their leg restraint chains, and punished them by keeping them restrained for long periods of time."[121] Furthermore, it has become clear in recent months that immigration judges have been intimidated by the Attorney General, who has publicly commented on their decisions in an unprecedented and arguably unethical fashion.[122] Attorney General Ashcroft has fired members of the Board of Immigration Appeals with whose decisions he does not agree.[123] This biased behavior by the Attorney General threatens to further undermine the due process rights of immigrants.

Finally, the closed hearings policy has operated to deprive immigrants of witnesses needed for their cases, and has likely resulted in erroneous removals and deportations.

C. Closing Hearings Deprives Immigrants of Their Right to Counsel

Blanket closure of immigration hearings also deprives immigrants of their right to counsel, and is part of a disturbing Justice Department trend to hinder the right to counsel in

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[121] U.S. Department of Justice, Office of the Inspector General, SUPPLEMENTAL REPORT ON SEPTEMBER 11 DETAINEES' ALLEGATIONS OF ABUSE AT THE METROPOLITAN DETENTION CENTER IN BROOKLYN, NEW YORK (December 2003).

[122] For example, the Attorney General has issued a press release applauding the decision of an immigration judge to deny asylum to one particular Muslim male who was the subject of a "special interest" hearing. *See* Press Release, Department of Justice, Statement of Barbara Comstock, Director of Public Affairs, on the Haddad Asylum Decision (Nov. 22, 2002) (02-691) (available at http://www.usdoj.gov/opa/pr/2002/November/02_civ_691.htm.) The fact that the Attorney General would authorize the issuance of an official press release commenting on the Haddad case is troubling, because the Attorney General is the final administrative authority in asylum cases; his Department's commentary on the outcome of the case is akin to the Supreme Court issuing a press release applauding a U.S. District Court judge's decision in a case that is not yet final and may ultimately be appealed to the Supreme Court. Such behavior by the Supreme Court or other court would be deemed a violation of the Code of Conduct. Canon 3A(6) of the Code of Conduct for United States Judges provides that judges "should avoid public comment on the merits of a pending or impending action."

[123] *See, e.g.* Ricardo Alonso-Zaldivar & Jonathan Peterson, *The Nation: 5 on Immigration Board Asked to Leave; Critics Call It a 'Purge,'* LOS ANGELES TIMES, Mar. 12, 2003, at 16 (quoting a Senate aide who said "This sends a signal to the remaining [members] that if you don't toe the line, you could be in jeopardy"); Lisa Getter & Jonathan Peterson, *The Nation: Speedier Rate of Deportation Rulings Assailed*, LOS ANGELES TIMES, Jan. 5, 2003, at 1 (describing Attorney General John Ashcroft's plan to clear administrative backlog with summary denials of appeals).

general.[124] "There's been a concerted effort to cut defense lawyers out of the process, to make it impossible for people accused of terrorism offenses to mount an effective defense."[125]

As mentioned above, in an immigration court proceeding, if an alien wants a lawyer, she must find and pay for one herself, often while incarcerated and perhaps even unable to use a telephone. Even if the alien has an attorney, INS may ship the alien thousands of miles away from his attorney, without even notifying the attorney.[126] The alien is responsible for providing evidence to rebut the INS's claims, although such evidence might be in a faraway country, or come from US Government employees whom the INS will not produce to testify. Although rules officially exist to ensure procedural fairness, in reality, translations are frequently bad, shaky evidence is commonly admitted, and jaded immigration judges and INS attorneys with little knowledge of the complicated politics of other nations can, without the guidance of counsel, make critical mistakes such as confuse one political group with another. Immigration law itself, in the words of the INS, is a "mystery and a mastery of obfuscation,"[127] and few immigrants can be expected to understand it or to appreciate their eligibility for relief. Access to counsel in immigration court is often the only chance an immigrant has to obtain justice – and perhaps prevent his own death.

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[124] For example, the Justice Department has altered prison regulations to allow the government to eavesdrop on attorney-client conversations. *See, e.g.*, Jim Edwards, *No Secrets*, MIAMI DAILY BUS. REV., Aug. 29, 2002 at A9 (discussing "a lengthening line of laws, regulations and other measures that constrain attorneys representing those swept up in the [terrorism] probe").

[125] Dan Christensen, *Secrets Within*, MIAMI DAILY BUS. REV., Mar. 12, 2003.

[126] Audi *supra* note 5. ("When you're locked up in Tucson and transferred five times in three weeks and you're not given a phone, your right to counsel is rendered meaningless.").

