

IMMIGRATION REMOVAL PROCEDURES IMPLEMENTED IN THE AFTERMATH OF THE SEPTEMBER 11, 2001 ATTACKS

HEARING

BEFORE THE

SUBCOMMITTEE ON IMMIGRATION,
BORDER SECURITY, AND CLAIMS

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED NINTH CONGRESS

FIRST SESSION

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IMMIGRATION REMOVAL PROCEDURES IMPLEMENTED IN THE AFTERMATH OF THE SEPTEMBER 11, 2001 ATTACKS

THURSDAY, JUNE 30, 2005

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON IMMIGRATION,
BORDER SECURITY, AND CLAIMS,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10:00 a.m., in Room 2141, Rayburn House Office Building, the Honorable John Hostettler (Chair of the Subcommittee) presiding.

Mr. HOSTETTLER. The Subcommittee will come to order.

Today, the Subcommittee on Immigration, Border Security, and Claims will review a series of procedural changes that were implemented after the September 11th attacks to address security concerns.

On September 11, 2001, terrorists hijacked and crashed four airplanes killing more than 2,900 people including all 246 people aboard the four airplanes.

The FBI immediately thereafter initiated a massive investigation called "PENTTBOM" into this coordinated terrorist attack. This investigation focused on identifying the terrorists who hijacked the airplanes and anyone who aided their efforts, as well as on preventing follow-up attacks. In the wake of those attacks, and in advance of the invasion of Iraq, the Justice Department and INS implemented procedures that they deemed necessary to protect the American people from alien terrorists. Some of those procedures have been criticized because of their effects on the aliens involved.

One procedure that has been so criticized is the closure of removal proceedings under the so-called "Creppy memo." While investigating the September 11th attacks, the Government became aware of numerous aliens who were present in this country in violation of immigration laws. A few of those aliens, as well as some aliens already in Government custody, were identified as "special interest" cases on the basis of law enforcement or intelligence information that "they might have connections with, or possess information pertaining to, terrorist activity." In a memo issued 10 days after the attacks, Chief Immigration Judge Michael Creppy issued guidance on the handling of special interest cases instructing immigration judges to close to the public hearings in such cases. That guidance, which was last followed in December 2002, has been su-

perseded by a regulation that allows Immigration Judges to issue protective orders for specific information on a case-by-case basis.

Some have been critical of the procedure used for charging aliens with immigration violations. Nine days after the September 11th attacks, the INS amended its regulations to extend the time period in which an arrested alien must be notified of the charges against him from 24 to 48 hours or a longer period where there is, "an emergency or other extraordinary circumstance." Critics have argued that this rule can result in an alien being detained indefinitely without charge. I note that since it was issued, the Department of Homeland Security has delineated what constitutes an emergency or other extraordinary circumstance.

Other immigration procedures that have been the subjects of criticism are the detention policies for certain asylum seekers. In the Matter of D-J, the Attorney General held that a Haitian who arrived by sea could be detained while his asylum case was pending. The goal of this policy was to deter other Haitians from undertaking, en masse, dangerous sea journeys to the United States. Under Operation Liberty Shield, announced by DHS in March 2003, asylum applicants from nations with a significant al Qaeda presence were detained until their claims could be adjudicated. DHS has reported that five aliens were detained under this program, four of them for less than 2 days, the fifth, subject to mandatory detention for a sexual assault conviction, for 5 months.

Alien advocates have criticized an INS regulation implemented in October of 2001, that allows for the staying of Immigration Judge release decisions pending, INS and now ICE, appeal of those decisions. Critics have complained that this provision undermines the authority of the Immigration Court and denies aliens due process. The Administration contends that this procedure is necessary to ensure that dangerous aliens remain in custody until the Board of Immigration Appeals can review the case. The Administration argues that, in essence, this procedure maintains the status quo pending appeal just like a Federal Court's stay of removal.

We will consider each of these procedures at today's hearing. It should be noted that none of the procedures relied on any of the provisions of the PATRIOT Act.

At this time, I now turn to the Ranking Member of the Full Committee, the gentleman from Michigan, for purposes of an opening statement.

Mr. CONYERS. Thank you, Mr. Chairman.

I appreciate that these hearings are being brought today to consider the measures that I have joined Mr. Berman and Mr. Delahunt in H.R. 1502. I think it is very important and appropriate that we do this.

Now, we began, of course, by recognizing that there is a great confusion about what is in the PATRIOT Act and what is outside of the PATRIOT Act, and that is because many of the activities were unilateral on the part of the executive branch or the Attorney General. And therefore, it was not clear to many people—and they weren't all citizens—many in the Congress. It just wasn't clear. And so although we want everyone to become more informed, the PATRIOT Act as a term has become a code for any post-September

11 policy that diminishes transparency or permits Government intrusion without adequate oversight.

So for us to consider the suggestions made here in 1502 to strike an appropriate balance between security needs and civil liberties is absolutely appropriate. Due process protections and civil liberties for noncitizens in the United States clearly enhance the effectiveness of our Nation's enforcement activity. I have been deeply involved in these proceedings since one of my constituents, a respected religious leader, was deported after being detained 18 months based on accusations of ties to a charitable organization that was suspected of being linked to terrorism. Rabih Haddad was deported during the night. Neither his attorney, or his family were notified about it. And at his immigration hearing, neither his family nor his Congressman could gain access to the proceedings that were taking place at that time. So I am very happy that we are here today to discuss the provisions in 1502. Thank you, Mr. Chairman.

Mr. HOSTETTLER. Chair now recognizes the gentleman from California for 5 minutes for purposes of an opening statement.

Mr. BERMAN. Thank you very much, Mr. Chairman.

And I do want to thank you for scheduling this hearing because I think it is an important one. You have put four policies on the table for discussion today, each of which was unilaterally adopted by the Administration in the aftermath of the terrorist attacks on September 11, 2001. Though we have heard from the Inspector General of the Department of Justice about his report on the results of one of these policies, we have not otherwise exercised oversight on these issues, and so I particularly appreciate the opportunity to do so today.

In the days and weeks after the September 11, 2001 terrorist attacks, the Department of Justice and the FBI were facing unprecedented challenges. Judging their actions in hindsight, we must consider that they were acting in a time of crisis, the magnitude of which our Nation had not experienced in decades. I think we should judge carefully and then focus our efforts on ensuring that the mistakes in judgment that occurred during that period are not repeated. Oversight is our duty, but once we have done the oversight, we should fix problems where we have identified that.

In that vein, Mr. Chairman, I have introduced a bill with Mr. Delahunt called the Civil Liberties Restoration Act. I appreciate you allowing his participation in this hearing. The first four sections of the Civil Liberties Restoration Act directly address the four policies that are the topic of our hearing today. The remaining eight sections of the bill cover issues from special registration and exercise of prosecutorial discretion, to data mining and production of business records. It is the place of Congress to make certain that our Government is given both adequate resources and the authority to protect the well-being of the American people, and clear legal standards and oversight that will protect their civil liberties. Where there is a balance to be had that does not diminish the ability to protect the country and at the same time conforms to our principles of open Government, then that balance should be struck.

The issues we address today in this hearing, I think for those purposes, the balance can be found in the Civil Liberties Restoration Act.

And the issue of closed immigration hearings, we will examine today. To take one example on those four issues, the result of the so-called Creppy memo that relayed the order of the Attorney General that all removal hearings for, "special interest," detainees be closed to the public, the press and the family; considering the timing of the memo, just 10 days after the country had been attacked, I understand the concern that led to the policy. If the goal was to protect information sensitive to our national security, who could disagree with the goal of that policy? The disagreement is not with the goal of the policy; it is with the way it was executed. In my mind, this is not a question of whether or not portions of hearings that involve sensitive national security information ought to be closed. The question is who ought to have the authority to close them, and whether that authority is exercised across the board or on a case-by-case basis. There is a balance to be struck here.

The same sort of across-the-board treatment is also the reason I take issue with the Administration's decision to deny whole classes of people individual bond hearings. The desire for balance, Mr. Chairman, was the starting point from which each provision of the Civil Liberties Restoration Act grew. These aren't partisan issues. I believe Mr. Rosenzweig will tell you that it is not everyday he is invited to testify by a Democrat. We appreciate him being here today. He is not alone in his judgment of our proposals. Two recent reports by the bipartisan Constitution Project came to the following conclusions relevant to our hearing today. There should be no blanket closure of deportation hearings. The Government should release the names of everyone it detains except under compelling circumstances as determined by a court. All persons in the United States are entitled to pretrial or prehearing release unless the Government demonstrates to the appropriate tribunal that the individual is likely to flee or poses a danger to the community.

These conclusions are entirely consistent with our proposals, and they were endorsed by David Keene of the American Conservative Union and Paul Weyrich of the Free Congress Research and Education Foundation. In previous oversight hearings, I have asked both Attorney General Gonzales and Deputy Attorney General Comey to address the issues of blanket closure of immigration hearings and delayed notice of charges. The Attorney General responded by saying that, without question, mistakes were made. And those are in quotes. Deputy Attorney General Comey said he never understood the need for the former, that is the blanket closure of immigration hearings, and called the latter a screw up. In some cases, they noted the policies were no longer in practice. Others, they willingly admitted were mistakes in judgment. Whether or not the policies are currently operative, the Committee has jurisdiction and should exercise oversight to be certain that the mistakes acknowledged will not be repeated. The way to ensure that, Mr. Chairman, is for Congress to speak on the issue.

Finally, Mr. Chairman, the Chair of the Full Committee recently expressed frustration and concern that the American public has become confused about what policies are part of the PATRIOT Act

and which are not. The Chairman is right, the name PATRIOT Act has become code for all of the Administration's immigration and law enforcement activities after September 11, 2001. I agree the public should be better informed and every effort should be made not to create further confusion. Even though most of the issues we will examine today are not part of the PATRIOT Act, they have a place in oversight of anti-terror powers. The fact that they were implemented without input from Congress furthers this case, and I appreciate the opportunity to examine them in this hearing. Thank you, Mr. Chairman.

Mr. HOSTETTLER. The Chair recognizes the gentlelady from Texas, Ranking Member of the Subcommittee for 5 minutes, for purposes of an opening statement.

Ms. JACKSON LEE. Thank you very much, Mr. Chairman.

This is the Judiciary Committee that I know and love because this is an important hearing, and I congratulate the Chairman and the Chairman of the Full Committee and the Ranking Member of the Full Committee and Mr. Berman and Mr. Delahunt. Their legislation, I am an original cosponsor of, and I congratulate them for moving forward on these issues. I saw the need for this, as well, as we began to look at comprehensive immigration reform and, in particular, the Save America Comprehensive Immigration bill, which we have authored, I have authored, deals with the need for an individual case-by-case bond determination in immigration cases. And it prohibits blanket denials of bond. These are some of the issues we are now facing along with some of the provisions in the PATRIOT Act. I have said many times that immigration does not equate to terrorism, but I understand it was difficult to maintain that distinction during the aftermath of the September 11 attacks.

The purpose of this hearing is to take a calm look at some of the immigration removal procedures and detention policies that were implemented during that period. On September 21, 2001, Michael Creppy, the Chief Immigration Judge for the Executive Office for Immigration Review issued a memorandum to all immigration judges advising them that the Attorney General had implemented additional security procedures for certain cases. In these cases, the immigration judges were required to close the hearings to the public and to avoid the disclosure of any information about the cases to anyone outside the Immigration Court. Secret hearings are inconsistent with our most basic principles of fairness. Immigration removal proceedings determine whether individuals who spend months in detention will be separated from their families and then be removed from a country in which they may have lived for many, many years. Hearings should not be conducted behind closed doors unless there is a compelling reason for such secrecy.

Many of us, including our former colleague, Dave Bonior worked extensively on the question of secret evidence; that secret evidence blinded, I believe, both prosecutor and, of course, defense. It took away from our system the purity of which we all are very proud of, and I think the basic premises of the Constitution, which in essence, indicates that there is minimally due process. Due process is not denial of justice. Due process is not denial of security. Due process is not reckless.

