

**“SPECIAL INTEREST” HEARINGS IN THE WAKE
OF SEPTEMBER 11TH:
A Response to the American Bar Association House of
Delegates’ Proposed Resolution Governing Immigration
Hearings**

By

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Editors’ Note—After the submission of this article, the Third Circuit issued its opinion in *North Jersey Media Group v. Ashcroft*, No. 02-2524 (3d Circ., Oct. 8, 2002), reversing the district court and holding that the First Amendment does not require public access to the “special interest” hearings.

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INTRODUCTION

A principal concern of the legal punditry in the wake of September 11th has been the threatened erosion of civil rights. From talking heads to newspaper editors, many have noted the pressure that some law enforcement practices have placed on traditional notions of what is just and proper in a free and open society. Undoubtedly, these commentators raise a powerful point: protecting constitutionally enshrined rights is of paramount importance—let no one accuse the authors of suggesting otherwise. At the same time, however, it is equally important to maintain the government’s legitimate authority and to permit it to respond to threats in times of national crisis. When these two sets of interests conflict, as they often do, a careful resolution is required. In the haste to defend either set, one should not lose sight of the other. Yet that, unfortunately, is precisely what the American Bar Association (the “ABA”) has done with its recent resolution on open hearings for detainees.¹ Overbroad, ill-conceived, and not constitutionally required, the ABA’s position, if adopted by the courts, would undermine

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¹ Resolution, American Bar Association (August 12-13, 2002), <http://www.abanet.org/humanrights/incommunicado.html> [hereinafter, “ABA Resolution”]. The ABA House of Delegates adopted this resolution at its annual meeting in August 2002.

the government's abilities and constitutional prerogatives to respond to last year's terrorist attacks.

In the aftermath of September 11, 2001, President Bush ordered a worldwide investigation into the terrorist attacks and other threats to the United States.² As part of this investigation, the government identified and initiated removal proceedings against numerous aliens who had violated the nation's immigration laws. Some of these aliens—those who may have connections with or information on terrorist activity within the United States—were further identified as being “special interest” cases.³ Among the aliens in this category are individuals who had close ties with the September 11th hijackers or are associates of al Qaeda.

At the request of the Attorney General, Chief Immigration Judge Michael Creppy issued a directive on September 21, 2001, requiring United States immigration judges to close to the public all proceedings for these “special interest” cases.⁴ This directive, as

² See *Detroit Free Press v. Ashcroft*, 195 F. Supp. 2d 937, 939-40 (E.D. Mich. 2002).

³ Because the identities of the aliens have been kept secret, the public cannot confirm whether everyone on the list meets the government's stated criteria. The government, however, has represented in court that this is the case. See, e.g., Brief for Appellants, *North Jersey Media Group v. Ashcroft*, No. 02-2524 (3d Cir. 2002).

⁴ See *id.* at 941. Judge Creppy's September 21, 2001, memo informed all INS judges of the Attorney General's decision to “implement[] additional security procedures for certain cases in the Immigration Court.” These procedures “require us to hold the hearings individually, to close the hearing to the public, and to avoid discussing the case or otherwise disclosing any information about the case to anyone outside the Immigration Court.” See Creppy Memo of 9-21-01 regarding Cases Requiring Special Procedures http://www.aclu.org/court/creppy_memo.pdf. The Department of Justice subsequently issued interim rules governing the issuance of protective orders and the sealing of records in similar hearings. 67 Fed. Reg. 36799; see also 67 Fed. Reg. 19508 (governing the disclosure of information by non-federal incarceration facilities of information pertaining to aliens held there at the request of federal authorities). Judge Creppy in turn issued another memorandum detailing the implementation of these regulations. See Creppy Memo of 7-16-02, <http://www.usdoj.gov/eoir/efoia/ocij/oppm02/OPPM02-02.pdf>.

one federal court of appeals recently determined, serves the compelling government interest of preventing terrorism.⁵ Specifically, it precludes sophisticated terrorist organizations, such as al Qaeda, from learning about ongoing investigations, discovering sources of information, and intimidating potential witnesses. Despite the vital security interests at stake, however, the courts that have reviewed the issue have awarded preliminary injunctive relief against the government.⁶ According to the Sixth Circuit and

⁵ See *Detroit Free Press v. Ashcroft*, 2002 WL 1972919, at *23 (6th Cir. 2002). The court observed:

“1. ‘[D]isclosing the names of ‘special interest’ detainees . . . could lead to public identification of individuals associated with them, other investigative sources, and potential witnesses . . . [and t]errorist organizations . . . could subject them to intimidation or harm . . .’

2. ‘[D]ivulging the detainees’ identities may deter them from cooperating . . . terrorist organizations with whom they have connection may refuse to deal further with them . . .’ thereby eliminating valuable sources of information for the Government and impairing its ability to infiltrate terrorist organizations.

3. ‘[R]eleasing the names of the detainees . . . would reveal the direction and progress of the investigation . . .’ and ‘[o]fficial verification that a member [of a terrorist organization] has been detained and therefore can no longer carry out the plans of his terrorist organization may enable the organization to find a substitute who can achieve its goals. . .’