[127] *Metro: In Brief*, WASH. POST, Apr. 24, 2001, at B1 (quoting INS spokeswoman Karen Kraushaar as stating, "Immigration is a mystery and a mastery of obfuscation, and the lawyers who can figure it out are worth their weight in gold").

Following the September 11 attacks, the Government has in many cases had a pattern and practice of denying "special interest" immigrants their right to counsel.[128] When giving immigrants lists of lawyers who can supposedly help with their cases, government officials have provided lists with bad phone numbers.[129] Lawyers have been told that they cannot accompany clients to interviews with the INS.[130]

Blanket closure of hearings deprives immigrants of access to counsel. When an immigrant is locked up, unable to contact his family, he often cannot obtain an attorney. If his family is unable to determine when and where his hearing will be, they cannot hire an attorney to be there to represent him. The Government will not provide him a free attorney. Because the Government itself is represented by an experienced attorney, and immigration court proceedings are adversarial, immigrants who are unrepresented by counsel are at a grave disadvantage.

D. Closing Hearings Can Injure Rather Than Protect National Security

The closure of hearings can actually hurt national security. The potential danger to national security posed by closed hearings is illustrated by the case of the Iraqi Six, a story that illustrates the grave consequences of unquestioning deference to Government requests for closed hearings.

In 1996, Saddam Hussein's troops rolled into Northern Iraq, attacking Kurdish allies of the United States. Kurdish opponents of the Iraqi regime were slaughtered. Belatedly, the US military evacuated some six thousand Iraqis and Kurds who had been associated with the Iraqi

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[128] BRILL, *supra* note 21, at 147(recounting the story of a high-level Department of Justice meeting in which "someone in the room remarked that the government should not try too hard to make sure [aliens] could contact lawyers").

[129] *Id*. ("Under INS rules, they were entitled to call a lawyer from jail, but the lists the INS provided of available lawyers invariably had phone numbers that were not in service").

[130] Mark Bixler, *Right to Counsel Denied, Immigration Lawyers Say*, ATLANTA J.-CONST., Mar. 12, 2003, at 2E (recounting story of Iranian national whose lawyer was told that he could not accompany him to an INS interview).

National Congress, taking the evacuees to Guam by military airlift. Among the evacuees were six men who would later earn the appellation "the Iraqi Six." Like their Kurdish and Iraqi compatriots, these men were interviewed on Guam by FBI agents, and later allowed to come to California. Once in California, they filed for political asylum, citing a well-founded fear of persecution by Saddam Hussein. After they filed for asylum, however, the US Immigration & Naturalization Service moved to deport them, claiming that classified evidence proved that the men were national security risks. INS said that secret evidence revealed that the men should be deported back to Iraq. INS refused to disclose the classified evidence to the men, or to their lawyers, despite the fact that one of their lawyers, R. James Woolsey, was the former Director of the Central Intelligence Agency.

If sent back to Iraq, the Iraqi Six faced certain death at the hands of Saddam Hussein. At the time of the hearings of the Iraqi Six, immigration hearings such as theirs were not closed. Although INS refused to allow the men or their lawyers to see the evidence in their cases, the hearings themselves were open. What happened during those hearings gives us a glimpse of what INS might do when no one – the press or the public – is there to watch. During the hearings of the Iraqi Six, the public learned that FBI agents with no prior experience dealing with Iraqi or Kurdish issues had interviewed the men after having had only a single 45-minute classified briefing on the situation in Iraq; translation problems caused the FBI to make critical mistakes in taking statements from the men; and FBI and INS agents collected allegations from other Iraqis, and then failed to investigate to see if the allegations were actually true. Government agents called these collections of allegations "evidence," classified them, refused to show them to the Iraqi Six or their lawyers, and used them as grounds for the "national security risk" charge. In addition, FBI and INS agents made appalling errors in interpreting evidence in

the case, including confusing thallium (rat poison) with valium (a common sedative), an error which caused them to determine that one of the men was a recreational drug user when instead he was a victim of poisoning by Iraqi intelligence agents. In another egregious error, an FBI interviewer thought that one man was lying because he described a trip to Baghdad in which he stayed with relatives who were Kurds. The FBI agent believed that no Kurds lived in Baghdad, although a quarter of Iraq's Kurds live there. The FBI agent was also unaware that Kurdish groups had engaged in negotiations with Saddam Hussein's regime. FBI agents mixed up family names with ethnic groups, and then said one man was lying because he failed to list his ethnic group as one of his names. INS failed to call as witnesses some key government employees – including at least one retired CIA agent – who could have cleared the men and testified how the men had helped the CIA. FBI and INS personnel had little understanding of the situation in Northern Iraq and the various struggles of the Kurdish people, and were thus unable to appreciate or evaluate the testimony they were hearing.

