How the Government's Response to 9/11 May Close the Doors to Open Government

DAVID A. SCHULZ

From its founding, the United States has recognized that "[a]n informed public is the most potent of all restraints upon misgovernment."[1] This principle was reinforced in the aftermath of Watergate through a broad strengthening of the public's right to inspect government documents under the Freedom of Information Act (FOIA)[2] and the Supreme Court's subsequent recognition of an affirmative, enforceable constitutional right of access to government proceedings.[3] As Chief Justice Burger explained, the right of access is critical in a democracy: "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing."[4]

The importance of openness as a safeguard against governmental abuse is reaffirmed by the short history of secrecy imposed after the events of September 11, 2001. Errors are inevitable in such a broad and concerted effort to sweep up sources of information as pursued by the Department of Justice after 9/11, and some mistakes plainly were made. In one widely reported case, a Muslim male, Abdallah Higazy, was detained and held for several months after a guard at the hotel next to the World Trade Center told officials that an aircraft radio was found in Higazy's room on 9/11.[5] Although Higazy apparently admitted at one point during his extensive interrrogation that he owned the radio, eventually the hotel guard was found to have lied and Higazy was completely exonerated.

Diligent reporters have uncovered other troubling examples among the government's secret detentions.[6] For example, Boston cab driver Nabil Almarabh was taken into custody a week after 9/11 but did not appear before a judge until May 2002, nearly eight months later.[7] After holding him for a total of eleven months, the government finally conceded it had no evidence to link Almarabh to terrorism.[8] In another case, Hady Hassan Omar was detained in Arkansas the day after the attacks and held for seventy-three days, simply because he bought a one-way airline ticket on the same Kinko's computer that had been used by one of the 9/11 hijackers.[9]

As troubling as the concerns for civil liberties that such detentions present are the serious long-term implications for open government suggested by the Department of Justice's single-minded effort to control all information about its actions. If embraced by the courts, the theories that the government has advanced to defend the secrecy of the 9/11 response will permanently restrict the public's right to know.

This article discusses actions taken by the Department of Justice in the wake of 9/11, including the closure of deportation hearings and imposition of new restrictions on access to records under FOIA. It also examines the troubling new legal theories advanced to justify the Department's focused control, and suggests that these theories, if accepted by the courts, may wreak irreversible havoc with our system of open government.

Information Clampdown After 9/11

New awareness of our many vulnerabilities flashed through government at every level like a bolt of lighting after the 9/11 attacks. Some agencies temporarily closed their websites, and every disclosure was assessed for its possible value to a terrorist. The Federal Aviation Administration, for example, removed from public view on its website and withdrew from libraries the reports of its enforcement actions. The Federal Energy Regulatory Commission similarly removed specifications for energy facilities, the U.S. Environmental Protection Agency removed reports concerning the risk and prevention of chemical accidents, and the Centers for Disease Control removed a report on security at chemical plants.[10] The Bureau of Transportation Statistics took down transportation atlas databases long used by environmentalists; and EPA officials, in the name of national security, even asked an environmental news service not to post the resumes of the agency's political appointees.[11]

At an October 2001 session for staff in the various federal agencies, the Department of Justice encouraged the use of a statutory exception in FOIA that permits withholding of "internal personnel rules and practices"[12] in order to keep confidential any information that revealed "vulnerabilities." A few months later, the White House chief of staff ordered agencies to withhold information that could be exploited by terrorists, even when the "national security" exemption in FOIA did not directly apply.[13]

Steps taken in the aftermath of 9/11 by the Attorney General and the Department of Justice reflect an effort to maintain total secrecy over all aspects of a massive terrorism investigation. Soon after the attack, the government invoked the immigration laws to detain and question an estimated 1,200 people, mostly Muslim men. Detentions were justified by the initiation of immigration proceedings for overstaying visas or other immigration violations.

Unlike typical deportation proceedings, however, the aliens rounded up by the FBI after 9/11 were brought before immigration judges in secret hearings closed to the view of the public and the press. Many of the detainees were held for weeks or months before being deported. Several may still be in government custody—some eighteen months later. None has been accused of any crime related to the 9/11 attacks.[14] According to a *Los Angeles Times* article published in September 2002, administration officials readily admitted that they used the immigration laws aggressively, "and they are proud of it."[15]

In addition to the hundreds of aliens pulled in for questioning on immigra-

David A. Schulz (david.schulz@cliffordchance.com) heads the media law practice group at Clifford Chance US LLP in New York. Robyn Aronson and Sherrell E. Evans, associates at the firm, assisted with the preparation of this article. The opinions in this article are solely those of the author and do not necessarily reflect the viewpoints of Clifford Chance or its clients.

tion violations, a number of individuals, very few of whom were charged with criminal conduct, were detained as "material witnesses" in the terrorism investigation. At least two U.S. citizens were quietly detained as "enemy combatants" and denied access to civilian courts.[16]

The Department of Justice dedicated itself to maintaining complete control over all information relating to its terrorism investigation. Perceiving this control to be threatened by the prevailing legal standards on public access to information, the Department developed a legal strategy to rewrite those standards.