4. ‘[P]ublic release of names, and place and date of arrest . . . could allow terrorist organizations and others to interfere with the pending proceedings by creating false or misleading evidence.’

5. ‘[T]he closure directive is justified by the need to avoid stigmatizing ‘special interest’ detainees, who may ultimately be found to have no connection to terrorism. . . .’ ”

Detroit Free Press at *23 (quoting *Detroit Free Press*, 195 F.Supp.2d at 946-47 (quoting affidavit of James S. Reynolds, Chief of the Terrorism and Violent Crimes Section, Criminal Division, Department of Justice)).

⁶ See *id.* at *1-2; *North Jersey Media Group v. Ashcroft*, 205 F. Supp.2d 288, 301-02 (D.N.J. 2002). Whereas the preliminary injunction issued by the district court in *Detroit Free Press* was limited to granting the press the right to attend removal proceedings involving one particular alien, the injunction issued by the District Court of New Jersey was much broader. It is not limited to a single alien but rather operates on a nationwide

the District Court of New Jersey, the First Amendment guarantees public access to removal hearings unless the government can show that closure is narrowly tailored to serve a compelling government interest.⁷ Concluding that the directive is not narrowly tailored, they rejected the government’s defense of the closure decision.⁸

The result of these decisions—open hearings—is being advocated by no less than the ABA, the putative trade representative of the legal industry. At its annual meeting in August, the ABA House of Delegates adopted a recommendation that the INS “[h]old public removal hearings” subject only to the narrowest of exceptions.⁹ To be precise, the ABA recommends that removal hearings be public unless:

[A] judge finds that a portion of any such hearing must be closed because (a) information that would pose an imminent threat to national security is likely to be disclosed in that portion of the hearing and (b) there is no other reasonably available alternative to closure that would adequately protect the government’s national security interest.¹⁰

The ABA defends this recommendation on due process grounds. According to the ABA, in administrative proceedings such as removal hearings, “ ‘the rule of the ‘open’ forum is

basis. It thus presents the possibility that future proceedings involving “special interest” aliens whose identities have not yet been revealed must be open to the public. Because of the breadth of this injunction, the government sought—and received—a stay from the United States Supreme Court pending the final disposition of the government’s appeal of the injunction to the United States Court of Appeals for the Third Circuit. *See North Jersey Media Group v. Ashcroft*, 122 S.Ct. 2655 (2002).

⁷ *See Detroit Free Press* at *22-27; *North Jersey Media Group*, 205 F. Supp.2d at 301-02.

⁸ *See Detroit Free Press* at *24-27; *North Jersey Media Group*, 205 F. Supp.2d at 302.

⁹ *See* ABA Resolution.

¹⁰ *Id.*

prevailing—if not by statutory mandate, then by regulation or practice.’ ”¹¹ Without discussing the First Amendment, the ABA also cites the district court’s decision in *Detroit Free Press*, which held against the closure of hearings.¹²

This article responds to the ABA’s overbroad resolution, explains why it is misguided from a policy standpoint, *see infra* Part I, and challenges the arguments that open hearings are constitutionally required under the First Amendment and the Due Process Clause, *see infra* Part II. Further, the article explains that the decision of when to close a removal hearing must be made in a more sensible manner, one that takes into account the magnitude and possibility of a risk. *See infra* Part II. Ideally, this decision would be reviewed by a neutral arbiter, and in the long run, this ideal may be attainable. In the short term, however, given the exigencies of the circumstances and the dramatic downside risk of undercutting national security, the Administration’s position is eminently sensible.

I. THE ABA’S RECOMMENDATION IS OVERBROAD AND THREATENS VITAL NATIONAL INTERESTS

As a question of policy, the interest in openness must be balanced against the countervailing need for secrecy, investigative effectiveness, and security. Though perhaps well-intended, the ABA’s resolution fails to strike the appropriate balance. Rather than allow the government reasonable leeway to protect sensitive information in “special interest” cases, the resolution requires open proceedings with almost no exception. Specifically, a hearing must remain open unless “information that *would* pose

¹¹ *See* ABA Report 115B at 8 (quoting *Fitzgerald v. Hampton*, 467 F.2d 755, 764 (D.C. Cir. 1972) (*citing* The Report of the Attorney General’s Committee on Administrative Procedure (1941))).

¹² *Id.*

an *imminent* threat to *national security* is *likely* to be disclosed.” On account of each of the italicized terms, which would provide any half-able attorney with a lifetime of justifications for opposing closure, this proposal is unjustifiably overbroad.¹³

First, the word “would” leaves little room for doubt. It requires certainty that the information poses a threat. A mere possibility, or even a probability, apparently falls short. And the fact that intervening events may play upon whether information will have such an effect is also apparently insufficient to justify closure. Put simply, the release of that information must cause the required threat.

Second, closure is prohibited unless the threat is “imminent.” The word “imminent” means “ready to take place” or “hanging threateningly over one’s head.”¹⁴ If an event is not about to happen immediately or is somewhat in doubt, it is not “imminent.” Thus, if information revealed at an open hearing would facilitate only a terrorist attack that is planned for the less-immediate future, the threat would not be imminent, and under the ABA’s resolution, would not justify closing the hearing. Irrespective of the magnitude of the risk or how many casualties might arise, the ABA recommendation would force the hearing to be public.