Media coverage of the deportation hearings of the Iraqi Six played a significant role in stopping their deportation and exposing these INS and FBI blunders. Under intense pressure, the Justice Department eventually declassified the evidence against the men. Once revealed publicly, the evidence proved to be shaky, unreliable, and in some cases, laughable. After having spent years in jail fighting deportation to Iraq, the men were eventually released. Today, these men are alive and well, and have helped the United States with the conflict in Iraq.

Were hearings like this held today, the men would no doubt be classified as "special interest" cases. The hearings would be closed to family, friends, and the press. Today, the press would not be allowed to expose the blunders of the FBI and the shaky nature of the INS's

evidence. Under today's secret hearings, men like this would have no chance – they would have been sent back to their country long ago and might well be dead today.

Ironically, in cases like those of the Iraqi Six, media coverage also helps protect the national security of the United States. National security is harmed when shaky evidence is used to deport people who could help our country. National security is harmed even more if foreign governments or organizations know they can manipulate the INS into deporting a foreign government's enemies through secret tribunals. National security is further harmed by the United States developing a reputation, with both its own immigrant community and the world at large, of treating minorities (and typically Islamic minorities) unfairly through secret proceedings. The case of the Iraqi Six should be an example to us of one of the dangers of secret immigration hearings. While such hearings may speed the removal of aliens, they may also cover up abuses and mistakes, and lead ultimately to tragic results. As one writer recently noted, "the idea that openness can be more effective than secrecy in reducing risks has received too little attention."[131]

E. Closing Hearings Fosters Misconduct and Misinformation

Closed hearings are particularly pernicious because they presume the government will act professionally and accountably in the absence of any public scrutiny. Unfortunately, the historical record does not reflect that the Department is always professional and accountable when it operates without oversight. The Federal Bureau of Investigation and the Immigration & Naturalization Service, the two agencies most often involved in "special interest" immigration hearings, are particularly noteworthy for their poor record of respect for due process.

[131] Mary Graham, *The Information Wars: Terrorism Has Become a Pretext for a New Culture of Secrecy*, ATLANTIC MONTHLY, Sept. 2002, at 37.

Throughout its history, but particularly during the 1950s and 1960s—a time when the nation was highly concerned about its security—the Federal Bureau of Investigation used illegal means to obtain information;[132] the FBI also used this information for political purposes unrelated to any national security threat.[133] Secrecy immunized the FBI's operations from public scrutiny. In repeatedly breaking the law and covering up its behavior, the FBI used the same rationale offered today by Attorney General Ashcroft to justify the current blanket closures of immigration court hearings. In the 1950s and 1960s, those excuses proved to be fictitious:

> The FBI's interest in secrecy and in minimizing the attorney general's oversight role was not predicated on national security considerations or even the possibility that leaks might compromise legitimate security interests. [A] culture of lawlessness . . . shaped FBI policies . . . [S]ecrecy encouraged FBI officials to act independently, even insubordinately.[134]

This same danger is apparent today, as the FBI attempts to deal with the threat posed by al Qaeda terrorists. Although the Attorney General has argued that his Department is trustworthy even in the absence of any public scrutiny, there are indications that such confidence is misplaced. In 2002, the public learned that the FBI and Justice Department had systematically misled the judges of the nation's Foreign Intelligence Surveillance Court, providing misinformation to support *ex parte* requests for wiretaps and surveillance of terrorism suspects in about 75 cases.[135] More recently, the public learned that the Department of Justice had

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[132] *See* Select Comm. to Study Governmental Operations with Respect to Intelligence Activities, INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS, S. REP. NO. 755, at Book III 355 (1976) ("Before 1966, the FBI conducted over two hundred 'black bag jobs.' These warrantless surreptitious entries were carried out for intelligence purposes").

[133] *See, e.g.*, G. GORDON LIDDY, WILL at 133 (1998) (describing how FBI Director J. Edgar Hoover had extensive files on various Washington politicians, which he used for political leverage).

[134] Athan Theoharis, CHASING SPIES: HOW THE FBI FAILED IN COUNTERINTELLIGENCE BUT PROMOTED THE POLITICS OF MCCARYTHISM IN THE COLD WAR YEARS 249-50 (2002).