Keeping the Public Out of Deportation Hearings

Guidelines issued by the Attorney General have long mandated that deportation hearings conducted by the Immigration and Naturalization Service (INS) be open to the public in most cases.[17] The guidelines permit any 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 sealing the deportation hearings of the hundreds of aliens rounded up after 9/11. On September 21, 2002, the chief immigration judge issued a memorandum imposing specific new procedures for any deportation case that the Attorney General designates as a "special interest" case. These new procedures, which took immediate effect, required hearings in all "special interest" cases to be closed, even to family members, and the existence of the proceeding itself kept secret. There could be no public docket or release of any information, even to confirm or deny the existence of a proceeding.[18]

The INS directive became the subject of two legal challenges by the press, one in Michigan and the other in New Jersey. The two lawsuits framed the same issue: whether deportation hearings could be completely closed on the unilateral order of the Attorney General with no judicial review at any point.

In Michigan, the *Detroit Free Press* challenged its exclusion from a deportation hearing involving Rabih Haddad, who had been detained for overstaying his visa.[19] Haddad had attracted press attention because he was cofounder of an Islamic charity, the Global Relief Foundation, which had been accused by the Treasury Department of supporting terrorism. The foundation's assets were frozen in a separate action.[20] By the time the Detroit newspaper obtained enough information to bring an action for access to Haddad's deportation hearings, three secret hearings had already been held.

In the meantime, two New Jersey newspapers had been trying to obtain information about the large number of aliens who had been detained in New Jersey after 9/11. Unable to learn anything, the papers filed a facial challenge to the INS directive that required all "special interest" proceedings to be secret.[21]

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 out of context 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.[22]

In both Michigan and New Jersey, the newspapers argued that the blanket sealing of deportation hearings violated the First Amendment right of access to government proceedings, and urged that a case-by-case inquiry was required to close specific deportation hearings. The newspapers also challenged as ineffective the Attorney General's blanket approach to secrecy: it barred the public from attending hearings before immigration judges but left detainees free to disclose information to anyone they desired. In other words, if any detainees actually were connected to terrorist organizations, they were free to pass on information; only the public was kept in the dark.

Enforcing Public Right of Access

The constitutional right of access asserted by the newspapers was first recognized by the Supreme Court in 1980 in *Richmond Newspapers, Inc. v. Virginia*.[23] That case involved the public's right to attend a criminal trial that a Virginia judge had conducted in secret under a statute that gave him discretion to do so. The Constitution prevents the public's exclusion from criminal trials in most circumstances, 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."[24]

The Court found a qualified right of access to be implicit in the First Amendment's guarantees of free speech and press, just as the right of association, right of privacy, right to travel, and right to be presumed innocent are implicit in other provisions of the Bill of Rights.[25]

The qualified First Amendment right of access is now recognized to be an affirmative right, enforceable by any member of the public or the press against abuse and overreaching by those in power. On the basis of this qualified right, the Department of Justice initially lost both challenges to its secret INS hearings. Judge Edmunds in Detroit and Chief Judge Bissell in New Jersey separately concluded that the constitutional right of access does apply to INS deportation hearings. Although such hearings are conducted before an administrative judge, deportation hearings are conducted largely like trials. They are adversarial proceedings before an impartial fact finder, where the detainee has the right to counsel (although not at government expense), the right to a fair and open hearing, the right to cross-examine witnesses, the right to a statement of the reasons for any action taken, and the right to appeal. In Chief Judge Bissell's words, the qualified right of access extends to such hearings because there is "a history of openness in deportation proceedings" and because the "abundant similarities between these proceedings and judicial proceedings" mean that the "same functional goals" are served by recognizing a qualified right to attend deportation hearings.[26]

New Theories to Restrict the Right of Access

On appeal, the Attorney General espoused a new theory to limit severely the right of access. Adopting an extremely aggressive stance to defend the secrecy of the INS hearings, he argued that the structure of the Constitution itself precludes the recognition of any implicit right to attend proceedings conducted by the "political branches," i.e., the executive and legislative branches, as opposed to the judicial branch. In his view, the executive branch remains free to impose secrecy by fiat, with no consideration of the

First Amendment at all.