Third, and equally startling, the resolution allows a judge to close a hearing only if the threat is to “national security.” A threat to a particular agent or other law-enforcement asset, while serious, may not count as a threat against “national security.” Because of the vagueness of this term, it provides little comfort.

¹³ The broad sweep of the ABA’s recommendation is no accident. The original draft permitted closure when a judge found it “necessary to protect national security.” This language was replaced in the second draft with the expansive text set out above. *See Recommendation 115B* at 1.

¹⁴ *See Webster’s Third New International Dictionary* 1130 (1993).

Fourth, closure is permitted only if the information posing the imminent threat to national security is “likely” to be disclosed. If the information stands a good chance of being revealed during the hearing, but disclosure is not “likely,” or “probable,”¹⁵ then the hearing remains open, regardless of the imminence of the threat, the target of the attack, or the anticipated magnitude of the impending destruction. Thus, if adopted, the ABA resolution would require the government to clear a high hurdle before it could protect individual pieces of sensitive information.

Finally, it precludes the government from protecting information that—by itself—may seem harmless, but, when combined with additional information, is vital to the government’s anti-terrorist efforts and capabilities. The resolution requires the closure decision to be made by a judge who, under the current system may lack the holistic perspective necessary for an informed decision.¹⁶ The judge may be ill-equipped to see how the “[b]its of pieces of information that may appear innocuous in isolation” can nonetheless be “used by terrorist groups to help form a bigger picture of the Government’s terrorism investigation.”¹⁷ For all these reasons, the ABA’s recommendation is unsound as a policy matter.

II. THE CLOSING OF REMOVAL HEARINGS FOR SPECIAL INTEREST DETAINEES VIOLATES NEITHER THE DUE PROCESS CLAUSE NOR THE FREE SPEECH CLAUSE.

In addition, the ABA’s recommendation is without basis in law. To accept its underlying rationale—*i.e.*, that the Administration has undermined constitutional rights—would require a wholesale revision of well-settled constitutional principles. For “while

¹⁵ See Webster’s Third New International Dictionary 1310 (1993).

¹⁶ See *CIA v. Sims*, 471 U.S. 159 (1985).

the Constitution protects against invasions of individual rights, it is not a suicide pact,”¹⁸ and neither the First Amendment nor the Fifth Amendment’s Due Process guarantee should play handmaiden to any such arrangement. As noted at the outset, improperly eroding the powers of government would be as wrong a result as improperly eroding constitutional civil liberties.

A. The First Amendment Does Not Guarantee Open Removal Hearings For Special Interest Cases.

Contrary to the decisions of the courts that have addressed the issue,¹⁹ the First Amendment does not require open removal hearings. As a general matter, there is no First Amendment right of access to government facilities,²⁰ government records,²¹ or government proceedings.²² Indeed, only in the context of criminal prosecutions, in *Richmond Newspapers, Inc. v. Virginia*, has the Supreme Court recognized an exception to this principle.²³ And as Justice O’Connor has explained, that exception carries no implications to other contexts.²⁴ Because deportation “is not a criminal proceeding,”²⁵

¹⁷ *Detroit Free Press* at *23.

¹⁸ *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963).

¹⁹ *See Detroit Free Press* at *1-2; *North Jersey Media Group*, 205 F. Supp.2d at 301-02.

²⁰ *See, e.g., Houchins v. KQED, Inc.*, 438 U.S. 1, 14 (1978). References to *Houchins* are to the lead opinion of Chief Justice Burger, which the Supreme Court has recognized as controlling. *See, e.g., Los Angeles Police Dep’t v. United Reporting Publ’g Co.*, 52 U.S. 32, 40 (1999).

²¹ *See, e.g., Houchins*, 438 U.S. at 14.

²² *See, e.g., Branzburg v. Hayes*, 408 U.S. 665, 684-85 (1972) (“[T]he press is regularly excluded from grand jury proceedings, [Supreme court] conferences, [and] the meetings of other official bodies gathered in executive session.”).

²³ *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

²⁴ *See Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 611 (1982) (opinion concurring in the judgment).

²⁵ *Carlson v. Landon*, 342 U.S. 524, 537 (1952).

but rather a regulatory function ancillary to the political branches' power over foreign affairs,²⁶ the exception does not apply, and the First Amendment does not require deportation hearings to be held open to the public.