This practice is addressed by Congressman Berman's Civil Liberties Restoration Act of 2005, H.R. 1502, which I have joined, as I indicated, with Congressman Delahunt. Section 101 of the Civil Liberties Restoration Act will prohibit blanket closures of immigration hearings. It would permit closure only when the Government can demonstrate a compelling privacy or national security interest. Before September 11, 2001, the former Immigration and Naturalization Service was required to decide whether it was going to initiate deportation proceedings within 24 hours of arresting an alien. On September 20, 2001, this was changed to 48 hours or an additional reasonable period of time, on emergency or extraordinary circumstances. Section 102 of the Civil Liberties Restoration Act would require DHS to initiate proceedings within 48 hours of an alien's arrest or detention. It would also require that any alien held for more than 48 hours be brought before an immigration judge within 72 hours of arrest or detention. This would not apply to aliens who are certified by the Attorney General to have engaged in espionage or a terrorist offense.

Might I just add an anecdotal story that came to our attention recently out of Virginia. The facts are not exactly the same, but a Pakistani doctor, a physician, who happened to take a course in nuclear medicine was simply held by members of law enforcement, simply held. No information was given. No understanding of why he was held, ultimately released, and never did the law enforcement agencies indicate why or indicate that he had been vindicated. These are just slight of hands that I think we, our country, is above and not beneath.

Although the Supreme Court has upheld mandatory detention when Congress has expressly required such detention for a discrete class of noncitizens, it has not authorized the executive branch to make sweeping, group-wide detention decisions. Since September 11, 2001, the Department of Justice and the Department of Homeland Security have mandated the detention of certain classes of noncitizens without any possibility for release until the conclusion of proceedings against them. Section 202 would require DHS to provide all alien detainees with an individualized assessment as to whether the detainee poses a flight risk or a threat to public safety, except detainees in categories specifically designated by Congress as posing a special threat.

On October 31, 2001, the Justice Department issued a rule that enables the Government to nullify a judge's order to release an individual on bond after finding that he is neither a flight risk nor a danger to the community. The rule permits the Department to automatically stay an immigration judge's decision to release an alien if the Government originally denied bond or set it at \$10,000 or more. No standards govern the granting of a stay in these cases, and it is simply at the discretion of the Government.

We are without the Constitution in our hands if we remove the right of the judiciary to review or to overturn decisions. Section 203 permits the Board of Immigration Appeals to stay the immigration judge's decision to release the alien for a limited time period and only when the Government is likely to prevail in appealing that decision and there is a risk of irreparable harm in the absence of a stay. I hope that we can work together.

As I started out, this is a Judiciary Committee that passed a bipartisan PATRIOT Act after 9/11. And I believe we have the opportunity in this legislation to recapture both that spirit and of course that challenge and responsibility on behalf of the American people. Mr. Chairman, I thank you and I hope and look forward that we will be able to do so.

Mr. HOSTETTLER. I thank the gentlelady. The Chair now recognizes Mr. Meehan, the gentleman from Massachusetts, for 5 minutes for purposes of an opening statement.

Mr. MEEHAN. I just want to thank the Chairman and the Ranking Member for providing us an opportunity for a hearing. I have been working with the Iranian-American Bar Association to catalogue and report the instances of what they have determined have been appalling treatment at many of these centers.

In 2004, the Iranian-American Bar Association conducted a study on the implementation of the NSEERS program. And I have to say, the results were staggering. At call-in registration centers, detainees encountered unsanitary facilities and incurred questioning that was both humiliating and unnecessary, and many were forced to stay for days without sufficient food or bedding. My line of questioning is going to be on the NSEERS program and the status of that program. More than 13,000 individuals who voluntarily complied with the registration program were placed in immigration removal proceedings for immigration violations not related to terrorism.

And last year, I asked Secretary Tom Ridge to produce a list of names and nationalities and a total number of NSEERS registrants with pending permanent residency applications that had been denied. In December of 2003, the Department of Homeland Security suspended the requirement that all individuals previously registered with the NSEERS reregister after 30 days and one year in the United States, but the NSEERS was not canceled and the call-in registration program continued. This is a great opportunity for Members of this Committee to look at this and other issues. And I thank the Chairman and Ranking Member for calling this hearing. And I yield back the balance of my time.

Mr. HOSTETTLER. I thank the gentleman.

At this time, the Chair recognizes the gentlelady from California, Ms. Lofgren for purposes of an opening statement.

Ms. LOFGREN. Thank you, Mr. Chairman.

I will not use my entire 5 minutes. I would like to express my gratitude for this hearing. I think that this is an important subject, and I think it is important to note that, while the Nation is focused on terrorism relative to this subject, in fact, what has occurred, at least from what I have seen in the constituent cases coming from my office, it is everybody; it has nothing to do with terrorism. It is wives and mothers of American citizens from countries of suspicion if you even want to use that. It is a very broad approach that has completely changed the nature and tenor of the way we deal with families, the families of United States citizens. And I think that is very much worthy of our review. I do have a question that I hope the Government witnesses will address, and that is the provision in the PATRIOT Act that requires that an alien either be brought before a magistrate or released in 7 days and why the Gov-

ernment feels that that provision can be ignored. I am interested in that, and I yield to Mr. Delahunt.

Mr. HOSTETTLER. Does the gentlelady yield back her time?

Ms. LOFGREN. I yield.

Mr. HOSTETTLER. At this time, without objection, the gentleman from Massachusetts, Mr. Delahunt will be permitted to participate in today's Subcommittee. And without objection, the gentleman is recognized for 5 minutes for purposes of an opening statement.

Mr. DELAHUNT. Thank you, Mr. Chairman and I appreciate the accommodation. First, let me associate myself with the remarks of my cosponsor, Mr. Berman. I genuinely appreciate the opportunity to participate. And I want to thank you and through you the Chair of the Full Committee. I think this is a very important hearing. I just wanted to make one observation. I think in your opening statement, Mr. Chairman, you used the phrase an "advocate for aliens." I don't want that impression to be that Mr. Berman and myself are advocating for aliens. What we are doing is advocating for long-held and profound American values, such as transparency and fairness.

And also, I think we consider ourselves as advocating for the appropriate role of the United States Congress in our Democratic system where consultation and oversight are keys to the functioning of that democracy. And I think that is what we are here advocating for. I am concerned, too, in the sense of the perception that is being created worldwide, given some of the anecdotes we have already heard relative to the issues, relative to these issues about specific cases.

I just want to note that this past April, a GAO report stated, and I am quoting from this report, recent polling data show that anti-Americanism is spreading and deepening around the world. Such anti-American sentiments can increase foreign public support for terrorism directed against Americans, impact the cost and effectiveness of military operations, weaken the United States' ability to align with other nations in pursuit of common policy objectives, and dampen foreign public's enthusiasm for U.S. business services and products. While I would suggest that we ignore this to our peril, in fact, a recent poll that was released last week indicated that those people who we consider our closest ally in the war on terror, the British people, have a better opinion of China than they do of the United States.

Again, the kind of anecdotes we have heard in opening statements here today I would suggest feed into that perception, and we have to deal with it. And I think the legislation that we have put forth goes in the direction of addressing the concerns and that perception. And with that, I yield back.

Mr. HOSTETTLER. I thank the gentleman.

The Chair now recognizes the gentleman from California for purposes of an opening statement.

Mr. LUNGREN. Thank you very much, Mr. Chairman.

And I want to thank you for having this hearing. When we had Mr. Comey here a couple of weeks ago, I think Mr. Comey put in proper perspective many of the issues we are dealing with here today, and that is immediately after 9/11, there was an effort, a good faith effort made by the Congress and members of the Admin-

istration, particularly by the Justice Department, to respond to the threat that was out there. This was a new threat with challenging issues that we had not faced before. Decisions were made at that time to respond in the best good faith way that we possibly could both here in the Congress and by the Administration, and particularly at the Department of Justice. As Mr. Comey suggested, some of the processes and procedures that were used at that time are no longer being used, both because they are no longer necessary or upon reflection, we realized that we could do a better job.

There was never, based on anything I could find, a suggestion that there was an intent not to protect the civil liberties of the people of this Nation. And I think we all agree with the idea that the terrorists will succeed if, on the one hand, they destroy us physically or if, on the other hand, they cause us to change who and what we are and cause us in any real way to tear up the Constitution. In my review of the facts at this point, I have not been able to see a case being made for that on the part of the Department of Justice, the Administration, or the Members of Congress or Congress collectively.

At the same time, it is incumbent upon us as the oversight committee to ensure that that does not happen, and for us to look at what we did immediately thereafter and see after, upon reflection, we would proceed differently in the future, take lessons out of that and never forget that we are still involved in a war on terror. We are involved in a war with people who told us in 1998 that it was the obligation of everyone who was loyal to their cause to kill every American man, woman and child anywhere in the world, combatant and noncombatant, civilian and noncivilian. That is a threat we have never had before. It is an ongoing threat. And while I join Members on both sides of the aisle in working diligently to ensure that we not make mistakes that result in our inattention to the protection of civil liberties, we also understand that this is a balance that we are striking precisely because we are involved in a war. If there were no 9/11, the actions that we are looking at with respect to the Administration would not be at question, because those actions would have been taken.

And so I appreciate the comments of my colleagues on both sides of the aisle, but I hope that we would recognize that what was done was in response to a perceived and real threat, number one. Number two, that there have been evolutions in the policies since that time. Number three, that it does none of us any good if we succumb to the temptation of hyping mistakes that were made and we not be overly broad in our observations, criticism or in fact, commendations. This is an ongoing process and something that requires our best and highest work, and I hope that we can work in that manner. I, for one, will say that I have found, thus far, the Justice Department to be forthcoming with answers to questions that I have raised and with respect, for instance, to certain parts of the PATRIOT Act; while they don't always agree with my approach on things, have been open to suggestions of some tweaking of that act. And so I look forward to hearing from the witnesses. I look forward to hearing my colleagues and look forward to working, very importantly, on behalf of the American people to deal with this delicate issue of the balance between the threat that is out there and our

preservation of our civil liberties as contained in our statutes and the Constitution. And I thank the Chairman for the time.

Mr. HOSTETTLER. At this time, I will introduce members on our panel of witnesses.

Lily Swenson currently serves as Deputy Associate Attorney General at the U.S. Department of Justice where she oversees immigration litigation and other issues. Prior to joining DOJ, Ms. Swenson was a partner in the Washington office of Mayer, Brown, Rowe & Maw. Her practice focused primarily on class action and appellate litigation. Ms. Swenson clerked for the Honorable Michael Kanne of the United States Court of Appeals for the Seventh Circuit. She graduated from the University of Wisconsin, Madison, and earned her J.D. From the University of Minnesota School of Law.

Joseph Greene is the Director of the Office of Training and Development at Immigration and Customs Enforcement, or ICE. He has served in the Office of Investigations at ICE since its inception in March 2003. He was named the Deputy Assistant director for the Smuggling and Public Safety Unit and then served as Deputy Assistant Director for the Mission Support Division. Mr. Greene began his INS career as an immigration inspector at JFK airport in New York. He has a Master's Degree in Philosophy from Fordham University in New York.

Paul Rosenzweig is senior legal research fellow at the Center for Legal and Judicial Studies at the Heritage Foundation, and an adjunct professor of law at George Mason University School of Law. He also serves on the Department of Homeland Security's Data Privacy and Integrity Advisory Committee. He has been a trial attorney in the Environmental Crimes Section of the Department of Justice, investigative counsel to the House Committee on Transportation and Infrastructure, and senior litigation counsel in the Office of the Independent Counsel. Mr. Rosenzweig earned his BA from Haverford College, an M.S. in Chemical Oceanography, from the Scripps Institution of Oceanography and is a graduate of the University of Chicago Law School.

Bill West retired as a supervisory special agent with ICE in May of 2003. In 1978, William West began service as a special agent with the investigations division of the U.S. Immigration and Naturalization Service. During his years at INS, he conducted a full range of immigration-related criminal investigations including fraud, smuggling, alien prostitution and criminal alien deportation cases. After joining the Miami District Office of the INS in 1991, Mr. West became chief of the Investigations Division's National Security Section. He has also served as regional task force coordinator for INS Organized Crime Drug Enforcement Task Force programs, authored articles, and taught law enforcement courses. In addition, he has received the INS Commissioner's Award, as well as an award from the Justice Department's Criminal Division.