The Attorney General's analysis depicted Articles I and II of the Constitution as containing their own specific "access" requirements: Congress's obligation to publish a "regular Statement and Account" of all public monies and the president's constitutional obligation to report annually on "the State of the Union."[27] Because the Constitution contains these express "access" obligations in Articles I and II, the Attorney General contended that it must be read to foreclose any other constitutional access obligations. Instead, the regulation of access to the political branches was left by the Framers to the discretion of those branches, subject only to regulation through "democratic processes."[28] Because, the Attorney General argued, Congress has never passed a law mandating public administrative hearings, decisions to permit public access were solely a matter of "executive grace," something that the courts could not compel in the face of constitutional silence on the issue.[29]

This novel argument for unfettered executive power to impose secrecy presented some doctrinal difficulties for the Attorney General. First, it overlooked that the Supreme Court located the constitutional right of access in the First Amendment, which has long been construed to impose limits on all branches of government, not just the courts. Moreover, the right of access was deemed to be implicit in the First Amendment precisely because access to information is a necessary tool in the hands of voters if "democratic processes" are to function effectively in regulating the political branches. As the Supreme Court put it in *Globe Newspaper Co. v. Superior Court*, the First Amendment right of access 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."[30]

The Attorney General also supported his narrowing of the right of access to judicial proceedings by reference to the Sixth Amendment guarantee of a "public trial" and the absence of any express "access" provision in Article III itself. He argued that these aspects of the Constitution could support an inference that the Framers intended a public right only to attend judicial proceedings.[31]

The reasoning of the Supreme Court in recognizing the right of access, however, had nothing to do with "access" obligations—missing or present—in Articles I through III. Indeed, just one year before *Richmond Newspapers*, the Court specifically rejected the notion that the Sixth Amendment creates any public right of access at all, finding the "public trial" guarantee in the Sixth Amendment to be an individual right extended only to criminal defendants.[32] The First Amendment right stands on other grounds.

As an alternate argument, the Department of Justice claimed that administrative proceedings should never be subject to a right of access, even if the right extends beyond Article III courts. The Department argued that there was no "1,000-year tradition" of access to administrative proceedings like the tradition of access to criminal trials relied upon by the Supreme Court in *Richmond Newspapers*. It also argued that the Framers would never have contemplated public access to the operations of administrative agencies because the common law never recognized such a right and the ability to maintain secrecy was viewed as a virtue of the unitary executive created by the Constitution.[33]

The Department argued that there was no "1,000-year tradition" of access to administrative proceedings.

On the other hand, "the Framers, who envisioned a limited Federal Government, could not have anticipated the vast growth of the administrative state."[34] As the Supreme Court explained just last year, "formalized administrative adjudications were all but unheard of in the late 18th century and early 19th century."[35] In addition, the Supreme Court in other contexts has indicated that the "vast expansion" of administrative regulation through which the government now operates is possible under our constitutional system only by adherence to certain "basic principles," and these include an obligation for quasi-judicial administrative proceedings generally to be "fair and open."[36] The Court has described an open hearing as an "inexorable safeguard,"[37] and it has long been the "prevailing" rule that administrative hearings are typically open, "if not by statutory mandate, then by regulation or practice."[38] Over the past two decades, many courts have found that the qualified right of access extends to administrative proceedings, including deportation hearings.[39]

Rejecting the Limited View of the Constitutional Right

The Attorney General's novel theories did not fare well in the appellate courts. Although they reached different positions on the Attorney General's right to close deportation hearings, neither the Sixth Circuit nor the Third Circuit accepted the sweeping propositions that would permanently limit the right of access to judicial proceedings only. In reviewing the Michigan decision, the Sixth Circuit rejected the entire approach, declaring that "[t]he Executive Branch seeks to uproot people's lives, outside the public eye and behind a closed door. Democracies die behind closed doors."[40] The Sixth Circuit agreed with the district court that a qualified right of access is attached to the deportation hearing and, based on the standards announced in *Richmond Newspapers*, found no proper factual basis to close the Hadid hearing. A motion for reconsideration was denied.

The Third Circuit took a different view. It credited the Attorney General's theory about the constitutional limitation to the right of access as being "open to debate as a theoretical matter."[41] However, it felt constrained by prior Third Circuit precedent not to adopt such a radical departure on the scope of the right of access. Nonetheless, the Third Circuit disagreed with the Sixth Circuit and concluded that the Department of Justice had made a sufficient showing under the *Richmond Newspapers* test that the right of access does not extend to INS deportation hearings. It found insufficient evidence that these hearings were historically open and concluded that the government had presented substantial evidence that a presumption favoring open hearings could threaten national security. The

Third Circuit thus agreed that any public access to deportation hearings was a matter of executive grace: "[A]lthough there may be no judicial remedy for these closures, there is, as always, the powerful check of political accountability on Executive discretion."[42] The Third Circuit also denied reconsideration.