More specifically, the text of the Constitution and a thousand of years of Anglo-American tradition counsel against extending the right-of-access doctrine to proceedings outside the judicial branch, such as deportation hearings. First, whereas the Sixth Amendment expressly incorporates the background principle of a “public trial” and supports an inference that the First Amendment implicitly incorporates it as well, no similar textual inference can be drawn with respect to the political branches. Articles I and II of the Constitution directly address the question of access and clearly do not provide for executive or legislative proceedings to be open to the public.²⁷ Second, the historical traditions behind access to judicial and non-judicial proceedings are demonstratively different. In contrast to the 1000 years of “unbroken, uncontradicted

²⁶ *Reno v. American-Arab Anti-Discrimination Comm*, 525 U.S. 471, 491 (1999); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950). As the Supreme Court recently explained, “[e]ven when deportation is sought because of some act the alien has committed, in principle the alien is not being punished for that act . . . but is merely being held to the terms under which he was admitted.” *American-Arab Anti-Discrimination Comm.*, 525 U.S. at 491. Moreover, concluding that deportation proceedings should be treated the same as criminal prosecutions would effectively unravel the entirety of deportation procedural law. As the Supreme Court recognized 100 years ago, deportation hearings need not comply with “the forms of judicial procedure.” *Yamataya v. Fisher*, 189 U.S. 86 (1903). Consequently, no jury sits, *see Carlson*, 342 U.S. at 537, there is no right to counsel at the government’s expense, *see* 8 C.F.R. 3.16(b), hearsay evidence is admissible, *see, e.g., Kiareldeen v. Mandel*, 408 U.S. 753 (1972), and removal hearings are not even provided in all cases, *see, e.g.,* 8 U.S.C. § 1231(a)(5); 8 C.F.R. § 217.4(b).

²⁷ *See* U.S. Const. art. II, § 3 (requiring President “from time to time [to] give to the Congress Information of the State of the Union”); U.S. Const. art. I, § 9, cl. 7 (requiring Congress to publish a “regular Statement and Account of the Receipts and Expenditures of all public Money”); U.S. Const. art. I, § 5, cl. 3 (requiring each House of Congress to publish a journal of proceedings from which it may withhold “such Parts as may in [its] Judgment require Secrecy”).

history” of public criminal trials pre-dating “the Norman Conquest,”²⁸ the political branches have consistently enjoyed the discretion to hold closed proceedings.²⁹ It is thus unsurprising that, until the rash of decisions requiring open removal proceedings, courts repeatedly and almost unanimously rejected claims that the First Amendment mandates public access to administrative operations.³⁰

Moreover, even were the right-of-access doctrine extended beyond its current confines, there would still be no basis for concluding that the First Amendment requires open immigration hearings for special interest detainees. Under *Richmond Newspapers* and its progeny, the public has a right of access only if (1) “the place and process have historically been open” and (2) public access would “pla[y] a significant positive role in the functioning of the particular process in question.”³¹ Contrary to the decisions in

²⁸ See *Richmond Newspapers*, 448 U.S. at 565-73 (plurality opinion); see also *infra* at 17.

²⁹ See, e.g., Note, *Open Meeting Statutes: The Press Fights for the “Right to Know,”* 75 Harv. L. Rev. 1199, 1199-1200 & n. 27, 1203-04 (1962) (explaining that, at common law, there was no right of public access to executive or legislative proceedings); *Capital Cities Media, Inc. v. Chester*, 797 F.2d 1164, 1169-70 (3rd Cir. 1986) (noting James Madison’s observation that “[t]here never was any legislative assembly without a discretionary power of concealing important transactions” and Thomas Jefferson’s view that “executive proceedings,” with limited exceptions, “should remain known to their executive functionary only, . . . [who] must be the sole judge of which of them the public interests will permit publication”) (internal quotation marks and citations omitted); The Federalist No. 70, at 472 (Alexander Hamilton) (J. Cooke ed. 1961) (identifying “secrecy” as a principal virtue of the unitary executive”).

³⁰ See, e.g., *Houchins*, 438 U.S. at 13; *Los Angeles Police Dep’t v. United Reporting Publ’g Corp.*, 528 U.S. 32 (1999) (arrest records); *United States v. Miami University*, 294 F.3d 797, 824 (6th Cir. 2002) (proceedings of university’s student disciplinary proceeding); *Capital Cities Media*, 797 F.2d at 1171 (records of state environmental agency); *ACLU v. Mississippi*, 911 F.2d 1066, 1071-72 (5th Cir. 1990) (records of state commission); *Calder v. IRS*, 890 F.2d 781, 783-84 (5th Cir. 1989) (IRS records). But see *Society of Professional Journalists v. Secretary of Labor*, 616 F. Supp. 569 (D. Utah 1985), *vacated as moot*, 832 F. 2d 1180 (10th Cir. 1987).

³¹ *Press Enterprise Co. v. Superior Court*, 478 U.S. 1, 8 (1986).

Detroit Free Press and *North Jersey Media Group*, neither prong can be satisfied in the context of the hearings in question.

As for the first prong, there has been only limited experience with open deportation hearings. According to the Sixth Circuit, since 1965 “INS regulations explicitly required deportation proceedings to be presumptively open.”³² By no stretch of the imagination can less than 40 years be considered a historical tradition comparable to the one for open criminal proceedings. Moreover, despite the court’s mystifying conclusion that the Executive branch has lacked discretion to close deportation hearings during this period,³³ the regulations are unmistakably clear that immigration judges, who are members of the Executive branch, may close deportation hearings “[f]or the purpose of protecting witnesses, parties, or the public interest.”³⁴ Indeed, actual practice confirms that deportation proceedings have not been “historically . . . open.”³⁵ Such hearings have most often been held in prisons, private homes, and other locations not freely open to the press.³⁶ Even today, the government holds thousands of deportation hearings in prisons

³² *Detroit Free Press* at *19 (citing 8 C.F.R. § 3.27).