Witnesses, if you would please stand in accordance with the requirements of the Committee and raise your right hand to take the oath.

[Witnesses sworn.]

Mr. HOSTETTLER. Let the record reflect that the witnesses answered in the affirmative.

And Ms. Swenson, you may begin your testimony.

**TESTIMONY OF LILY SWENSON, DEPUTY ASSOCIATE
ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE**

Ms. SWENSON. Mr. Chairman and Members of the Subcommittee, thank you for the opportunity to testify at this important hearing. On behalf of the Department of Justice, I want to assure the Subcommittee that we take very seriously all of the issues you have raised. In this post-9/11 world, we must continue to protect our Nation's security while not losing sight of our immigrant heritage or forsaking the rights of the individual.

The issues you have raised touch upon these sometimes competing interests and the Department remains committed to striking the appropriate balance. I would like to discuss the closure of immigration hearings to the public. In the days following September 11, the Attorney General, through a memorandum from Chief Immigration Judge Michael Creppy, instructed immigration judges to close administrative hearings in what turned out to be approximately 600 cases involving aliens who might be connected with or have information about terrorist activity in the United States.

The Creppy memorandum was applied for approximately 15 months and discontinued in December of 2002. Looking back at the Department's decision to limit public access to these cases following 9/11, we should be reminded of three things: First, the hearings closed under the Creppy memorandum were not secret. Although the executive branch could not disclose information in those cases to the public, nothing prevented the aliens or their counsel from doing so to friends, to family or, for that matter, to the press. As it turned out, they overwhelmingly didn't. We can only presume that they chose not to for their own privacy or safety interests.

Second, closure affected only public access to special interest cases. It did not affect an alien's due process protections. Aliens were given a full and fair opportunity to litigate their claims and to be represented by counsel. In fact, about 75 percent of the 600-odd aliens in special interest cases had their own lawyers.

Third, as I said earlier, the Department has not closed any immigration proceeding pursuant to the Creppy memorandum for over 2.5 years. Looking to the future, although the Department has not done so since the Creppy memorandum, it is imperative that it retain the ability to close a category of special interest cases to the public if circumstances warrant. Should we ever again face an attack of the type we did on September 11th, the Department may not be able to guard national security interests if it must adjudicate a large number of individual closure requests. Moreover, absent uniform closure instructions like in the Creppy memorandum, immigration judges may decide to disclose information in the individual cases before them which terrorist groups can then piece together into a bigger picture that can be used to thwart the Government's efforts. During a time of national emergency, which is the only time the Department has resorted to closing immigration hearings, such scenarios would pose unacceptably high risks to national security.

Next, let me address automatic stays. The automatic stay regulation was originally promulgated because, as the Attorney General

determined, a bond decision by an immigration judge that allows for immediate release is effectively final if, as the appeal would necessarily assert, the alien turns out to be a serious flight risk or a danger to the community. These concerns are not merely theoretical. In the last 5 years, more than 62,000 or 45 percent of aliens who were released from custody during the pendency of their removal proceedings failed to appear for the removal hearings. The emergency stay motion procedures that existed prior to the automatic stay regulation created a significant window of time wherein the alien may be released while a bond appeal was being submitted to and considered by the Board of Immigration Appeals in Falls Church, Virginia. The automatic stay regulation addresses the anomaly created by the old rules by preserving the status quo pending appeal, but only in a certain class of relatively serious cases and only for a reasonable duration. As such, although sparingly used, only a few hundred times out of over 100,000 appealable cases over 4 years, the automatic stay is an important public safeguard against the unwarranted release of aliens that otherwise would be determined by the Board to be a serious flight risk or a danger to the community.

Finally, let me address briefly individualized bond determinations. When a removable alien is apprehended, an immigration officer decides whether he should be released on bond. If the alien wishes to contest the officer's decision, he can obtain an individual hearing before an immigration judge. Although aliens have no right to bond at all and, by extension, they have no right to individualized bond hearings, the Attorney General has nonetheless to afford to most aliens individualized hearings before an immigration judge. A decision issued by the Attorney General in 2003 called the Matter of D-J directed immigration judges to consider in addition to dangerousness and flight risk, factors relating to national security and immigration policy in making individual bond determinations. The rule established in the Matter of D-J is sound as a matter of policy and of law, and it should not be legislatively undone.

Mr. Chairman, thank you for the opportunity to testify before the Subcommittee. I look forward to answering any questions you may have.

[The prepared statement of Ms. Swenson follows:]

PREPARED STATEMENT OF LILY FU SWENSON

STATEMENT

OF

LILY FU SWENSON

DEPUTY ASSOCIATE ATTORNEY GENERAL

BEFORE THE

SUBCOMMITTEE ON IMMIGRATION, BORDER SECURITY AND CLAIMS

CONCERNING

IMMIGRATION REMOVAL PROCEDURES IMPLEMENTED IN THE

AFTERMATH OF THE SEPTEMBER 11TH ATTACKS

June 30, 2005

Mr. Chairman, members of the Subcommittee, thank you for the opportunity to testify at this important hearing. On behalf of the Department of Justice, I want to assure the Subcommittee that we take very seriously all the issues that you have raised. In this post-9/11 world, it is critical that we continuously and vigilantly protect our Nation's security, while not losing sight of our immigrant heritage or forsaking the rights of the individual. The issues you have raised touch upon these sometimes competing interests, and the Department remains committed to striking the appropriate balance. With this in mind, I would like to address the topics of closed immigration court hearings, the automatic stay regulation, and individualized bond hearings.

CLOSED IMMIGRATION COURT HEARINGS

In the immediate aftermath of September 11th, the federal government launched an intensive investigation to identify those responsible, and to detect and prevent future terrorist attacks. In the course of that investigation, the government identified certain aliens as persons of "special interest" to the pending terrorist investigation, on the basis of law enforcement or intelligence information that they might have connections with, or possess information pertaining to, terrorist activity in the United States. On September

21, 2001, ten days after the terrorist attacks, and in conjunction with the investigation, the Attorney General implemented special security procedures for immigration court proceedings in special interest cases. These procedures were set forth in a memorandum from Chief Immigration Judge Michael Creppy to immigration judges and court administrators nationwide. In relevant part, the memorandum instructed the courts to “close * * * to the public” administrative hearings in all special interest cases, and to bar public access to the administrative record and docket information in such cases.

All told, approximately 766 detainees were designated as special interest cases, 611 of whom had one or more immigration hearing closed in accordance with the Creppy memorandum. Subsequently, some of the aliens in special interest cases, such as Zacarias Moussaoui, were transferred to law enforcement authorities for criminal prosecution, and at least 505 of the aliens in special interest cases were deported from the United States. Still other aliens who were initially designated as special interest cases were removed from that category as the government reevaluated its designations based on new information arising out of its terrorism investigation. Accordingly, the population of special interest cases subject to the closed hearing procedures diminished with time. In fact, no alien has been subject to those procedures since December 2002.

In assessing the Department’s decision to limit public access to these special interest immigration hearings, it is important to bear in mind four considerations. First, despite some rhetoric to the contrary, these closed immigration hearings were not “secret” proceedings that prevented an alien from notifying friends and family of his location. Indeed, although agency personnel were barred from publicly disclosing information concerning special interest cases, nothing prevented the aliens or their counsel from releasing information about their proceedings to family members, friends, witnesses — or, for that matter, the press. There was no gag order on the aliens, and each alien was free to communicate his location and the subject of the proceedings to whomever he chose. As it turned out, most of the aliens in special interest cases chose

not to disclose publicly their identities or the circumstances of their proceedings, presumably based upon their own privacy interests.

Second, closure of proceedings did not affect an alien's due process protections. Rather, closure affected only the public's access to proceedings in special interest cases. Every alien in a special interest case was given a full and fair opportunity to present evidence and witness testimony in support of his claims and to cross-examine any witnesses called by agency counsel. And every alien had the right to be represented by counsel of his choice. Indeed, approximately 75 percent of the 611 aliens in special interest cases were represented by private counsel in their immigration hearings.

Third, the Department has not closed any immigration proceeding pursuant to the Creppy memorandum for over two and half years. All of the hearings that have been fully closed since December 2002 have been closed either on a case-by-case basis (such as in matters involving asylum claims or spousal abuse), or because the alien is a victim of child abuse. See 8 C.F.R. §§ 1003.27(b)-(c), 1208.6, 1240.11(c)(3)(i). The Creppy memorandum therefore has had no effect since the aftermath of September 11th. Indeed, reflecting the Administration's commitment to balancing national security with individual rights, the Department has, following that crisis, adopted narrower and more tailored procedures that in the context of the cases now being litigated are adequate to safeguard the government's interest in keeping confidential sensitive national security and law enforcement information. In particular, the Executive Office for Immigration Review has promulgated an interim regulation, 8 C.F.R. § 1003.46 (2003), that authorizes immigration judges to issue protective orders, accept documents under seal, and close proceedings or portions thereof where protected information might be discussed. To obtain such an order, the agency must prove to the immigration judge a substantial likelihood that public disclosure of the protected information would harm the national security or law enforcement interests of the United States.

Fourth, although the Department has not closed public access to an entire class of immigration

proceedings for the past two and a half years, it is still imperative that it retain the ability to do so if circumstances warrant. The Executive Branch must retain sufficient flexibility to undertake broader security measures in the extraordinary event of a national security crisis, such as that presented by the September 11th terrorist attacks. On this point, we note that, except in the territorial region covered by the United States Court of Appeals for the Sixth Circuit, there is no legal bar to the implementation of measures such as those in the Creppy memorandum. The procedures in the Creppy memorandum withstood constitutional attack in *North Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002), a Third Circuit case which flatly rejected the notion that the public has a First Amendment right of access to immigration court proceedings. Although the Sixth Circuit adopted a different view (see *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002)), the Supreme Court declined to review the issue, thus leaving the Third Circuit's decision undisturbed. Accordingly, the Executive Branch retains the authority in most parts of the nation to close specific categories of immigration court cases to the public to protect national security interests in the event of a national emergency.

The Executive Branch's authority in this regard should not be cabined by legislation. Should we ever again face a terrorist attack on American soil as we did on September 11th, we may well not be able to guard national security interests if we are required to adjudicate each closure request on a case-by-case basis using a strict scrutiny analysis. Faced again with such circumstances, the closure of a limited and carefully defined category of immigration court hearings in special interest cases would be necessary to serve a variety of compelling interests, especially at the outset of the government's investigation, when the reliability of source information is most uncertain. This approach would protect against disclosure both of obviously sensitive information — such as evidence that the government knows of particular links between a detainee and terrorist activity — and of information the significance of which may not be apparent in isolation, but which can be fit by terrorist groups into a bigger picture that can be used to thwart the government's efforts to

investigate and prevent terrorism. Public disclosure during removal hearings of information concerning where, how and why aliens in special interest cases were detained, for example, would allow terrorist groups to discern patterns and methods of investigation. Information about how such aliens entered the country would allow terrorist groups to see patterns of entry — in other words, what works and what does not. Information about evidence the United States has against members of a particular terrorist cell collectively would reveal to the terrorist group which of its cells have been significantly compromised and, by inference, which have not, and would allow terrorists to alter their plans in a way that presents an even greater threat to the United States. In addition, disclosure of information the government possesses, as well as indications of what information the United States does *not* possess, would allow terrorist organizations to evade detection, alter future attacks, obstruct pending proceedings, and deter cooperation with the government's terrorism investigation. Finally, and importantly, disclosure would intrude upon the privacy interests and personal safety of those aliens, witnesses, and lawyers who may not wish to be associated publicly with a terrorism investigation.

At bottom, the sensitivity of information that could undermine a terrorism investigation, especially during its early, most critical phases, will not always be apparent or provable on a piecemeal basis. Moreover, case-by-case closure determinations could themselves expose critical information about which activities and patterns of behavior merit such closure, and create a risk that immigration judges will erroneously conclude that individual cases, viewed in isolation, are not sensitive enough to warrant closure. Finally, absent the ability to shield highly sensitive, yet unclassified information from public disclosure on a categorical basis, the government may be forced to forego some removal actions, and release aliens who have suspected links to terrorist activity in the United States. Especially in a time of national emergency — which has been the only time the

Department has resorted to closing the immigration hearings in a specific category of special interest cases — such a scenario would pose an unacceptably high risk to the national security.