The frontal assault on the right of access in the INS cases is disturbing because it is largely unnecessary to win the confidentiality that the Department of Justice has sought. The First Amendment right of access is a qualified right and may be overcome when a compelling interest such as national security requires closure.[43] Whether the qualified right of access may be restricted in a given instance is guided by a consideration of four factors laid down in *Richmond Newspapers* and its progeny:

1. Whether an open proceeding is substantially likely to prejudice a transcendent value;
2. If so, whether any alternative exists to avoid that prejudice without limiting public access;
3. If not, whether the limitation of access is narrowed (in scope and time) to the minimum necessary; and
4. Whether the limitation of access effectively avoids the prejudice it is intended to address.[44]

This four-part test is satisfied by a particularized showing on a case-by-case basis that open proceedings pose a direct threat to a compelling interest.[45] Because national security interests are "compelling" and "transcendent," the four-part test is well suited to protect legitimate national security concerns without a wholesale removal of the right of access from all executive branch proceedings as the Attorney General urged.

Another concern exists regarding the national security arguments advanced to oppose a typical case-by-case approach for "special interest" deportation proceedings: if these arguments are sufficient to deny the existence of the right of access to all deportation proceedings, they could equally support a contention that no right of access exists to attend any proceeding, even criminal trials, that involves alleged terrorists.

Blocking FOIA Access

Beyond the challenge to the constitutional right of access, open government since 9/11 has been threatened by both executive and legislative restrictions on the statutory right of access under FOIA.[46]

The Department of Justice did not want to reveal the names of any detainees, the circumstances of their detention, or the nature of any charges that may have been filed. It produced only very limited data, such as the number of people arrested, and, on occasion, the place of birth, citizenship status, and date of detention of some of those held for immigration violations. However, freedom of information laws, both state and federal, presented a potential impediment to the Department's desire to maintain control over information about its roundup of Muslim immigrants. Thus, the Department created solutions to address this "problem."

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A month after 9/11, Attorney General Ashcroft sent a memorandum to the head of every federal agency and department, advising that the Department of Justice, as their lawyer, would defend any refusal to provide information under FOIA so long as there was any "sound legal basis" for the denial.[47] The Ashcroft memorandum replaced a presumption favoring disclosure that then-Attorney General Janet Reno had adopted in 1993. Under Reno, the Department would defend an agency's refusal to produce information only when the release of information could lead to "foreseeable harm."

Faced with the Department's refusal to provide information about the detainees, civil rights groups filed an FOIA request with the State of New Jersey, seeking the names of those being held in state and county jails as INS detainees. A New Jersey court initially ruled that the names must be disclosed under that state's freedom of information law. While the ruling was on appeal, however, the Department of Justice swung into action. The INS issued a new "interim regulation" barring detention facilities that hold immigration detainees under contract with the federal government from publicly disclosing the identity of, or any other information about, a detainee. The regulation was to have immediate effect and would apply to all pending requests for information, even requests subject to court proceedings at the time they were issued.[48]

Subsequently, a New Jersey appeals court reversed the order for disclosure of names. It held that the new Department of Justice regulation preempted the state freedom of information law, and rejected arguments that the regulation was beyond the authority of the INS commissioner and had been adopted improperly.[49]

FOIA requests were also sent to three agencies within the Department of Justice: the FBI, Office of Information Privacy, and INS. Invoking FOIA's Exemption 7, the Department rejected in each case requests for the names of those detained, the dates and locations of detentions, and the identities of the lawyers representing detainees. Exemption 7 allows the government to protect from disclosure information "compiled for law enforcement purposes" if disclosure could reasonably be expected to "interfere with enforcement proceedings," "constitute an unwarranted invasion of personal privacy," or "endanger the life or physical safety of any individual."[50]

The Department contended that disclosure of the names of INS detainees might deter them from cooperating in the ongoing investigation after they were released from custody. The Department also suggested, apparently without offering any evidence that any INS detainee actually had links to terrorism, that "terrorist organizations . . . may refuse to deal further with [the detainees]" or may threaten them and thereby eliminate "valuable sources of information."[51] Furthermore, it contended that releasing the names of detainees could reveal to terrorist organizations "the direction and progress of the investigations" and allow terrorist organizations to develop means to impede the investigation. The Department even suggested that public release of the names of people who had been detained "could allow terrorist organizations and others to interfere with the pending proceedings by creating false or misleading evidence."[52]

In asserting the right to withhold under Exception 7 the names of those detained, the Attorney General was once again breaking new ground. Just as Chief Justice Burger had traced the common law right of access to criminal trials back to the Middle Ages in *Richmond Newspapers*, the litigants in the FOIA case against the Department of Justice traced the public disclosure of the names of people arrested back to the abolition of the Star Chamber in 1641. From that point forward, secret arrests have been deemed unlawful because they lead to coerced confessions and other unreliable statements from detainees.[53] The Federalist Paper No. 84, in which Alexander Hamilton describes a secret detention as more vile than depriving a man of his life without due process,[54] documents the Founders' revulsion to secret arrests.