[135] Philip Shenon, *Secret Court Says F.B.I. Aides Misled Judges In 75 Cases*, N.Y. TIMES, Aug. 23, 2002, at A1.

misreported the number of terrorism-related convictions it had obtained,[136] and may have exaggerated the number of terrorists present in the United States.[137] Finally, the Department of Justice's own Inspector General has documented serious abuses of immigrants that took place in connection with the post-September 11 mass arrests of Muslim men.[138]

Along with the FBI, the INS—the other key agency involved in immigration detainee cases—has not been a shining light in federal law enforcement circles, either.[139] Its inefficiency and ineptitude have become so notorious as to be a cliché. At least one lawmaker has called it the "agency from hell."[140] For years, news reports have told of corruption, mismanagement, and an agency culture that tramples on people's rights and tolerates racism and abuse.[141] There is no reason to think that the agency has suddenly been reformed post-September 11 such that it can be trusted to act properly in the absence of public scrutiny. Although the agency has now been

[136] U.S. Gen. Accounting Office, JUSTICE DEPARTMENT: BETTER MANAGEMENT OVERSIGHT & INTERNAL CONTROLS NEEDED TO ENSURE ACCURACY OF TERRORISM-RELATED STATISTICS, GAO-03-266 (Jan. 2003) (reporting that almost half of the convictions deemed "terrorism-related" by the Department of Justice were determined by GAO investigators to have been wrongly classified as such).

[137] Patrick Howe, *FBI Agent Questions FBI's Terrorism Readiness if Iraq Attacked*, ASSOCIATED PRESS, Mar. 6, 2003 (citing an agent's letter to FBI Director Robert Mueller in which she questions the evidence linking al Qaeda to Iraq and the truthfulness of a FBI statement claiming that there are 5,000 terrorists in the country).

[138] OFFICE OF THE INSPECTOR GEN., *supra* note 22 and note 121.

[139] *See, e.g.,* Brent Walth & Kim Christensen, *INS Bureaucracy, Blundering Create "The Agency from Hell,"* OREGONIAN, Dec. 11, 2000, at A01; OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, IMMIGR. & NATURALIZATION SERVICE MANAGEMENT OF PROPERTY, Rep. No. 01-09 (Mar. 2001) (finding that "INS did not adequately account for property and that immediate corrective actions are necessary"); THOMAS ALEXANDER ALEINIKOFF et al., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 251 (4th ed. 1998) ("INS was once respected as a relatively well-run and efficient administrative agency . . . But as its tasks expanded and the statute and regulations became more complex, . . . [m]anagement systems became badly outmoded, and tales of long delays . . ., lost files, and poor morale . . . became distressingly common").

[140] Walth & Christensen, *supra* note 139, at A01 (quoting Zoe Lofgren, D-Calif.).

[141] *See, e.g.,* Kim Christensen et al., *Unchecked Power of the INS Shatters American Dream*, OREGONIAN, Dec. 10, 2000, at A01 (noting that "one in seven of the agency's 32,000 employees was the subject of an internal investigation in 1999").

absorbed into the new Department of Homeland Security, the employees remain largely the same.[142]

In connection with immigration detainees, the Department of Justice has repeatedly misled the public as to the reasons for its blanket policy. Attorney General Ashcroft himself first claimed that blanket closure of hearings was necessary because the "special interest" immigrants affected belonged to al Qaeda.[143] Later, Justice Department officials privately admitted that none of the immigration detainees were actually al Qaeda members. These errors in DOJ's reporting were ultimately revealed by the news media.[144] Perhaps not surprisingly, the DOJ has since sought even more opportunity to hide its operations from the media and the public.[145]

When DOJ "does not have sufficient management oversight and internal controls in place … to ensure the accuracy and reliability of its terrorism-related conviction statistics,"[146] it is highly unlikely that it has sufficient management oversight and internal controls over the designation of "special interest" administrative immigration cases, given that criminal cases have a much higher profile at the Department. Given the due process interests at stake in immigration court hearings, mismanagement and inefficiency should not be tolerated. There is no reason to think that mismanagement and inefficiency will disappear without public scrutiny.

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[142] *See, e.g.*, Philip Shenon, *Threats and Responses: Domestic Security; Ridge Discovers Size of Home Security Task,* N.Y. Times, Mar. 3, at A1.

[143] *Terrorist Attack Investigation: Ashcroft Details Tally of Detainees, Other Developments*, FACTS ON FILE WORLD NEWS DIG., Nov. 27, 2001, at 932A1.

[144] An article in the *Philadelphia Inquirer* first raised allegations that the DOJ was improperly reporting information about terrorism-related convictions. *See* Mark Fazlollah & Peter Nicholas, *U.S. Overstates Arrests in Terrorism: For Years, Officials Said, Cases That Should Not Have Been in that Category Were Included to Support Budget Requests*, PHILADELPHIA INQUIRER, Dec. 16, 2001, at A01. This article triggered the GAO investigation that confirmed the inaccurate reports.