As its regulations and conduct reflect, the Department prefers that immigration court hearings be held publicly, and, in the vast majority of cases, they are so held. Immigration regulations that are currently in effect provide immigration judges with the ability to close hearings to protect the privacy and safety of applicants for asylum and victims of domestic violence, and they provide some measure of protection for sensitive national security and law enforcement information where the government can demonstrate a specific need for such protection on a case-by-case basis. These regulations are sufficient at this time and should remain in place. Should the United States ever again be confronted with an exceptional security threat, however, it is imperative that the Department retain the flexibility to invoke broader security measures to handle a national emergency. Particularly in light of the lessons learned following September 11th, the Department should not be statutorily barred from closing public access to a specifically defined category of immigration cases.

AUTOMATIC STAYS OF RELEASE

Questions have been raised concerning the government's authority to detain potentially dangerous aliens in removal proceedings when (1) the Department of Homeland Security ("DHS") has determined that an alien should not be released, or should only be released on a bond of \$10,000 or more, but an immigration judge disagrees; and (2) DHS's appeal of the immigration judge's adverse custody or bond decision is pending before the Board of Immigration Appeals ("BIA"). The so-called "automatic stay" regulation, set forth at 8 C.F.R. § 1003.19(i)(2), promotes an orderly process for reconciling such conflicting decisions that balances the considerable governmental interest in protecting public safety and minimizing alien absconders against the interest of detained aliens in

securing their release. Although the current regulation is fully supported by substantial policy considerations, see 63 Fed. Reg. 27441, 27447 (May 19, 1998); 66 Fed. Reg. 54909 (Oct. 31, 2001), the Department has recently developed amendments that would further hone the regulation's focus as well as limit the duration of automatic stays.

The background of the "automatic stay" provision illuminates why it continues to be necessary. Section 236(a) of the Immigration and Nationality Act (the "Act") — which authorizes detention of aliens during the pendency of removal proceedings against them — does not provide aliens either with the right to release or the right to bond during removal proceedings. Indeed, it makes no mention of immigration judges at all. Rather, the law vests broad discretion in the Attorney General to determine whether aliens merit release.

Following the enactment of the Homeland Security Act, detention functions related to removal proceedings were transferred to DHS, while the adjudicatory functions of immigration judges and the Board were retained by the Attorney General. As a result, both DHS and the Attorney General concurrently possess detention authority under section 236(a). The authority vested in the DHS Secretary has been delegated to Immigration and Customs Enforcement ("ICE") (formerly known as the Immigration and Naturalization Service or "INS"), while the authority vested in the Attorney General has been delegated in the first instance to immigration judges to make an interim custody determination, and then to the BIA to make a final determination (unless the Attorney General reviews the determination himself).

The process by which the Attorney General and DHS exercise this discretion is set forth in regulations. After ICE makes an initial custody or bond decision under 8 C.F.R. § 287.3, the alien in some cases may decide to appeal ICE's decision to an immigration judge. 8 C.F.R. § 1236.1(d)(1).

If, contrary to ICE's initial decision, the immigration judge orders the alien released (or released on lower bond), ICE can appeal to the BIA. 8 C.F.R. § 1236.1(d)(3). In cases of greater seriousness where ICE's initial decision is either not to release the alien or to set a bond of \$10,000 or more, ICE has the discretion, pursuant to 8 C.F.R. § 1003.19(i)(2), to invoke an automatic stay of the immigration judge's release order pending ICE's prompt appeal to the BIA. The Attorney General has established guidelines for the length of time the BIA may take to adjudicate cases, and provides that priority be given to cases involving detained aliens. 8 C.F.R. § 1003.1(e)(8)-(i).

The automatic stay in no way alters the standards for release or bond in immigration proceedings. Rather, the automatic stay merely provides the Attorney General's delegated decision makers at the BIA with the time needed to review the record upon which bond decisions are made in the prescribed class of cases. Indeed, the regulation was originally promulgated because, as the Attorney General determined, "[a] custody decision that allows for immediate release is effectively final if, as the [DHS] appeal would necessarily assert, the alien turns out to be a serious flight risk or a danger to the community." See 63 Fed. Reg. 27441, 27447 (May 19, 1998); see also *Demore v. Kim*, 538 U.S. 510, 523 (2003) ("deportation proceedings would be vain if those accused could not be held in custody pending the inquiry into their true character") (internal quotations omitted). These concerns are not merely theoretical; it is well known that high absconding rates have long plagued the immigration system. See *id.* at 528. In just the last four fiscal years, for example, more than 52,000 aliens who were released from custody during the pendency of their removal hearings failed to appear for their scheduled removal hearings. EOIR, *FY 2004 Statistical Year Book*, at H3 (March 2005).

Under the emergency stay motion procedures that existed prior to the automatic stay

regulation, a “significant window of time” was created “wherein the alien may be released while” a complete record of proceedings and the parties’ briefs were prepared and transmitted to the BIA in Falls Church, Virginia, and the BIA reviewed the record and adjudicated the motion. To avoid unmerited release during that window of time, the BIA would have had to make on-the-spot determinations in each case as to whether a stay pending appeal should be granted. To make matters worse, the BIA’s nationwide jurisdiction (which includes Hawaii and Guam) meant that, “due to the time difference between the east and west coast, an alien may be ordered released after the Board has closed for the day.” 66 Fed. Reg. at 54909, 54910-54911 (Oct. 31, 2001).

The automatic stay regulation addresses the anomaly created by the old rules by preserving the status quo — but only in a certain class of relatively serious cases and only for a limited duration — thereby enabling the BIA (and, on occasion, the Attorney General) to adjudicate finally detention and bond issues. Although immigration judges conduct approximately 30,000 custody hearings every year, EOIR, *FY2004 Statistical Year Book*, at B5, there have only been a few hundred cases in which DHS has invoked the automatic stay, in total, during the nearly four years since the interim rule was promulgated in October 2001. As such, the automatic stay is a sparingly used but important public safeguard against the unwarranted release of aliens who otherwise would be adjudicated by the BIA to be a serious flight risk or a danger to the community. Without the automatic stay, DHS’s right to appeal in these cases would be negated as a practical matter.

Because the Department is continually focused on improving its immigration procedures, it has developed amendments to the automatic stay regulation to ensure that it fulfills the purposes it was designed to serve. In the Department’s view, the amended regulation will strike a sound balance between protecting public safety and the integrity of the removal system and preserving individual

liberties.

INDIVIDUALIZED BOND DETERMINATIONS

Finally, I would like to address the issue of individualized bond determinations. When a removable alien is apprehended within the United States, a DHS officer makes a determination as to whether he should be released on bond, and if so, the bond amount. If the alien wishes to contest the DHS officer's determination, he can request a hearing before an immigration judge (unless he is subject to mandatory detention under section 236(c) of the Act or is otherwise ineligible). These procedures exist solely as a result of regulatory delegations; section 236 of the Act provides neither for a right to release on bond, or for immigration judge review of DHS custody decisions.

At the hearing, the immigration judge considers, among other factors, the alien's dangerousness and flight risk. A decision by the Attorney General in 2003 directs immigration judges to consider, in addition to dangerousness and flight risk, factors relating to national security and immigration policy in making bond determinations. See *Matter of D-J-*, 23 I.&N. Dec. 572 (A.G. 2003) (discussing, among other things, the importance of avoiding bond determinations that encourage further unlawful and dangerous mass migrations by sea). The rule established in *Matter of D-J-* is sound as a matter of policy and law, and should not be legislatively undone.

In that case, D-J- was one of 216 Haitians and Dominicans onboard a vessel that sailed into Biscayne Bay, Florida. The vessel sought to evade Coast Guard interdiction, and, once it reached shore, many of the aliens attempted to evade law enforcement officials. D-J- was apprehended, and he sought, and was granted, an individualized bond determination by an immigration judge. The immigration judge granted bond over the objections of the INS. The BIA affirmed, and the case was certified to the Attorney General, subject to an automatic stay of release pending the Attorney

General's decision.

Immigration officials offered evidence to the Attorney General of two broad areas of national security that were implicated by the order releasing D-J- and others like him. First, they demonstrated that release of D-J- and others who arrived on his vessel would "tend to encourage further surges of mass migration from Haiti by sea, with attendant strains on national and homeland security resources" that could be "used in supporting operations elsewhere." Moreover, further mass migration "place[d] the lives of the aliens at risk." Second, they showed that, "in light of the terrorist attacks of September 11, 2001, there is [an] increased necessity in preventing undocumented aliens from entering the country without the screening of the immigration inspections process" because "third country nation[al]s" were using countries such as "Haiti as a staging point for attempted migration to the United States." The Attorney General agreed with the INS and reversed the decision of the BIA, concluding that national security and immigration policy concerns were appropriate considerations in bond determinations.

As noted above, Section 236(a) of the Act does not grant aliens any right to release on bond. Instead, the statute gives the Attorney General the broad discretion to grant bond *if* he concludes bond is merited. The Act moreover places no limits on the factors the Attorney General may consider in making this determination as long as it is based on a reasonable foundation.

As they have no right to release on bond in the first instance, so aliens have no right to individualized bond hearings — even though the Attorney General has chosen to provide a process that affords most aliens individualized bond hearings before an immigration judge who reviews DHS's initial detention determination. Nothing about the consideration of national security or immigration policy concerns, however, undermines the individualized nature of these bond hearings. The granting

of bond to D-J- as an individual implicated serious national security interests relating to the encouragement of further mass migration and the release of insufficiently screened, undocumented alien migrants from certain countries following September 11th. His individual circumstances — the conduct of his vessel, the actions of the passengers on that vessel after they reached shore, his home country, the effect his release would have on other prospective migrants from his home country — were all considered as part of his bond determination.

The real issue raised by *Matter of D-J-* is therefore not whether D-J- received an individualized bond determination, but rather whether in making the individualized determination that bond was not merited in D-J-'s case, it was desirable for the Attorney General to consider national security and immigration policy issues in addition to whether the alien was a danger to the community and whether he posed a serious flight risk.

To ask that question is essentially to answer it. It has been within the longstanding authority of the Attorney General to exercise broad discretion consistent with his statutory obligations, based on *any* reasonable consideration — let alone considerations based on serious national security concerns — to grant or deny an alien's request for bond. See *Reno v. Flores*, 507 U.S. 292, 313-14 & n.9 (1993) (rejecting juvenile aliens' demands for an "individualized custody hearing" and upholding the use of "reasonable presumptions and generic rules" in such cases). There is no justification for imposing legislative blinders on the Executive Branch so that it may not consider factors beyond those that are entirely unique to the alien seeking a bond determination — especially when it is clear that such bond determinations can have profound effects that reach beyond the alien and the immediate community into which he is released to undermine both our national security and the safety of future groups of migrant aliens themselves. Indeed, as explained in declarations from

the Coast Guard, the State Department and the Defense Department submitted in *Matter of D-J-*, the demonstrated effects of certain bond determinations — the prompting of further hazardous mass migrations, the encouragement of third party nationals to exploit a migration route that has proven successful, and the attendant diversion of scarce operational resources to address these problems — all counsel strongly against imposing such blinders.

Finally, in connection with bond determinations, is important to note the well-established distinction in immigration law between aliens who have made an entry into the United States and those who have not. See, e.g., *Zadvydas v. Davis*, 533 U.S. 678 (2001); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953). The Supreme Court has made clear that, unlike aliens who have entered into the United States, aliens who have not made an entry have no constitutional due process rights with respect to their admission or their release from detention. The government's authority to detain such aliens is supported by legitimate national security concerns, including the fact that arriving aliens often have no documentation indicating who they are, what their criminal history is, or why they are not a threat to the Nation's security. Any effort to revise bond proceedings should be mindful of this important distinction, and should not seek to erase the difference in status between these two groups of aliens. See generally *Martinez v. Clark*, 125 S. Ct. 716, 727 (2005) (holding that, although the Court would not construe section 241(a)(6) of the Act governing post-removal order detention as doing so, Congress has the capacity to enact laws that provide different rules for the continued detention of aliens who have not yet affected an entry into the United States).

Mr. HOSTETTLER. Thank you, Ms. Swenson.
Mr. Greene.