Another Loss in District Court

Once again, the Department's aggressive stance did not fare well in the district court. Judge Kessler of the U.S. District Court for the District of Columbia rejected many of the Department's claims, including

- the assertion that disclosure might deter cooperation because it assumed that terrorist organizations did not already know its members had been detained, something that was entirely "implausible" given the passage of time;
- the theory that disclosing names would permit terrorists to "map" the progress of the investigation because it again assumed the detainees were not communicating with their friends, a theory so sweeping, according to Judge Kessler, that it would turn the FOIA exemption into an open-ended grant of authority to withhold information; and
- the contention that disclosure of names would lead to the creation of false evidence or evidence tampering, a claim for which the government provided no factual or logical support.[55]

Judge Kessler also objected to government arguments that were based on the assumption that the hundreds of individuals rounded up did in fact have terrorist links when the government had presented no evidentiary basis for believing that any detainee had an actual connection to terrorism.[56]

Noting that secret arrests are "a concept odious to a democratic society,"[57] Judge Kessler ordered the release of basic identifying information about the detainees. She was unwilling to countenance a wholesale removal from public view of information that historically has been available, and felt compelled to reject the demand for secrecy when the government could not demonstrate how secrecy would advance its claimed objectives in any meaningful way:

> Difficult times such as these have always tested our fidelity to the core democratic values of openness, government accountability, and the rule of law. The Court fully understands and appreciates that the first priority of the executive branch in a time of crisis is to ensure the physical security of its citizens. By the same token, the first priority of the judicial branch must be to ensure that our Government always operates within the statutory and constitutional constraints which distinguish a democracy from a dictatorship.[58]

Judge Kessler also dealt with the government's arguments that the names of detainees should be withheld under FOIA exemptions intended to protect privacy and personal safety interests. Acknowledging that such interests might be present, the judge directed that detainees be required to notify the court and "opt out" of any affirmative request for public disclosure. Otherwise, Judge Kessler concluded, the public interest in knowing the names of the detainees would prevail. An appeal of the district court's order is pending.

The fundamental principle behind the federal FOIA is the public's right to know what its government is doing. In passing that Act, Congress recognized that access to government records is "critical to earning and keeping citizens' faith in their public institutions and to ensuring that those institutions operate within the bounds of the law."[59] While the Act allows information to be withheld when reasonably necessary to protect national security, the effort to interpret other exceptions broadly and the adoption of a presumption against disclosure whenever possible threaten to alter significantly the openness of government.

Congress Also Acts

Yet another effort to restrict access to information developed on a different front after 9/11. Through months of sometimes-heated debate, Congress wrangled over proposals in the Homeland Security Act (HSA) to limit the availability under FOIA of information provided to the new Homeland Security Department. A story about GAO documents found in the caves of Afghanistan became famous on Capitol Hill.[60] The focus of congressional debate on HSA centered on whether new FOIA limitations were actually needed, given not only existing authority to withhold information that might damage the national security, but also the protection afforded trade secret information and other commercially sensitive materials.[61]

Congress recognized that most of the country's critical infrastructure is in the hands of private business. Business also controls essential information about any potential infrastructure vulnerabilities. The drafters of HSA wanted to encourage businesses voluntarily to share this information with the new department, and they believed that the existing FOIA exemptions were not adequate to facilitate voluntary corporate disclosures. Rep. Tom Davis (R.-Va.) expressed this view:

> Just last year it was discovered that the widely used implementations of the simple network management protocol, a fundamental element of the Internet, contained vulnerabilities that could expose the Internet's infrastructure to attack. Many companies were reluctant to give the government information about these vulnerabilities, which were not yet mentioned in the general press, for fear that the vulnerability information would be forced to be disclosed once it was in the government's hands and this could create substantial risk to their customers and to the Internet and the U.S. economy.[62]

The alleged failure to provide sufficient protection to business information was the primary argument for creating a new exception to FOIA. The government could not do its job of protecting the country from terrorists, according to this rationale, if it did not receive the sort of information that businesses were reluctant to disclose.