³³ *See id.* (“[T]he Government contends . . . that Congress . . . gave them discretion to open or close deportation hearings. We find the Government’s reading unpersuasive.”).

³⁴ This provision has been substantially unchanged since 1964. *See* 8 C.F.R. 242.16 (1964).

³⁵ *Press Enterprise Co.*, 478 U.S. at 8.

³⁶ *See* Rule 34, Dep’t of Commerce & Labor, Bureau of Immigration and Naturalization, Immigration Laws and Regulations of July 1, 1907, at 58 (1908) (deportation for institutionalized alien required to be held in institution); *United States ex rel. Ciccerelli v. Curran*, 12 F.2d 394, 396 (2d Cir. 1926) (rejecting due process challenge to deportation hearing held in prison); J. Clark, *Deportation of Aliens from the United States to Europe* 363 (1931) (“If the alien is located in a county jail, hospital, or prison or at his own home, he may be given the [deportation] hearing where he is, or at the convenience of the inspector may be taken elsewhere.”)

every year.³⁷ Finally, in a variety of instances, deportation hearings are closed either automatically or at the option of the detainee.³⁸

Despite this evidence that open deportation hearings have not been the norm since the time “ ‘when our organic laws were adopted,’ ”³⁹ the Sixth Circuit discovered a rationale for a First Amendment right of access.⁴⁰ Relying solely on a concurring opinion by Justice Brennan, the court held that a “brief” historical tradition could suffice “where the beneficial effects to that process are overwhelming and uncontradicted.”⁴¹ The court, however, cited no majority opinion for this untenable position, which effectively eliminates the “experience” prong of the constitutional analysis and reduces the inquiry to whether public hearings play a sufficiently positive role in the process. Under the Sixth Circuit’s view, the right of access can be extended as long as a court

³⁷ See H.R. Rep. No. 104-469, pt. I, at 124 (1996); see *Houchins*, 438 U.S. at 12-16.

³⁸ For example, immigration proceedings (including removal hearings) involving an abused child must be closed, see 8 C.F.R. 3.27(c), immigration proceedings (including removal hearings) involving an abused alien spouse must be closed unless the spouse consents to openness, see *id.*, and asylum proceedings may be closed at the alien’s request, see *id.* 240.11(c)(3)(i), even though, conceivably, the government might prefer open asylum hearings to help expose fraudulent claims of asylum (perhaps even by potential terrorists). Interestingly, it does not appear that the press is clamoring to open these hearings, the closing of which has no benefits for (but may have costs to) national security.

³⁹ *Richmond Newspapers*, 448 U.S. at 569.

⁴⁰ The court also suggested it is relevant that, from 1882 until 1964, immigration statutes did not *require* hearings to be closed. See *Detroit Free Press* at *19. But the constitutional test is not whether Congress statutorily mandated closed hearings. Rather, the question is whether “the place and process have historically been open.” *Press Enterprise Co.*, 478 U.S. at 8 (1986). And as explained above, that certainly is not the case.

⁴¹ *Detroit Free Press* at *19 (citing *Richmond Newspapers*, 448 U.S. at 589 (Brennan, J., concurring)).

concludes that the “beneficial effects” (as determined by a court) warrant it. In short, the right exists if a court wants it to exist.

Even were the “experience” prong so truncated, the second prong of the *Richmond Newspapers* analysis alone would defeat the proposed constitutional right. It is manifest that public access does not play a significant positive role in deportation hearings—let alone produce the “overwhelming and uncontradicted” beneficial effects that the Sixth Circuit required in light of the brevity of the open-hearing tradition. According to that court, public access bears five benefits. Yet four of these—“public access acts as a check on the actions of the Executive by assuring that proceedings are conducted fairly and properly”; “openness ensures that government does its job properly, that it does not make mistakes”; “openness enhances the perception of integrity and fairness”; and “public access helps ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government”⁴²—are generic advantages of openness that apply equally to almost all government proceedings. Were these benefits sufficient to require public access, then virtually all executive, legislative, and judicial functions (including, perhaps, judges’ own deliberations) would have to be open. Perhaps recognizing this inevitable consequence, Justice Brennan—in the very opinion on which *Detroit Free Press* relied—concluded that “the value of access must be measured in specifics” and that “[a]nalysis is not advanced by rhetorical statements that all information bears upon public issues.”⁴³

⁴² *Detroit Free Press* at *21-22.

⁴³ *Richmond Newspapers*, 448 U.S. at 589 (Brennan, J., concurring).

The Sixth Circuit's only other alleged benefit is even less compelling, if not downright troubling. As the court put it: "[A]fter the devastation of September 11 and the massive investigation that followed, the cathartic effect of open deportations cannot be overstated. They serve a therapeutic purpose as outlets for community concern, hostility, and emotions."⁴⁴ This is unsubstantiated psychobabble.⁴⁵ Without logic (or expertise in psychology) the court has let a constitutional inquiry turn on its own unverifiable assessment of whether open hearings function as therapy for an entire country. Unquestionably, such "analysis" should have no place in First Amendment jurisprudence. On its face, it is sheer speculation; and at its core, it appears no more principled than one's own policy preferences. For those who would like the government to be more protective of alleged individual rights, open hearings may in fact have a cathartic effect; but for those who would prefer the government to be more responsive to national security concerns, the idea of public hearings for associates of al Qaeda or other terrorist organizations may seem startling, and maybe even terrifying.