**TESTIMONY OF JOSEPH GREENE, DIRECTOR OF TRAINING
AND DEVELOPMENT, U.S. IMMIGRATION AND CUSTOMS EN-
FORCEMENT, U.S. DEPARTMENT OF HOMELAND SECURITY**

Mr. GREENE. Thank you, Chairman Hostettler and distinguished Members of the Subcommittee, and I thank you for this opportunity to discuss certain immigration enforcement procedures implemented after the September 11 attacks.

As you know, after those attacks, our Government enacted a number of immigration enforcement policies in an effort to provide greater security to our Nation and our public. These efforts included investigating those responsible for the attack and trying to deter and disrupt the ability of others to carry out further attacks upon the people of this country. The Department of Homeland Security supports the current regulatory system that governs the closure of immigration hearings. In particular, DHS believes regulations granting immigration judges the authority to issue protective orders and to accept documents under seal strike an appropriate balance in individual cases. These regulations ensure that sensitive law enforcement information can be protected while allowing alien respondents and immigration judges to review Government evidence.

Before 9/11, immigration officers had to determine whether to maintain custody or release an alien or whether to issue a notice to appear within 24 hours. On September 17, 2001, INS issued an interim rule amending that, providing immigration officers more time to make determinations regarding the processing and custody of aliens arrested on immigration charges. Under this interim rule, immigration officers now have 48 hours to make the determination whether to detain or release the alien and to determine whether to issue a notice of appearance charging an alien with grounds for removability. The rule also provides that under extraordinary circumstances, the immigration officer may have reasonable time beyond the 48-hour period to make a determination regarding custody.

DHS has implemented procedures to ensure aliens in detention receive prompt notice of the charges against them. On March 30, 2004, the then Under Secretary of Border Transportation and Security Asa Hutchinson issued guidance to DHS immigration enforcement officers on the requirements of those regulations. This memorandum also provided guidance regarding exceptions to the 48-hour rule, including what events constitute an emergency or other extraordinary circumstances that might justify a delay in charging an alien beyond the 48-hour period. In addition, ICE detention policies and guidelines provide further assurance that aliens arrested on immigration charges receive all of the protections under law to which they are entitled.

In July, 2003, ICE issued a detention standard requiring immigration officials in the field to monitor detention conditions and address any detainee concerns that might arise. The U.S. Government has a policy in place requiring the detention of virtually all seagoing migrants found in or arriving in the United States. This

policy was adopted to deter aliens from illegally attempting to reach the United States by sea. Such attempts are often dangerous both to the aliens and to U.S. Law enforcement officials and divert limited enforcement resources from counterterrorism and homeland security responsibilities. The basis for this policy was affirmed in the decision in the Matter of D-J on April 17, 2003, in which the Attorney General vacated the Board of Immigration Appeals' decision granting release on bond to a Haitian alien who attempted to enter the United States on a vessel carrying 216 undocumented aliens. In his decision, the Attorney General instructed the BIA and immigration judges that it was appropriate to consider national security interests in bond proceedings involving undocumented aliens present in the United States who are arrested and detained pending a decision on their removal. The underlying concern for releasing seagoing migrants, such as in the Matter of D-J, is that the release could encourage a surge of illegal mass migration by sea. Discouraging such unlawful and dangerous migration is consistent with sound immigration policy and the national security interests of this country.

In 2001, the Department of Justice issued an interim regulation providing that in cases where the district director had determined that the alien should not be released or had a bond set of \$10,000 or more, any order of the immigration judge ordering the release shall be stayed upon ICE's filing of the form with the executive office of immigration review. The interests served by allowing ICE to obtain an automatic stay in these cases is considerable. A custody decision that allows for immediate release is effectively final if the alien turns out to be a serious flight risk or a danger in the community. This automatic stay provides a safeguard to the public, briefly preserving the status quo while ICE seeks expedited appellate review of the immigration judge's custody decision.

In conclusion, procedural changes implemented in the wake of the 9/11 attacks were reasonable measures intended to provide greater security to our Nation and the public. DHS has reviewed these policies in consultation with appropriate entities, such as the Inspector General, the DHS Office of Civil Rights and Civil Liberties, and nongovernment organizations. The policies and procedures provide the appropriate balance between ensuring our Nation's security and providing individual rights.

Mr. Chairman and Members of the Subcommittee, thank you for the opportunity to testify today, and I look forward to your questions.

[The prepared statement of Mr. Greene follows:]

PREPARED STATEMENT OF JOSEPH R. GREENE

Mr. Chairman and members of the Subcommittee, thank you for the opportunity to speak with you today about certain immigration enforcement procedures implemented in the aftermath of the September 11th attacks.

After the devastating terrorist attacks upon the United States in September 11, 2001 that killed 3,000 people, the Government enacted a number of immigration enforcement policies in an effort to provide greater security to our nation and the public. Those efforts included investigating those responsible for the horrific events of 9/11, and trying to deter and disrupt the ability of others to carry out any additional attacks upon the people of this country. The immigration policies adopted after the September 11th attacks were directed towards these goals, which I am happy to discuss with you today.

IMMIGRATION HEARING CLOSURES

DHS supports the current regulatory scheme that governs the closure of immigration hearings. In particular, the Department of Homeland Security believes that the regulations issued by the Department of Justice on May 21, 2002, granting immigration judges the authority to issue protective orders and to accept documents under seal, strike an appropriate balance in individual cases, ensuring that sensitive law enforcement information can be protected while allowing alien respondents and immigration judges to review the evidence relied upon by the Government. Modeled after the Federal Rules of Civil Procedure, this tool allows DHS to introduce sensitive law enforcement information into immigration hearings. The procedures allow the alien to fully and fairly litigate the facts presented through this process. This is a valuable tool that DHS fully supports.

48-HOUR RULE

Before September 11, 2001, regulations required that an immigration officer make a determination regarding whether to maintain custody or release an alien and whether a notice to appear would be issued within 24 hours of the alien's arrest. That regulation did not set forth specific time requirements for serving the alien or the immigration court with a notice to appear.

On September 17, 2001, the INS issued an interim rule amending 287.3(d) to provide immigration officers more time to make determinations regarding the processing and custody of aliens arrested on administrative immigration charges. Under that interim rule, immigration officers now have 48 hours to make a determination whether to detain or release an alien and to determine whether to issue a notice to appear charging the alien with removability. The interim rule also provides a narrow exception to the 48-hour requirement. The rule provides that under exigent circumstances, an immigration officer may have an additional reasonable time beyond the 48-hour time period to make a determination regarding custody and whether to issue a notice to appear.

DHS has implemented procedures to ensure aliens in detention receive prompt notice of the charges against them. On March 30, 2004, Under Secretary of Border and Transportation Security (BTS), Asa Hutchinson, issued guidance to all DHS immigration enforcement officers on the requirements of the regulations. In cases that present no emergency or other extraordinary circumstances the following procedure will be followed:

1. All custody determinations and charging decisions must be made in 48 hours of an alien's arrest.
2. The initial custody determination, and the date and time of that determination, will be documented on a Notice of Custody Determination (Form I-286).
3. The officer will also note on the custody determination form the charge or charges of removal reasonably believed to be applicable to the alien. The officer will also cite to the provisions of the Immigration and Nationality Act under which the charges are based.
4. A completed custody determination form will be served on the alien within 48 hours of his or her arrest, and the time and date of service is to be noted on the form as well. If for any reason the form is not served within 48 hours, the officer is required to annotate the form with the reasons that prevented service of the custody determination within the 48 hours after the alien's arrest.
5. A copy of the complete custody determination must be placed in the alien's permanent alien registration file.

The March 30, 2004 memo provides guidance on 8 C.F.R. §87.3(d)'s exception to the 48-hour rule when emergency or extraordinary circumstances are presented. The memo also provides guidance on what events constitute an emergency or other extraordinary circumstance under 8 C.F.R. 287.3(d) that might justify a delay in charging an alien beyond the 48 hour period.

Any determination of the existence of emergency or extraordinary circumstances must be made by a Special Agent in Charge (SAC), a Border Patrol Chief, a Field Officer Director for Detention and Removal, or an equivalent position. The official who makes that decision is required to document that decision and forward a copy of that decision to Headquarters.

ICE detention policies and guidelines provide further substantial additional protections to ensure that aliens arrested on administrative immigration charges receive all the protections under the law to which they are entitled. All immigration

detainees are provided with lists of local legal services providers, and are given appropriate telephone access with which to consult with and retain legal representation. DHS also has issued guidance to ensure that we adhere to our obligations under the Vienna Convention on Consular Relations with respect to the rights of detainees to contact their consular officials or representatives. Additionally, ICE issued a detention standard in July 2003 that requires that DHS immigration officials in the field visit persons who are detained in DHS facilities to monitor detention conditions and address any detainee concerns that may arise.

OPERATION LIBERTY SHIELD

On March 17, 2003, coinciding with the U.S. deployment of our ground troops in the Iraqi combat zone, the U.S. Government launched Operation Liberty Shield to increase security and readiness in the United States. This nationwide operational plan was designed to protect U.S. citizens, infrastructure, and deter those who plan further terrorist attacks. Liberty Shield integrated selected national protective measures with the involvement of a wide range of Federal, State, local and private assets. The primary objectives of Operation Liberty shield included: (1) increased security at borders; (2) stronger transportation protection; (3) ongoing measures to disrupt threats against our nation; (4) greater protection for critical infrastructure and key assets; and (5) increased public health preparedness.

Additionally, these increased security measures at our borders resulted in a shift in detention policy. During this brief one-month period, asylum applicants arriving at ports of entry from nations where al-Qaeda, al-Qaeda sympathizers, and other terrorist groups are known to operate, were subject to detention during the processing of their asylum claims. On April 17, 2003, Operation Liberty Shield concluded. At that time, all persons detained under this temporary rule, a limited number, had their cases reviewed on an individual, case-by-case basis.

MATTER OF D-J-

As explained in a Federal Register Notice issued on November 11, 2002, the U.S. Government has a policy in place requiring the detention of virtually all seagoing migrants found in or arriving in the United States. This policy was adopted to deter aliens from illegally attempting to reach the U.S. by sea. Such attempts are often dangerous for the aliens and U.S. law enforcement and divert limited law enforcement resources from counter-terrorism and homeland security responsibilities.

The basis for that policy was affirmed by a decision on April 17, 2003, in which the Attorney General vacated the Board of Immigration Appeals' (BIA's) decision granting release on bond to a Haitian alien who attempted to enter the United States on a vessel carrying 216 undocumented aliens. In the resulting decision, *Matter of D-J-*, 23 I&N Dec. 572 (AG. 2003), the Attorney General instructed the BIA and Immigration Judges that it was appropriate to consider these national security interests in bond proceedings involving undocumented aliens present in the United States who are arrested and detained pending a decision on their removal.

The decision stated that section 236(a) of the Immigration and Nationality Act (INA) and the accompanying regulations do not confer a right to an alien to be released on bond, and that the INA does not limit the discretionary factors that may be considered by the Attorney General (or the Secretary of Homeland Security) in determining whether to detain an alien during the pendency of removal proceedings. Based on this conclusion, the Attorney General decided it was within his discretion not to release this "undocumented seagoing migrant" due to national security concerns and immigration policy interests.

An underlying concern with releasing seagoing migrants such as in *Matter of D-J-* is that the release could encourage a surge of illegal mass migration by sea or at land borders. The effect would be a strain on the Department's border security resources.

Attempts to reach the U.S. shores by seagoing migrants also imperil the lives of aliens, as many border crossings are attempted in unsafe conditions or are undertaken via smuggling rings, leaving aliens, particularly women and children, vulnerable to victimization. Discouraging such unlawful and dangerous migration is consistent with sound immigration policy and the national security interests of our country.

STAY OF RELEASE ORDERS

In 2001, the Department of Justice issued an interim regulation that modified 8 C.F.R. 3.19(i)(2). The current automatic stay regulations provide that in cases where the district director has determined that the alien should not be released, or has set bond of \$10,000 or more, any order of the immigration judge ordering release

shall be stayed upon the INS's (now ICE's) filing of a Form EOIR-43 with the immigration court within one business day of the issuance of the immigration judge's order, and the immigration judge's order shall remain in abeyance pending decision of the appeal by the Board. The stay lapses if ICE fails to file a notice of appeal with the Board within *ten business days* of the issuance of the order of the immigration judge. In addition, if the Board orders the alien's release, the Board's order shall be automatically stayed for five business days, and if the case is certified to the Attorney General, the Board's order shall continue to be stayed pending the decision of the Attorney General.