Opponents countered that the proposed blanket exemption for business information voluntarily submitted to the new Department of Homeland Security was far too broad: it exempted so much information that it would create a safety net against public scrutiny of business practices. Senator Leahy urged that more secrecy would undermine rather than promote national security. In his view, "an overly-broad FOIA exemption would encourage government complicity with private firms to keep secret information about critical infrastructure vulnerabili-

ties, reduce the incentive to fix the problems and end up hurting rather than helping our national security."[63]

Opponents also urged that new FOIA limitations were not necessary because the law already protected such sensitive information:

> REP. SCHAKOWSKY: I . . . repeatedly have asked proponents of this exclusion, including the FBI and Department of Commerce, for even one single example of when a Federal agency has disclosed voluntarily submitted data against the express wishes of the industry that submitted that information. They could not name one case. Instead, we are told that FOIA rules just are not conducive to disclosure, that corporations are not comfortable releasing data needed to protect our country, even if we are at war. Is our new standard for deciding such fundamental questions of openness and accountability in our democracy how comfortable industry will be?[64]

During the debates, many in Congress believed that more protections against disclosure of infrastructure information might be needed, but viewed the initial exemption proposed in the HSA as providing too much room for abuse. As first proposed by the House, section 204 of the HSA would have protected from disclosure any "critical infrastructure information," as long as the information was being voluntarily produced and privacy was requested at the time the information was first furnished to the new department. Some were concerned that this approach would require the government to keep vast amounts of data secret, even information furnished orally and information that businesses routinely submit or make accessible to the government under a number of regulations.

Only minor refinements to the new FOIA exception were made, however, before the law was passed following the 2002 midterm elections. As enacted, HSA allows voluntarily submitted information to be used in criminal, regulatory, and congressional proceedings. However, such information can be used in a federal or state civil lawsuit by a third party only with the written consent of the party that submitted the information—an unlikely scenario. HSA makes one other significant change: it imposes criminal penalties on anyone who illegally discloses any information voluntarily provided to the department. With its penalties of imprisonment up to one year, fines, and dismissal from employment, HSA may someday be seen as the first step toward a more general "official secrets" law.

The Ultimate Impact?

The attacks on 9/11 had a direct and immediate impact on the openness of government. Almost as quickly as the nation's airspace was temporarily closed, government websites were temporarily shut down and scrutinized to remove information that might possibly be useful to terrorists. From removing information from public view to holding secret hearings outside the realm of the press and the public, security became the prime focus of government at every level.

The longer-term consequences for open government, however, will result less from these immediate reactions to the threat of al-Qaida terrorists than from parallel efforts to rewrite the terms of statutory and constitutional access rights. Such efforts will dramatically limit the scope of the public's right to know. Legislative and administrative actions threaten a significant rollback of FOIA, and the Department of Justice has urged the courts to limit severely the constitutional right of access to government proceedings. The Department has chosen not merely to use existing exemptions to restrict problematic data, but to change the ground rules by which information of all types is made available to the public.

Nine days after the terrorist attack, President Bush warned that the terrorists were targeting America's freedom: "[The terrorists] hate our freedoms: our freedom of religion, our freedom of speech, our freedom to vote and assemble and disagree with each other . . . freedom and fear are at war."[65] Unfortunately, as the brief history since 9/11 suggests, the freedom to gather and publish information about our government's actions may itself fall victim to the terrorist attack.