Nor does comparison to criminal processes satisfy this prong, as the court in *North Jersey Media Group* suggested.⁴⁶ In contrast to criminal trials, deportation hearings do not serve the public purpose of retribution and are not a means of punishing

⁴⁴ *Detroit Free Press* at *22 (quoting *Richmond Newspapers*, 448 U.S. at 569 (internal quotation marks omitted)).

⁴⁵ Whereas *Richmond Newspapers* used similar language, it did so only in the context of explaining why there was 1000 years of history supporting open criminal hearings. See *Richmond Newspapers*, 448 U.S. at 569. *Richmond Newspapers* did not suggest that a court's psychoanalysis of the country could independently justify a constitutional requirement of open hearings in another context.

⁴⁶ *North Jersey Media Group*, 205 F.Supp.2d at 301.

those who have taken actions against the public.⁴⁷ Their results are not decided by juries, a cross-section of the public,⁴⁸ and do not operate as a mechanism for deterring everyone in the public. Inherent in the political branches' power over foreign affairs⁴⁹—a domain which necessarily cannot be fully exposed to the public—deportation hearings are intrinsically not a public process, and there is thus no valid basis for extending the constitutional requirement of open access to such proceedings. Thus, neither tradition nor logic dictates that removal hearings must, as a First Amendment matter, remain open to the public.⁵⁰

B. The Due Process Clause Does Not Guarantee Open Removal Hearings For Special Interest Cases.

The Due Process Clause does not lend the ABA resolution any greater support. Certainly, the Constitution requires process, but only such process as is due, and this varies with context, the nature of the proceeding, the decision to be made, and the participants involved.⁵¹ In particular, it has long been accepted that the dictates of the

⁴⁷ See *American-Arab Anti-Discrimination Comm.*, 525 U.S. at 491.

⁴⁸ See *Carlson*, 342 U.S. at 537.

⁴⁹ See *United States ex rel. Knauff*, 338 U.S. at 542.

⁵⁰ Because there is no First Amendment interest in open removal hearings, there is no need to address whether the government's directive on "special interest" cases survives strict scrutiny.

⁵¹ See, e.g., *Parham v. J.R.*, 442 U.S. 584, 608 & n.16 (1979) (The "due process clause is flexible and calls for such procedural protections as the particular situation demands"). This point is also made in the only decision the ABA resolution cites to support its understanding of Due Process, *Fitzgerald v. Hampton*, 467 F.2d 755 (1972). That Court did indeed hold that the Due Process Clause required an administrative agency to hold an open termination proceeding. *Id.* at 766. That the recommending committee had to dig back to 1972 for support is instructive. To the extent *Fitzgerald* even remains good law in the face of the more recent Supreme Court decisions discussed *infra*, which establish a different understanding of the Due Process Clause's application to administrative

Due Process Clause vary from administrative proceedings to judicial proceedings; differ for aliens and citizens; and must be applied with judicious deference to the Executive's core constitutional powers over immigration, foreign affairs, and national security. It is thus unsurprising that, as explained above, there is no well-established tradition of open removal hearings.

First, the Due Process Clause has never been understood to export the full trappings of judicial process into administrative proceedings, such as immigration hearings, which fall entirely within the auspices of an administrative agency.⁵² Rather, the Supreme Court has made clear that precisely the opposite is true.⁵³ Accordingly, the procedures used by different administrative bodies vary widely, ranging from the familiar trial format to a variety of informal and perfunctory proceedings. And importantly, unlike courts, administrative bodies frequently and routinely hold closed hearings. For instance, the Social Security Administration resolves over 400,000 claims each year in hearings presumptively closed to everyone except the parties.⁵⁴ Administrative

hearings, that case in no way implicated the additional exigencies imposed by the involvement of immigration law and national security concerns.

⁵² Even with respect to judicial proceedings, the Due Process Clause does not prescribe the procedure to be followed. *See, e.g., Nelson v. Adams USA, Inc.*, 529 U.S. 460, 465 (2000) (Federal Rules of Civil Procedure “further” the guarantee of due process, but are not mandated by it); *accord Hansberry v. Lee*, 311 U.S. 32, 42 (1940) (the Due Process Clause of the Fourteenth Amendment does not compel adoption of the Federal Rules of Civil Procedure); *Hurtado v. California*, 110 U.S. 516, 521-22 (1884) (the Due Process Clause of the Fourteenth Amendment does not prescribe “a particular mode of procedure in judicial proceedings”).

⁵³ *Parham*, 442 U.S. 584, 607-08 (administrative proceeding need not even conduct a “formal or quasi-formal hearing” because the “judicial model for factfinding” does not apply). Additionally, for example, administrative officers, unlike judicial officers, frequently play both an investigative and an adjudicative role. *Compare In re Murchison*, 349 U.S. 133 (1955), *with Withrow v Larkin*, 421 U.S. 35, 52-55 (1975).