The interests served by allowing ICE to obtain an automatic stay are considerable. A custody decision that allows for immediate release is effectively final if, as the ICE appeal would necessarily assert, the alien turns out to be a serious flight risk or a danger to the community. Historically, 30 percent of aliens released or paroled have failed to appear for subsequent immigration court hearings. Historically, this number becomes much greater, approximately 85%, once an alien is ordered removed. In such cases, the appeal provides little benefit to the agencies exerting efforts to effect removal, and less still to the community receiving the dangerous or absconding alien. The automatic stay provides a safeguard to the public, briefly preserving the status quo while ICE seeks expedited appellate review of the immigration judge's custody decision. The BIA retains full authority to accept or reject ICE's contentions on appeal.

Additionally, the ICE Office of the Principal Legal Advisor had created internal safeguards to ensure that automatic stays are filed in appropriate cases.

CONCLUSION

The procedural changes implemented in the wake of the 9/11 attacks that I have discussed today were reasonable measures intended to provide greater security to our nation and the public. DHS has reviewed these policies working with the appropriate entities such as the Inspector General, the DHS Office for Civil Rights and Civil Liberties, and consulting with Non-Governmental Organizations, and has developed policies and procedures to ensure that they provide the appropriate balance between ensuring our nation's security and protecting individual rights.

Thank you for the opportunity to testify today on this issue and I look forward to answering any questions you may have.

Mr. HOSTETTLER. Thank you, Mr. Greene.
Mr. Rosenzweig.

TESTIMONY OF PAUL ROSENZWEIG, SENIOR LEGAL RESEARCH FELLOW, CENTER FOR LEGAL AND JUDICIAL STUDIES, THE HERITAGE FOUNDATION

Mr. ROSENZWEIG. Mr. Chairman and Representative Jackson Lee, thank you very much for inviting me to testify.

As Congressman Berman noted, it isn't very often that a member of the Heritage Foundation is invited to come at the behest of a Democratic Member of this body, and I thought I would take the time to explain why.

And in doing so, I would like to associate myself with a large portion of the remarks you made, Mr. Lungren.

I don't think it is to come here and criticize past practices that were taken in the heat of the post-9/11 era, but to see if we can learn from them and identify now in a term of relative calm rather than crisis what the optimal set of rules will be for the next situation. And I believe we can learn something from that history.

I start by believing that, pretty much, the rules that we are discussing are not matters of constitutional requirement. Immigration law is within the plenary disposition of this body, and you can set the procedures that you want to. The question then is, what are the right procedures, and why do we care? For some, we care, because of the immigrants and the heartfelt problems that are affecting them that drive them to come to our shores. For others, it is

the American values of transparency and due process that we hold dear and wish to see within our Government. For me, actually, it is a different thing all together. It is because I want to empower the Government to do as much as is humanly possible to combat both illegal immigration and terrorism. And I think the more transparency there is, the more comfortable we can be giving the enhanced authority to the immigration and customs enforcement officials to do their job. But that transparency, that oversight, that kind of notice and process is at the core of how we ensure that the powers that we give are not abused, are not misused.

I yield to nobody in my admiration for members of the Department of Justice and Immigration. I am willing to stipulate from the get-go that mistakes that are made are made through legitimate concern for American security. But they are fallible human beings just as we all are. And so the right process is to put in place ideas about how we can monitor what is being done and correct them when there are errors. The proposals that are before you, it seems to me, address those in a fair and reasonable way.

Section 101 of the CLRA calls for a presumption of openness. Doesn't call for mandatory openness of all immigration proceedings, rather it calls for them to be open but subject to closure upon demonstration of national security, a risk to the asylum seeker—you could maybe think of some others to add—compelling governmental interests, like the safety of individuals or risk of flight or destruction of evidence. But it seems to me that the presumption of openness is the right place to start. And the only argument I have heard against that is that there is an administrative burden to being obliged to make a closure argument on a case-by-case basis. And I am willing to agree that that is an administrative burden that will at times prove difficult. And if we begin with the presumption of openness, there may even be some errors at the end. But at the core, we have to start from the idea that in order for Congress and the public to conduct their oversight of immigration proceedings, we should begin with the idea that there should be no universal or blanket closure that applies to a class of cases and work backwards from there.

The same can be said, I think, of, for example, section 202 of the CLRA proposal which is the one that goes to whether or not there should be individualized bond determinations. Again, I am perfectly willing to agree that there may be nonindividualized concerns that will impact each individual's determinations, concerns such as those that Mr. Greene advanced about governmental resources and the desire to deter, but that shouldn't blind us to the need or the desire, I should say, to give each individual immigrant his own time in court, his own opportunity to be heard. Now his individual considerations may in the end be deemed pale next to some of these national security concerns, and if that is the decision of the immigration judge, so be it. But to adopt a rule that allows for a blanket set of determinations based on group characteristics, it seems to me contrary to our general adherence to ideas of individuated justice.

I see my time has expired. And I would be happy to answer questions. With that, I thank you.

[The prepared statement of Mr. Rosenzweig follows:]

PREPARED STATEMENT OF PAUL ROSENZWEIG

TESTIMONY OF

PAUL ROSENZWEIG

SENIOR LEGAL RESEARCH FELLOW
CENTER FOR LEGAL AND JUDICIAL STUDIES

THE HERITAGE FOUNDATION*

214 MASSACHUSETTS AVENUE, NE
WASHINGTON, DC 20002

BEFORE THE UNITED STATES HOUSE OF REPRESENTATIVES

COMMITTEE ON THE JUDICIARY

SUBCOMMITTEE ON IMMIGRATION, BORDER SECURITY, AND CLAIMS

REGARDING

IMMIGRATION REMOVAL PROCEDURES IMPLEMENTED IN THE
AFTERMATH OF THE SEPTEMBER 11TH ATTACKS

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Good morning Mr. Chairman, Representative Jackson-Lee, and Members of the Subcommittee. Thank you for the opportunity to testify before you today on the challenge of maintaining the balance between security and essential American freedoms inherent in responding to the threat of terror, in the particular context of post-September 11th immigration removal procedures.

For the record, I am a Senior Legal Research Fellow in the Center for Legal and Judicial Studies at The Heritage Foundation, a nonpartisan research and educational organization. I am also an Adjunct Professor of Law at George Mason University where I teach Criminal Procedure and an advanced seminar on White Collar and Corporate Crime and I serve on the Editorial Board of the Journal of National Security Law and Policy. In addition I am the Chairman of the Department of Homeland Security's Data Privacy and Integrity Advisory Committee, though nothing I say here, whether written or in oral testimony, represents the views of the Committee or that of other Committee members.

I am a graduate of the University of Chicago Law School and a former law clerk to Judge R. Lanier Anderson of the U.S. Court of Appeals for the Eleventh Circuit. For much of the first 13 years of my career I served as a prosecutor in the Department of Justice and elsewhere, prosecuting white-collar offenses. During the two years immediately prior to joining The Heritage Foundation, I was in private practice representing principally white-collar criminal defendants. I have been a Senior Fellow at The Heritage Foundation since April 2002.

I should note that my perspective on the question before you is that of a lawyer and a prosecutor with a law enforcement background, not that of an immigration law practitioner. Thus, I tend to ask broad questions about appropriate procedures against the backdrop of traditional law enforcement rules, rather than looking at them through the lens of immigration concerns. I should hasten to add that much of my testimony today is based upon a series of papers I have written (or co-authored) on various aspects of this topic and testimony I have given before other bodies in Congress, all of which are available at The Heritage Foundation website (www.heritage.org). For any who might have read portions of my earlier work, I apologize for the familiarity that will attend this testimony. Repeating myself does have the virtue of maintaining consistency -- I can only hope that any familiarity with my earlier work on the subject does not breed contempt.

To begin with, I want to commend the subcommittee for its attention to this matter. As you will no doubt realize, as a Heritage scholar my instincts are conservative in nature. I am not, therefore, often invited to be a witness before this body by the Ranking Democratic Member of a subcommittee. That I am today, and that I feel perfectly comfortable doing so is a testament both to the balanced and thoughtful nature of some of the proposals for reform that have been made concerning this area of law and to a growing bipartisan consensus on matters relating to our post-September 11 response to civil liberties and national security questions.

As you may know, I recently participated in a bipartisan working group comprised of former government officials from both Democratic and Republican administrations who developed a consensus set of recommendations for the renewal of the expiring Patriot Act provisions. My experience there and my analysis of the issues before you today, convinces

me that there can, in fact, be a very wide common middle ground both in politics and in the public. We have but to work together to find it.

I have often, in the past, written that the civil liberties/national security question is the most significant and salient one facing America today – more important, if you will forgive me, than questions about Social Security reform or others of that ilk. We have, perhaps, in the past had an unfortunate tendency not to seek the middle ground. But the questions are too important for that instinct and I am pleased, therefore, to be able to appear before you today in that spirit of bipartisan, or perhaps more accurately non-partisan, inquiry.

In that vein, I realize that this hearing is styled as an oversight hearing. But too often the lack of bipartisanship is the product of dwelling on past problems (and trying to assign blame) rather than seeking solutions. And so, in the context of the problems identified for this committee's examination and in the spirit of bipartisanship that seems to have taken hold, I also want to look today at solutions -- and specifically, at some of those proposed by Representative Howard Berman for modification of immigration procedures in H.R. 1502, the Civil Liberties Restoration Act (CLRA). With that introduction, and in that spirit, let me turn now to the issues before you.

* * * * *

The Federal government has very wide Constitutional authority to deal with matters of immigration. And it also has a Constitutional obligation to insure national security. But, just because the Congress and the President have a constitutional obligation to act forcefully to safeguard Americans against terrorist attacks does not mean that every means by which they might attempt to act is necessarily prudent. Core American principles would seem to require that any institutional government program be implemented with caution, mindful that many of these systems will be with us for a long time to come.¹ More particularly, as we adopt new rules and regulations we should ensure that checks and balances are maintained, so that Executive authority is cabined. We should be skeptical of any system of laws or procedures that is implemented without the panoply of protections against its abuse. As James Madison told the Virginia ratifying convention: "There are more instances of the abridgment of the freedom of the people by gradual and silent encroachments of those in power than by violent and sudden usurpations."²

Thus, when reasonable solutions are proposed that will maintain the necessary Executive authority, but limit the potential for abuse they should, in my view, be given careful consideration. I, therefore, want to look at the issues before this subcommittee through the lens of four such proposals in the CLRA.

Section 101 – Section 101 of the CLRA is intended to address issues arising from the implementation of the Creppy Memorandum in the immediate aftermath of September 11.

¹ See generally Paul Rosenczweig, Principles for Safeguarding Civil Liberties in an Age of Terrorism, Executive Memorandum No. 854 (The Heritage Foundation, Jan. 2003).

² Speech to the Virginia Ratifying Convention, June 16, 1788, *reprinted in* Matthew Spalding, ed., THE FOUNDERS' ALMANAC 133 (The Heritage Foundation, 2002).

As the subcommittee is well aware, that memorandum authorized the blanket closure of immigration proceedings. Section 101 (as introduced in HR 1502) would prohibit that sort of blanket closure, and establish a presumption that immigration hearings should be open, except in cases of national security, to protect the identity of a confidential informant or to protect identity of the immigrant whose hearing is being conducted.

Reasonable minds can disagree over the government's constitutional authority to issue such a blanket order of closure. Indeed, the Third and Sixth Circuits have done so in their review of the policy.³ We need not, however, resolve that constitutional question – for it seems to me that, as a matter of policy to be set by this body, we should strongly prefer openness and transparency of governmental functions where possible.

Put another way, most Americans recognize the need for enhanced national security. They are even willing to accept certain governmental limitations on open proceedings as a necessary response to the new threats.