Endnotes

1. Grosjean v. Am. Press Co., 297 U.S. 233, 256 (1936).
2. Administrative Procedure Act, 5 U.S.C. § 552 (2002). The FOIA was significantly strengthened in 1974 over President Ford's veto.
3. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980).
4. *Id.* at 572.
5. *In re* Material Witness Warrant No. 38, Misc. No. 01–1750 (S.D.N.Y. Aug. 5, 2002).
6. A number of troubling detentions made in connection with the secret roundup of possible suspects are documented in Brief of Amici Curiae Washington Post Co. et al., Center for Nat'l Sec. Studies v. U.S. Dep't of Justice, 215 F. Supp. 2d 94 (D.C. Cir. 2002) (No. 02-5254).
7. Steve Fainaru, *Suspect Held 8 Months Without Seeing Judge*, WASH. POST, June 12, 2002, at A1.
8. Steve Fainaru, *September 11 Detainee Is Ordered Deported*, WASH. POST, Sept. 4, 2002, at A10.
9. Dan Eggen, *9/11 Detainee Files Lawsuit*, WASH. POST, Sept. 10, 2002, at A2.
10. The responses to 9/11 by various government agencies are documented in a white paper issued by the Reporters Committee for Freedom of the Press, *Homefront Confidential* (2d ed. 2002), *available at* www.rcfp.org.
11. *Administration Seeks FOIA Change, Tightens Info.*, LDRC MEDIALAWLETTER, Aug. 2002, at 58.
12. 5 U.S.C. § 552(b)(2).
13. *Homefront Confidential*, *supra* note 10, at 39–40.
14. *See* David G. Savage, *Critics Say Terror Probe Bends Immigrations Laws*, L.A. TIMES, Sept. 10, 2002, at 17.
15. *Id.*
16. *See, e.g.*, Hamdi v. Rumsfeld, 296 F.3d 278 (4th Cir. 2002), *rev'd*, 316 F.3d 450 (4th Cir. 2003); Padilla *ex rel.* Newman v. Bush, 233 F. Supp. 2d 564 (S.D.N.Y. 2002).
17. Before the Homeland Security Act was adopted late in 2002, the INS was within the Department of Justice, and guidelines promulgated by the Attorney General created a presumption of openness. *See* 8 C.F.R. § 242.16(a)(1965) ("Deportation hearings shall be open to the public"); 8 C.F.R. § 3.27 (2002).
18. The new procedures were mandated by the chief immigration judge pursuant to the regulatory authority to close proceedings "in the public interest." 8 C.F.R § 3.27 (2002).
19. *See* Detroit Free Press v. Ashcroft, 303 F.3d 681 (6th Cir. 2002), *reh'g denied by*, No. 02–1437, 2003 U.S. App. LEXIS 1278 (6th Cir. Jan. 22, 2003).
20. *See* Global Relief Found., Inc. v. O'Neill, 315 F.3d 748 (7th Cir. 2002) (rejecting claim that government lacked authority to freeze the foundation's assets).
21. *See* North Jersey Media Group, Inc. v. Ashcroft, 308 F. 3d 198 (3d Cir. 2002).
22. *Id.* at 203.
23. 448 U.S. 555 (1980).
24. *Id.* at 576–77.
25. *See id.* at 577 (Burger, C.J.) (the right of access is "assured by the amalgam of the First Amendment guarantees of speech and press" and their "affinity 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); *id.* at 583 (Stevens, J., concurring) ("an arbitrary interference with access to important information" abridges the First Amendment).
26. North Jersey Media Group, Inc. v. Ashcroft, 205 F. Supp. 2d 288 (D.N.J.

2002), *rev'd*, 308 F. 3d 198 (3d Cir. 2002).

27. Brief for Appellants at 21–22, *North Jersey Media Group, Inc.*, 308 F.3d at 198 (No. 02–2524).

28. *Id.* at 22.

29. *Id.* at 19–36.

30. 457 U.S. 596, 604 (1982) (citation omitted). *See also* Richmond Newspapers v. Virginia, 448 U.S. 555, 587 (1980) (Brennan, J., concurring) (right of access plays important structural role in our democracy); Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 516 (1984) [*Press-Enterprise I*] (Stevens, J., concurring) (the right of public access is not founded upon "the public trial provision" of the Sixth Amendment).

31. Brief for Appellants at 21, *North Jersey Media Group, Inc.*, 308 F.3d at 198 (No. 02–2524).

32. Gannett Co. v. DePasquale, 443 U.S. 368 (1979). *Press-Enterprise I*, 464 U.S. at 517 (Stevens, J., concurring) (the right of access furthers the "core purpose" of assuring free communication about the functioning of government); United States v. Criden, 675 F.2d 550 (3d Cir. 1982) (public has no rights of access under the Sixth Amendment).

33. Brief for Appellants at 22–23.

34. Fed. Maritime Comm'n v. S.C. State Ports Auth., 122 S. Ct. 1864, 1872 (2002).

35. *Id.*

36. Morgan v. United States, 304 U.S. 1, 14 (1938), *rev'd*, 313 U.S. 409 (1941).

37. *Id.*

38. Fitzgerald v. Hampton, 467 F.2d 755, 764 (D.C. Cir. 1972) (citing Report of the Attorney General's Committee on Administrative Procedure (1941)).

39. *See* Whiteland Woods v. Township of West Whitelands, 193 F.3d 177 (3d Cir. 1999) (planning commission hearing); Detroit Free Press v. Ashcroft, 195 F. Supp. 2d 937 (E.D. Mich. 2002) (deportation proceedings); Soc'y of Prof'l Journalists v. Sec'y of Labor, 616 F. Supp. 569 (D. Utah 1985) (Mine Safety & Health Administration investigative hearing), *vacated as moot*, 832 F.2d 1180 (10th Cir. 1987); Dep't of Health & Rehabilitative Servs. v. Tallahassee Democrat, Inc., 481 So. 2d 958 (Fla. Dist. Ct. App. 1986) (right to attend adoption hearing); Herald Co. v. Weisenberg, 452 N.E.2d 1190 (N.Y. 1983) (unemployment insurance hearings); Daily Gazette Co. v. Comm. on Legal Ethics, 326 S.E.2d 705 (W. Va. 1984) (attorney disciplinary proceeding); Courier J. v. Gash, 9 Media L. Rep. (BNA) 1735 (Ky. Cir. Ct. 1983) (coroner's inquest); *see also Fitzgerald*, 467 F.2d at 755 (due process right to attend Civil Service Commission removal hearing).