⁵⁴ *See* 20 C.F.R. § 404.944; 20 C.F.R. § 416.1444.

disablement hearings, which deprive an individual of a protected property interest, are also frequently presumptively closed.⁵⁵ The Code of Federal Regulations is replete with similar examples of presumptively or potentially closed hearings.⁵⁶ And closed administrative proceedings have repeatedly gained judicial sanction in the face of due process challenges.⁵⁷

Second, the Due Process Clause distinguishes between aliens and citizens.

Although a resident alien may invoke the Due Process Clause,⁵⁸ in a case such as this one “the role of the judiciary is limited to determining whether the procedures meet the essential standard of fairness under the due process clause and does not extend to

⁵⁵ See, e.g., 12 C.F.R. § 19.199 (Office of Comptroller of Currency); 12 C.F.R. § 263.97 (Federal Reserve Board); 12 C.F.R. § 513.7(b) (Office of Thrift Supervision); 12 C.F.R. § 623.7(b) (Farm Credit Administration); 12 C.F.R. § 1780.75(a)(i) (Office of Federal Housing Enterprise Oversight).

⁵⁶ Nor are closed hearings unique to administrative proceedings. Grand juries, for instance, operate entirely behind closed doors, and the Due Process Clause does not demand otherwise. *In re Grand Jury Witness*, 835 F.2d 437, 441 (2d Cir. 1987). Petitions for search warrants and other law enforcement are also frequently made under seal, as are many civil judicial proceedings, upon good cause shown. Such examples further demonstrate the flexibility of the requirements of due process.

⁵⁷ See, e.g., *Prebble v. Brodrick*, 535 F.2d 605, 616 (10th Cir. 1976) (closed dismissal hearing comported with due process); *Dougherty v. Walker*, 349 F. Supp. 629, 646 (W.D. Mo. 1972) (same, noting, “[t]he purpose of a hearing in cases such as this one is not to gain publicity but to determine the facts and arrive at the truth. There was no provision in the law or in the University's regulation requiring the granting of an open hearing and the failure to grant such does not constitute the denial of due process”).

Contrary to the views of the district court in *North Jersey Media Group, the Japanese Immigrant Case*, 189 U.S. 86, 101 (1903), is inapposite. That case simply stands for the unremarkable proposition that, for those aliens who enter the country legally and begin to establish roots, the Due Process Clause requires a hearing. It lends no weight to the theory that this hearing must be open.

⁵⁸ See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

imposing procedures that merely displace congressional choices of policy.”⁵⁹ Never has the Supreme Court held that “fairness” mandates removal hearings to be open. And as the Third Circuit has explained, an alien’s procedural entitlements in such a context are limited:

An alien: (1) is entitled to a factfinding based on a record produced before the decisionmaker and disclosed to him or her; (2) must be allowed to make arguments on his or her own behalf; and (3) has the right to an individualized determination of his or her interests.⁶⁰

Third, the judicial branch should not undermine the political branches’ core constitutional powers through an expansive interpretation of the Due Process Clause. The matter at hand implicates no less than three such powers: immigration, foreign policy, and national security. Indeed, “ ‘[t]he power to expel or exclude aliens’ ” is “ ‘a fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control.’ ”⁶¹ Congress’s broad authority to regulate and the Executive’s ability to implement those regulations in this area are unquestioned.⁶² Fully respecting these powers, courts have been careful to give due deference to the

⁵⁹ *Landon*, 459 U.S. at 34-35; *see also Jay v. Boyd*, 351 U.S. 345, 357-58 (1954) (“[S]uspension of deportation is not given to deportable aliens as a right, but, by congressional direction, it is dispensed according to the unfettered discretion of the Attorney General. In the face of such a combination of factors we are constrained to construe the statute as permitting decisions based upon matters outside the administrative record, at least when such action would be reasonable.”).

⁶⁰ *Abdulai v. Ashcroft*, 239 F.3d 542, 549 (3d Cir. 2001).

⁶¹ *Fiallo*, 430 U.S. at 792 (quoting *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953)).

⁶² *See Kleindinst v. Mandel*, 408 U.S. 753, 765-66 (1972) (citing cases for the proposition that Congress’s authority to exclude groups of aliens is unfettered).

Executive's actions,⁶³ which implement Congress's mandates and safeguard the nation.⁶⁴

Courts afford the same deference to the Executive when it acts with regard to foreign policy or in the national defense.⁶⁵

This is not the time to curtail these powers and encroach on the political branches' ability to defend the nation. Because of the sensitivity of the government's ongoing investigation into terrorism, the potential for disruption of a vitally important government effort, and the lack of a historical pedigree for mandatory open removal hearings, the courts ought not extend the Due Process Clause so that it requires such hearings.

III. CONSTRUCTING A MORE BALANCED POLICY APPROACH.

The foregoing sections have developed two relatively simple points: (1) the ABA's policy is *too broad*, and (2) the Constitution does not *require* open removal hearings. Neither section, however, answers the ultimate question of what the government's policy *should be*. To that question we now turn.