[145] Christensen, *supra* note 125, at A1 (reporting how the DOJ is apparently sealing all records relating to a civil lawsuit filed against the warden of a federal correctional institution by a since-released Muslim inmate).

[146] U.S. GEN. ACCOUNTING OFFICE, *supra* note 136.

F. Closing Hearings Alarms the Immigrant Community

The immigrant community has been terrified by the DOJ's new policies, including blanket closure of immigration hearings. Immigrants are leaving the United States, apparently from fear of this policy and others like it.[147] Ironically, this fear lessens the likelihood that immigrants will come forward to help the Government win the war on terrorism. "By rounding up young Muslim men for questioning, or holding them indefinitely on minor immigration charges, the Justice Department may alienate precisely the people they need to blow the whistle on suspicious activity."[148]

G. DOJ Has Used a Fictitious Excuse to Close Hearings

The possibility of terrorists learning intelligence sources and methods from immigration court hearings is quite likely a pretext. In reality, the Government appears to prefer closed immigration hearings not because of any actual threat to national security posed by open hearings, but because closing hearings makes it easier to deport aliens. The pretextual nature of the Government's excuses for blanket closure of these hearings becomes apparent after one considers the information that has "leaked" out of "special interest" hearings. This information indicates that the Government may have misled the public about the reasons for closing these hearings. Matthew Purdy, a New York Times journalist, writes:

> One East Coast immigration judge, who asked that his name remain secret, said the secret cases were "just regular cases" and that he had heard no evidence of terrorism at the hearings. "I'm sure there are plenty of terrorists," he said. "I haven't seen any." He said the people he had seen "were at the wrong place at the wrong time."[149]

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[147] Mae M. Cheng, *Uproot: Pakistanis Seek Refuge in Canada*, NEWSDAY, Oct. 5, 2003, at A06 ("But after 9/11, they felt like they were targeted by authorities on the grounds that most are Muslim. . . . That has led them to Canada. Here, they are peaceful. They are comfortable.").

[148] Thomas & Isikoff, *supra* note 120, at 37.

[149] Purdy, *supra* note 15, at B5.

H. Closing Hearings is an Overbroad Response to the Problem of Deporting Terrorists

Events subsequent to the September 11 attacks have made it clear that the DOJ blanket policy of closing immigration court proceedings has been an overbroad response to the problem of terrorism.[150] The "special interest" policy has created a dragnet that has targeted many persons who have no connection whatsoever to terrorism. Many of these people have been deprived of liberty for months at a time and in a manner that undercuts the legitimacy of the Government's terrorism investigations. As one immigration attorney said, "If they're still holding people who clearly have no tie-in to September 11th, what does it say about the quality of the overall investigation?"[151]

I. Closing Hearings Makes America a Poor Example to the World

In the past, the United States Government has condemned other countries that resorted to secret hearings to try alleged terrorists. There is an obvious resemblance between the practice of holding secret immigration hearings and the former practices of totalitarian regimes. Now the United States Government is engaging in the behavior that it formerly condemned. It has become apparent that "an unknown number of detainees have simply disappeared into what amounts to a secret legal system."[152] Blanket closure of hearings is a poor example to the rest of the world, and undercuts the American role as an international model for how justice should be administered.

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[150] For example, many of the "special interest" detainees were Israeli Jews, a group that is highly unlikely to be a security threat to the United States. *See, e.g.*, John Mintz, *60 Israelis on Tourist Visas Detained Since Sept. 11; Government Calls Several Cases 'of Special Interest,' Meaning Related to Post-Attacks Investigation,* WASH. POST, Nov. 23, 2001, at A22 ("'It was obvious they mistook us' as Arabs from Israel," said an Israeli army veteran).

[151] *Id.* at A22 (quoting attorney David Leopold, who represented several Israeli Jews who were held as "special interest" detainees, but were later released when the Government could produce no evidence connecting them to any terrorist activity).

[152] Audi, *supra* note 5, at 1A.

CONCLUSION

The Department of Justice's blanket closure of certain "special interest" immigration hearings has revealed the grave dangers inherent in such an approach. Immigration hearings are much like criminal trials, and often even more is often at stake. Like criminal trials, immigration hearings should be open to public scrutiny, absent an individualized assessment that a particular hearing should be closed. Blanket closure of these hearings is not a weapon that the Government needs in its war on terrorism, and it threatens to undermine our confidence in the workings of our government. Immigrants facing accusations that they are linked to terrorism should be afforded a right to free counsel and full due process. The Department of Justice should not be allowed to determine unilaterally whose hearings should be closed and whose should be open. The Sixth Circuit was emphatically correct that "democracies die behind closed doors."

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