40. Detroit Free Press, Inc. v. Ashcroft, 303 F.3d 681, 683 (6th Cir. 2002).

41. North Jersey Media Group, Inc. v. Ashcroft, 308 F. 3d 198, 201 (3d Cir. 2002).

42. *Id.* at 220.

43. *E.g., Richmond Newspapers*, 448 U.S. at 581; *Globe Newspaper*, 457 U.S. at 606–07.

44. *E.g., Globe Newspaper*, 457 U.S. at 606–07; *Press-Enterprise I*, 464 U.S. at 510; Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 14 (1986) [*Press-Enterprise II*]; Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1070 (3d Cir. 1984); *Press-Enterprise I*, 464 U.S. at 510; United States v. Antar, 38 F.3d 1348, 1362–63 (3d Cir. 1994); *In re* Charlotte Observer, 882 F.2d 850, 854–55 (4th Cir. 1989). The "effectiveness" factor flows from the proposition that First Amendment rights will not be abridged for an idle purpose. *See* Neb. Press Ass'n v. Stuart, 427 U.S. 539 (1976) (rejecting a prior restraint, *inter alia*, as ineffective in accomplishing its intended goal); Smith v. Daily Mail Publ'g Co., 443 U.S. 97 (1979).

45. *Press-Enterprise II*, 478 U.S. at 15; *Press-Enterprise I*, 464 U.S. at 510; *Antar*, 38 F.3d at 1363. Closure decisions in extraordinary circumstances have been made on an entirely sealed record. *E.g., In re* Newark Morning Ledger Co., 260 F.3d 217, 223 (3d Cir. 2001) (when necessary, a court may "close a hearing to decide *whether* disclosure is warranted" (citing United States v. Smith, 123 F.3d 140, 150 (3d Cir. 1997))).

46. 5 U.S.C. § 552.

47. *See* 2001 FOIA Post No. 19 (Oct. 15, 2001), *available at* www.usdoj.gov/oip/foiapost/2001foiapost19.htm.

48. *See* 67 Fed. Reg. 19508 (Apr. 22, 2002) (codified at 8 C.F.R. § 236.6).

49. ACLU v. County of Hudson, No. A-4100-OIT5 (N.J. Super. Ct., App. Div. 2002), *available at* www.judiciary.state.nj.us/opinions/a4100–01.pdf.

50. 5 U.S.C. § 552(b)(7)(A), (C), (F).

51. Ctr. for Nat'l Sec. v. Dep't of Justice, 215 F. Supp. 2d 94, 101 (D.D.C 2002).

52. *Id.*

53. LEONARD W. LEVY, ORIGINS OF FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION 34 (2d ed. 1986).

54. Federalist No. 84, at 577 (Alexander Hamilton) (J. Cooke ed. 1961) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *136). *See generally* Brief for Amicus Curiae, The Washington Post Co., at 8–16, Ctr. for Nat'l Sec. v. Dep't of Justice, 215 F. Supp. 2d 94 (D.C. Cir. 2002) (No. 02–5254) (documenting the history of disclosure of the names of individuals detained and arrested).

55. *Ctr. for Nat'l Sec.*, 215 F. Supp 2d at 99–102.

56. *Id.* at 102.

57. *Id.* at 96 (quoting Morrow v. District of Columbia, 417 F.2d 728, 741–42 (D.C. Cir. 1969)).

58. *Id.*

59. *Id.*

60. *E.g.*, 148 CONG. REC. H5847 (daily ed. July 26, 2002) (statement of Rep. Davis).

61. 5 U.S.C. § 552(b)(1), (4).

62. 148 CONG. REC. H5847, *supra* note 60.

63. 147 CONG. REC. S9410 (daily ed. Sept. 26, 2002) (statement of Sen. Leahy).

64. 147 CONG. REC. H5846 (daily ed. July 26, 2002) (statement of Rep. Schakowsky).

65. George W. Bush, Address to a Joint Session of Congress and the American People (Sept. 20, 2001), *available at* www.whitehouse.gov/news/releases/2001/09/20010920-8.html.