Although their constitutional analyses were erroneous, both the Sixth Circuit and the District of New Jersey articulated an eminently sound principle of policy: open proceedings generally serve as an antidote to unhealthy and unsustainable concentrations

⁶³ See, e.g., *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001); *Mathews v. Diaz*, 426 U.S. 67, 82 (1976).

⁶⁴ *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950) (the right to exclude aliens "stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation").

⁶⁵ *Verdugo-Urquidez*, 494 U.S. at 287 ("Indeed, as Justice Harlan put it, 'the question of which specific safeguards . . . are appropriately to be applied in a particular context . . . can be reduced to the issue of what process is 'due' a defendant in the particular circumstances of a particular case.' [*Ried v. Covert*, 354 U.S. 175 (1957)].").

of governmental power.⁶⁶ Indeed, transparency and a free flow of information enable the people and the press to operate as a check on potential government overreaching. This is not to say, however, that upon a sound rationale the government may not elect secrecy. As discussed above, it certainly may. Rather, the point is that, as a general matter, a preference for openness is a sound policy.

The difficulty lies in striking the appropriate balance between competing concerns. That balance must take into account both the value of openness and the offsetting government interests in pursuing legitimate law-enforcement and intelligence-gathering initiatives. In addition, a careful analysis must consider the magnitude (as well as the likelihood) of the potential cost—the downside—of erring in setting the balance. It may be that in a criminal case it is better that one hundred guilty men go free than one innocent man be incarcerated, even if the risk of ununderincarceration is future recidivism. But what if the risk is the wholesale terror and slaughter that al Qaeda and other terrorist organizations have promised? What if the potential downside, however improbable it may be, is the release of small pox or a dirty bomb?⁶⁷ The point is that the cost-benefit

⁶⁶ See, e.g., ALEXIS DE TOCQUEVILLE, *Democracy in America* at 58-59, 270-76 (HarperPerennial 1988, J.P. Mayer, ed.). (“But in America the sovereignty of the people is neither hidden nor sterile as with some other nations; mores recognize it, and the laws proclaim it; it spreads with freedom and attains unimpeded into ultimate consequence”; noting also how the institution of the jury educates and involves ordinary citizens in the function and administration of government).

⁶⁷ The administration has repeatedly raised the specter of terrorist groups obtaining weapons of mass destruction. See, e.g., Jules Witcover, *Why Now? Still Waiting for Answer*, Baltimore Sun (Sept. 13, 2002); Bradley Graham, *Cruise Missile Threat Grows, Rumsfeld Says*, The Washington Post (Aug. 18, 2002); James Risen & Philip Shenon, *Traces of Terror: The Investigation; U.S. Says it Halted Al Qaeda Plot to Use Radioactive Bomb*, New York Times (June 11, 2002).

analysis that must drive policy decisions such as this shifts dramatically towards the government's position when viewed in light of the global war against terrorism.

Also favoring the government's closure decision is the fact that bits of apparently innocuous information, when coupled or aggregated into a "mosaic" can amount to sensitive national security information.⁶⁸ Under the current system, it is impossible for a single judge—faced with one piece of seemingly harmless information—to know whether it fits into such a mosaic and thus whether its disclosure would undermine vital national interests. In the Administration's opinion, no individual judge can have before him the scope of information required to understand the need to close many individual hearings.⁶⁹ Of course, absent the information possessed by the government, no one can evaluate the legitimacy of the government's position.

One possible solution, for the future, is to create a panel of judges to review all the "special interest" cases and, with due deference to the Executive's expertise, to evaluate the entire "mosaic" upon seeing the government's full presentation. These proceedings, of course, would be closed to the public, but if the panel determines that an individual case does not pose a risk to national interests, then the detainee's removal proceedings would be open. This approach appears to serve the competing objectives of policing the Executive and preserving law-enforcement and intelligence-gathering initiatives. On the one hand, there would be an impartial arbiter empowered to review

⁶⁸ *See* 67 Fed. Reg. 36799.

⁶⁹ *See id.*

the Executive's closure decisions. And yet, on the other, this review itself would be both confidential and properly deferential to the Executive's judgments.⁷⁰

That said, even if such a system would produce long-term benefits, in the short run the Administration faces a more immediate challenge. Given the exigency of the circumstances and the grave, dramatic downside risk, it is difficult to criticize the government for the approach it has taken thus far. Now is not the time to curtail the Executive's prerogatives.

CONCLUSION

Since September 11, 2001, an oft-heard refrain has been that if the government curtails individual liberties, the terrorists will have won. The ABA, unfortunately, has taken this position at least one step too far. Although the government should not trample on well-established liberties, now is not the time to forge an unprecedented expansion of those rights. In light of the national security concerns that are potentially at stake, the ABA's recommendation should be rejected.

⁷⁰ In its recently promulgated interim rules governing the issuance of protective orders and the submission of evidence under seal in immigration cases, the government proposes that it be held to establish that the requested order pertains to a "substantial and important governmental interest," and that there exists a "substantial likelihood that disclosure or dissemination will harm the law enforcement or national security interests of the United States." 67 Fed. Reg. 36799, 36800. A similar standard might be adopted by the reviewer of the request for broad closure of removal proceedings.



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