But what they insist upon – and rightly so – is the development of systemic checks and balances to ensure that new authorities and powers given the government are not abused. And to achieve a suitable system of oversight against abuse, we need adequate transparency. We do not seek transparency of government functions for its own sake. Without need, transparency is little more than voyeurism. Rather, its ground is oversight – it enables us to limit the executive exercise of authority. Paradoxically, however, it also allows us to empower the executive; if we enhance transparency appropriately, we can also comfortably expand governmental authority, confident that our review of the use of that authority can prevent abuse. While accommodating the necessity of granting greater authority to the Executive branch, we must also demand that the Executive accept greater review of its activities.

In that spirit, a presumption of open proceedings enhances rather than diminishes our program of immigration law enforcement. It allows us to understand the implementation of the law; provides the opportunity for observation by the public; and, most significantly, provides an ability to measure the program's implementation against some objective outside metric. Public notice of governmental activity is the hallmark of accountability – it fixes in time and place the ground for decision making and prevents *ex post* justifications from being developed.

Thus, we should be at least somewhat concerned by any blanket closure order. It undermines the transparency of government processes and public confidence in the justice of our system. It also frustrates, to some degree, Congress' oversight responsibilities. For as John Stuart Mill said: “[T]he proper office of a representative assembly is to watch and control the government; to throw the light of publicity on its acts; to compel full exposition and justification of all of them which anyone considers questionable; to censor them if found condemnable.”⁴

³ Compare *North Jersey Media Group v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002) (holding blanket closure policy constitutional) with *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002) (holding policy unconstitutional).

⁴ John Stuart Mill, “Considerations on Representative Government,” 42 (1875)

Thus, the premise of Section 101 – that the routine closure of immigration proceedings is unwise – is one that all should endorse. I would express one reservation regarding the draft of the language as originally introduced (I understand that some consideration is being given to modifying the language). As drafted, the bill particularizes only three specific grounds on which an immigration hearing might be closed – national security; protection of a confidential informant; and to preserve the confidentiality of an asylum application.

I can at least imagine several other plausible, perfectly legitimate, compelling governmental interests that would, on a case-by-case basis be reasonable to advance as grounds for a hearing closure. Examples of such, by way of analogy, might include factors akin to those used for delaying notification of electronic surveillance – that is, if keeping a hearing open might endanger the life or physical safety of an individual, or allow flight from prosecution, the destruction of evidence, or the intimidation of witnesses.⁵ My recommendation is that the language be amended to capture the possibility of such other contingencies, either by specifying them individually or, perhaps more readily, by simply authorizing case-by-case closure of the hearings on a showing of a compelling governmental need and then expounding on that authorization by way of example in the committee's report language.

With that one caveat – that some broadening of closure grounds is required – section 101 strikes, in my judgment, the right balance. It adopts as a rule our general preference for transparency, but recognizes that in the post-September 11 world there might, in individual cases, be a necessity for modifying that preference.

Section 201 – Section 201 would require DHS to serve a Notice to Appear (NTA) – the charging document that begins an immigration proceeding – on every non-citizen within 48 hours of his arrest or detention. It also requires that any non-citizen held for more than 48 hours be brought before an immigration judge within 72 hours of the arrest or detention. This section recognizes an exemption for non-citizens who are certified by the Attorney General, based on reasonable grounds, to have engaged in espionage or a terrorist offense, as provided for in the Patriot Act.

Prior to September 11, 2001, the INS was required to make charging determinations within 24 hours of arrest. On September 20, 2001, the Justice Department issued an interim rule extending that charging period to 48 hours or “an additional reasonable period of time” in “emergency or other extraordinary circumstances.”

The genesis of this legislative proposal lies in the immediate aftermath of September 11. As the Department of Justice's Inspector General has reported, many non-citizens were jailed without being informed of the grounds for their detention for lengthy periods – a few (roughly 3%) for more than a month after being arrested. These delays in serving notice of charges made it difficult for immigrants to understand the basis for their detention, request bond, or be effectively represented by legal counsel.⁶ Indeed, it is notable that while regulations require that a charging decision must be made within a specified period of time,

⁵ I draw these ideas from 18 USC § 2705(a)(2). To be sure the analogy is not perfect.

⁶ See generally DOJ OIG, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks* (April 2003).

no rule requires service of the charges (in the form of an NTA) on the non-citizen in a timely fashion – only INS (now ICL) practice embodies that requirement.

To be sure, a portion of the delay found by the Inspector General is explicable by the truly extraordinary circumstances that existed in New York after September 11. The INS field office where many of the records were kept, for example, was within the closure zone in southern Manhattan.

But even those extraordinary circumstances cannot explain the absence of a legal standard. Notice of charges is a fundamental core aspect of what we consider reasonable due process. Indeed, the requirement for notice of criminal charges goes back to the 1500s as a response to the Star Chamber of England.

Thus, in 1637 when Freeborn John Lilburne, a Puritan, was examined by the Star Chamber on unspecified charges, his response was simple: “I am not willing to answer you to any more of these questions, because I see you go about by this examination to ensnare me; for, seeing the things for which I am imprisoned cannot be proved against me, you will get other matter out of my examination; and therefore, if you will not ask me about the thing laid to my charge, I shall answer no more.”⁷

The American legal tradition, born of the English common law and informed by the history of religious prosecution that motivated many Englishmen to emigrate, reflects an early and consistent adoption of this common law preference for accusatorial specificity. The requirement is so ingrained that as Justice Black has written: “No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal.”⁸

Of course, immigration proceedings differ from criminal charges. And thus, again, reasonable minds can differ on whether a particular type of notice requirement is constitutionally mandated. But, again, it seems to me that we should all agree that it is good policy. Especially if understood, as I understand it, to contain an exception for truly extraordinary circumstances (should, for example, a repeat of September 11 make it impossible for compliance) it is difficult to see the argument against a general rule requiring service of the notice on the non-citizen once the charging decision has been made.

As drafted section 201 has one other benefit. It excludes from consideration those immigrants deemed by the Attorney General to pose national security risks pursuant to the Patriot Act (as it should – for as to those immigrants one can imagine circumstances where notice might adversely effect national security interests). As a consequence, section 201 may well have the collateral benefit of providing an incentive for the Department to use the provisions of the Patriot Act in which Congress authorized such determinations – a set of rules that have gone unused in part because of the ready availability of alternate administrative mechanisms. Where Congress has expressly spoken to an issue it seems to me preferable that the Executive abide that determination, rather than relying on more

⁷ 3 State Tr. 1315, 1318 (1637) (emphasis added). This description of the examination is based upon Lilburne’s own written account.

⁸ *Cole v. Arkansas*, 333 U.S. 196 (1948).

general authority. If section 201 assists in that, it will have additional benefits beyond its express provisions.

Section 202 -- Section 202 would require the Secretary of Homeland Security to provide all detainees, except those in categories specifically designated by Congress as posing a special threat, with an individualized assessment as to whether the non-citizen poses a flight risk or a threat to public safety. If the individual is determined to not be a flight risk or danger, the Secretary of Homeland Security must set a reasonable bond or other conditions that will ensure the person's appearance in future proceedings.

This decision is in response to recent policies adopted by the Department of Justice that have, in effect, denied bond to whole classes of non-citizens with no individualized hearings before a judge. For example, the Attorney General issued a precedent Board of Immigration Appeals decision declaring that all Haitian asylum applicants who arrive by sea must be held in detention while their asylum proceedings are pending.⁹

Unilateral executive branch decisions mandating detention for classes of individuals is inconsistent with our commitment to individualized justice. When we make broad decision regarding classes of people in situations that call for individual consideration the rule of law is, again diminished. Indeed, the blanket detention of individuals who pose no risk of flight or harm to the community wastes critical resources that should be concentrated on investigating and detaining actual risks.

To be sure, requiring individual hearings is, itself, a significant cost on the system – but it is one that the system ought to bear as a mark of our commitment to due process. Nor, in my view, is the requirement for an individual hearing a code for excluding from consideration all factors that are not unique to the individual. Calling for an individualized determination does not, it seems to me, necessitate closing our eyes to factors beyond the individual's situation. There may, indeed, be general considerations regarding a category of immigrants that are relevant to a group of individuals. But in the end, those general considerations cannot legitimately be the *only* factors considered. Rather, as a matter of policy and as a matter of simple justice, those general considerations can and should properly be a piece of the puzzle, matched up with individual considerations unique to each individual. To be sure, we may approach some claims with a general skepticism, but equally surely we should provide for the rejection of that general skepticism when the facts and circumstances warrant.

Here is one example of how this construct would, in my mind, properly work. Consider the case of illegal immigrants who have already been designated for deportation by an immigration judge and who now have an appeal pending before the BIA. The DHS' "Hartford pilot project" -- a policy that mandates detention on every non-citizen who loses before the immigration judge – seems to me the wrong answer. It substitutes a single general consideration for individual consideration.

But we need not go so far as to disregard the fact that an initial determination of deportability has been made. It is not surprising that people facing a potentially final order

⁹ *In re D-J*, 23 I&N Dec. 572 (A.G. 2003).

of removal are more likely to abscond than those as to whom no initial adjudication has been made.¹⁰ And we would be foolish to utterly ignore that reality.

Thus it seems, again, to me that an analogy to criminal law is apt. Prior to a criminal trial, the presumption is in favor of release. Once a defendant has been convicted however, the presumption reverses and we anticipate the denial of bail unless the defendant makes a convincing case that he is not a flight risk or a danger to the community.¹¹ To be sure, he continues to be entitled to an individual determination. But this paradigm does reflect the appropriate balance (as, I believe, does section 202). It requires individual consideration of factors both relevant to the individual and of general applicability. Our own commitment to individual justice suggests nothing less.

Section 203 – Finally, Section 203 permits the Board of Immigration Appeals to stay the immigration judge’s decision to release the alien for a limited time period and when the government is likely to prevail in appealing that decision and there is a risk of irreparable harm in the absence of a stay. This provision reverses an existing rule that enables the government to unilaterally nullify a judge’s order to release an individual on bond after finding that he is neither a flight risk nor a danger to the community. The rule permits the Department to automatically stay an immigration judge’s decision to release an alien if the government originally denied bond or set it at \$10,000 or more. The rule has the effect of allowing the government’s immigration attorneys to overrule immigration judges.

On simple checks and balances principles, the existing rule seems inappropriate (though, again, it may very well be constitutionally permissible). As I’ve made clear throughout this testimony, I believe we can grant the government additional powers to combat terrorism while reasonably anticipating that the checking mechanisms in place will restrain too excessive a use of those powers. We must, and should, therefore be highly skeptical of rules and regulations that eliminate or limit those checking mechanisms.

The ability of an executive official to stay the order of an immigration judge on his own authority is an example of the type of rule that rightly generates skepticism. As a former government attorney myself, I yield to nobody in my admiration for their commitment to the rule of law. When they err, in my view, it is more often from mistake than from venality. But it is precisely because they are fallible human beings that we provide for oversight of their actions – and a unilateral ability to disregard the order of an immigration judge violates that principle of oversight.

To be sure, immigration judges err as well – and that is why we have the Board of Immigration Appeals. But, in my view, section 203 is right to place review of the immigration judge’s bail decision in the BIA, rather than with a Departmental trial attorney.

¹⁰ See Immigration and Customs Enforcement, Endgame: Office of Detention and Removal Strategic Plan, 2003-2012 (2003) (reporting 85% absconder rate for those released after final order of removal). The DOJ IG has reported a 30% absconder rate for those released during proceedings and a 70% rate for those with a final order of removal.

¹¹ Compare 18 U.S.C. § 3142 (presuming release appropriate pending trial) with 18 U.S.C. § 3143 (presuming detention appropriate post-trial, pending appeal).

* * * * *

I conclude where I began, by commending the subcommittee for its attention to these matters. The time to address these issues is now. As Michael Chertoff, the former Assistant Attorney General for the Criminal Division and now Secretary for Homeland Security, wrote during a brief stint in the private world:

The balance [between liberty and the response to terror] was struck in the first flush of emergency. If history shows anything, however, it shows that we must be prepared to review and if necessary recalibrate that balance. We should get about doing so, in light of the experience of our forbearers and the experience of our own time.¹²

In reviewing what we have done and what we should do in the future, we must be guided by the realization that this is not a zero-sum game. We can achieve both goals – liberty and security -- to an appreciable degree. The key is empowering government, while exercising oversight. So long as we keep a vigilant eye on police authority, so long as the courts remain open, and so long as the debate about governmental conduct is a vibrant part of the American dialogue, the risk of excessive encroachment on our fundamental principles of liberties and due process is remote. The only real danger lies in leaving policies unexamined.

Mr. Chairman, thank you for the opportunity to testify before the Subcommittee. I look forward to answering any questions you might have.

¹²See Michael Chertoff, *Law, Loyalty, and Terror*, THE WKLY. STANDARD 15, 17 (Dec. 1, 2003).

Mr. HOSTETTLER. I think the gentleman's time has expired. And he will have questions asked of him.

But the Chair recognizes Mr. West for 5 minutes.

TESTIMONY OF WILLIAM WEST, RETIRED SUPERVISORY SPECIAL AGENT, U.S. DEPARTMENT OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE, U.S. DEPARTMENT OF HOMELAND SECURITY, IMMIGRATION AND CUSTOMS ENFORCEMENT

Mr. WEST. Thank you. I would like to thank the Chairman and the Members and staff for the opportunity to present testimony today.

As we know, the issue of immigration law enforcement and how it relates to counterterrorism matters has been a topic of intense studies since the 9/11 attacks. Indeed, the 9/11 commission issued a separate staff report on the topic and clearly found that, before 9/11, the U.S. Government was significantly ill prepared from the perspective of utilizing its immigration law enforcement resources and counterterrorism matters.

Fortunately, there have been some improvements since 9/11 with the creation of DHS, but more needs to be done. Several topics of discussion for this hearing relate to immigration removal proceedings, and I have discussed them at length in my written statement submitted for the record. Given the time considerations, I will touch on them briefly here and gladly answer any questions from the panel.

Number one, on hearing closure, this issue relating to Government trial attorneys requesting that removal hearings against aliens be closed to the public, this practice is not new to the post-9/11 era but was employed more often since then because the number of cases involving sensitive information being heard in immigration courts has increased substantially.

It should be noted, such proceedings are still adversarial in nature, and the alien respondents are still entitled to their full due process rights under the law in those closed hearings, including having legal representation.

Mr. WEST. Secondly, the 48-hour rule. This relates to the time period allowed when an alien is initially detained and when the alien is served notice of formal immigration removal charges.

Before 9/11, the INS operated under a general 24-hour rule. After 9/11, the complexities of conducting additional intelligence agency background checks added to what is already the convoluted and time-consuming process of determining an alien's status and physically processing a detained alien. The 48-hour time period is not unreasonable under the circumstances once those circumstances are fully understood.

The blanket detention policy under Operation Liberty Shield, applies to asylum seekers entering the U.S. from known terrorist-producing countries. Given the historic widespread fraud and abuse in the U.S. political asylum system, combined with what is even today a relatively easy capability of deceiving that system, especially by people who come from the very countries where those terrorist organizations flourish and it is therefore often very difficult to verify

those asylum claims from those claimants, the detention policy for those countries is sound.

That said, the policy is still not really a blanket policy, and the DHS and the State Department are fully allowed, on a case-by-case basis, to authorize the release of those claimants when they are deemed releasable.

Finally, the ICE trial attorney authority to stay immigration judge release orders. This authority existed well before 9/11, dating back to 1998, and was employed in certain high-profile criminal alien cases and very limited national security deportation cases before 9/11. After the 9/11 attacks, when the number of removal cases involving sensitive information and evidence not releasable in immigration court increased significantly, the use of that process also increased.

Such action still requires trial attorneys to obtain headquarters general counsel level approval beforehand so there is senior level review of the case before that authority is actually invoked, and there is also appellate review conducted at the Board of Immigration Appeals.

In summary, all these issues should remind us that removal or deportation proceedings are not criminal judicial proceedings but administrative proceedings conducted within the realm of the Executive Branch of the U.S. Government, as sanctioned by Congress and the Federal courts. They are different, and different for a reason.

An alien respondent found guilty of a deportation violation, unlike a criminal defendant, is not punished by being sent to prison but is, instead, simply required to go home, much as a homeowner tells an unwelcome guest who has violated the privilege to stay in his house to leave. We should not forget the distinct differences or the reasons for those differences between those two systems.

Thank you, and I will be glad to answer any questions.

Mr. HOSTETTLER. Thank you, Mr. West.

[The prepared statement of Mr. West follows:]

PREPARED STATEMENT OF WILLIAM D. WEST

I wish to thank the Chairman, the panel members and the staff of the Subcommittee for the invitation to appear today and the opportunity to offer this testimony. As the Nation has moved onward from the terrorist attacks of September 11, 2001, the significant nexus between our national security and issues related to the enforcement of our immigration and nationality laws has become increasingly apparent.

The National Commission on Terrorist Attacks Upon the United States, the 9/11 Commission, devoted considerable research to the topic of immigration issues connected to the 9/11 attacks. In fact, there was a separate staff report titled *9/11 and Terrorist Travel* detailing the background and history of those immigration issues. As that report clearly indicated, the US Government was ill prepared for dealing with national security threats from an immigration enforcement perspective before the 9/11 attacks.

A handful of us who were in the immigration law enforcement profession during that period and who also happened to be among the very few involved in counter-terrorism efforts knew very well how ill prepared we really were. Even fewer of us, including me, tried to sound the alarm years before; but those efforts always fell on deaf ears. Those in senior management positions of the Immigration and Naturalization Service (INS) and the Department of Justice (DOJ) at the time who could have implemented meaningful changes in that area simply had no understanding of the issues or genuinely believed immigration law enforcement had no significant role to play in counter-terrorism and other national security matters, notwithstanding the fact that specific immigration and nationality laws dealt directly with

such issues and foreign nationals (aliens), who violated a variety of other immigration laws, were often the primary suspects in such cases.

Even the first attack against the World Trade Center in 1993 and the related plot to destroy New York tunnels, a Federal building and other landmarks, all of which involved conspirators who were aliens that also violated US immigration and nationality law, failed to awaken the senior levels of the US Government to the realization that immigration law enforcement should have been an integral part of the country's counter-terrorism efforts. Those efforts only evolved very slowly and at the local field office level, with a slight and begrudging Headquarters level acknowledgment by the late 1990s. It really was much too little much too late by 9/11.

The situation did change after the 9/11 attacks, at least from the immediate perspective of the INS making manpower available to the FBI and other agencies to assist in counter-terrorism investigations in the months following the attacks. Ironically, the INS found itself being limited in being able to assign Special Agents to work such matters because many of its Special Agents did not have the requisite security clearances. Unbelievably, INS often did not require some of its Special Agents to have *any* security clearance.

With the creation of the Department of Homeland Security (DHS), and the abolition of the INS and the formation of the Bureau of Immigration and Customs Enforcement (ICE) as the interior immigration enforcement/investigative arm of DHS, the assignment of ICE agents to work counter-terrorism cases became part of the new homeland security mandate within DHS. Those efforts were, and are, limited by the other investigative missions of ICE (and there are many) and the number of Special Agents within the agency (approximately 5500).

Within ICE, only about 2000 Special Agents were "legacy" INS Special Agents who had the full background and training in immigration and nationality law and experience conducting investigations therein. While ICE has supposedly conducted cross-training for all its agents (legacy Customs and INS), that cross-training appears to have consisted of at most two weeks of in-service training, often conducted in field offices, and sometimes it amounted to less. The rest of the cross-training was essentially on the job.

After the 9/11 attacks, the Government implemented several changes within certain immigration benefit and removal proceedings. Those changes are the primary topic of this hearing and I would like to discuss each below. Please note that I offer this testimony from the perspective of twenty-nine years of Federal law enforcement experience, twenty-five of which directly investigating and enforcing US Immigration and Nationality laws as a Special Agent and Supervisory Special Agent with the Investigations Division of the INS and ultimately, before my retirement the end of April 2003, with ICE under DHS. From the early 1990s, I became involved in counter-terrorism and other national security cases, and eventually became the Chief of a unique and specific National Security Section within the INS Investigations Division in south Florida devoted to such cases. I have direct, real world experience investigating foreign nationals who were involved in terrorism, espionage, human rights persecution and modern-day war crimes and other national security threats to the United States, targeting those suspects for immigration and nationality law violations within a multi-agency task force arena. This is not academic, think-tank theoretical experience but in-the-field, on-the-street working experience over many years and I hope that provides the panel with a special perspective on these matters.

Hearing Closure: This process allows the Government to close removal (deportation) hearings before an Immigration Judge (the Immigration Court) to the public upon a motion that having the hearing remain open/public would potentially jeopardize national security or other ongoing sensitive investigative issues.

Shortly after the 9/11 attacks, FBI and INS agents nationwide were flooded with leads related to that investigation, as well as off-shoot investigations involving other potential terror threats. As those leads were processed, and it was fully understood that no potential lead or suspect that might in any way be linked to the attacks or another such threat could be overlooked, the vast majority of the subjects of those leads were identified as aliens and many of those aliens were determined to be in violation of some provision of the Immigration and Nationality Act.

Those early case leads, wherein the subjects were quickly determined to be illegal aliens, resulted in the alien subjects being arrested and detained on entirely legitimate immigration law violations. Those were violations, however, that under normal circumstances might have resulted in the alien being released on their own recognition or on a small bond. In the weeks and months following 9/11, in following up leads related to the 9/11 investigation, those were anything but "normal" circumstances.

The Government was faced with the dilemma of aggressively investigating these leads, identifying potential suspects during the process of investigating those leads, and then having a viable legal charge against those suspects that allowed for their arrest and detention. How to process the follow up legal proceedings without jeopardizing the larger and potentially more important counter-terrorism lead information while still maintaining legal control and custody over the suspect became the issue. Hearing closure was the answer.

It should be noted that closing the hearing still allowed the detained alien his/her adversarial due process rights in Immigration Court. The alien was still allowed legal representation. The hearing itself was simply not open to the public. The use of Immigration Court protective orders was implemented to facilitate the non-release of hearing information outside the courtroom in such cases.

As the Government has expanded its counter-terrorism investigative efforts beyond the 9/11 attacks over the past several years, with the augmentation of assigned ICE agents and Title-8 authorization to FBI agents (the FBI received immigration enforcement authority just before the creation of DHS in 2003), cases with the same scenario continued to present themselves.

The concept is essentially a blend of “quasi-FISA” with Immigration Court proceedings, ruling in favor of not publicly releasing sensitive information about a case generally in order to protect an ongoing investigation. The need to continue to have this flexibility is evident by the fact that such cases continue to be developed within the multi-agency counter-terrorism task force approach. It should be reiterated, the adversarial nature and legal representation status for the alien respondent is not changed in these closed proceedings; it is only that such proceedings are closed to the public.

48 Hour Notification Rule: Before the 9/11 attacks, there existed a semi-formal but generally adhered-to “24 hour” rule wherein an alien detained in deportation matters was served with a charging document . . . the old Order to Show Cause which was later replaced by the Notice to Appear which is currently in use. Little understood by the general public, nor even by the law enforcement community outside those within what was INS and now ICE, is the fact that physically processing an alien arrested on removal charges, even something as “simple” as overstaying a nonimmigrant visitor status, can quite literally be more time consuming and paper-complex than the processing for many felony criminal arrests.

How can that be? The issue of actually determining if an alien is in violation of the Immigration and Nationality Act is often not clear, easy nor fast. It is a legal requirement for all aliens within the United States to carry with them at all times evidence of their alien registration, assuming they have such evidence, and if they do not it is technically a misdemeanor criminal offense under 8 USC 1304(e). Needless to say, violation of this provision of law is rampant, and prosecution for this is extremely rare. However, once an alien is determined to be an alien by an ICE agent, the alien’s status must then be determined and it is incumbent on the alien to prove he/she is lawfully within the United States (8 USC 1361).

If the alien does not possess any registration documents, as required by Federal law, at the time of the encounter, the alien may be detained until their status is determined. Even if the alien presents a document purporting to be evidence of alien registration, with a few short questions being improperly answered about how the status was obtained, and if the document appears altered, (there is an abundance of fraudulent immigration documents “out there”) it is entirely likely the investigating agents will pursue further inquiry.

That further inquiry means conducting additional in-depth questioning, either in the field or in the immigration office and conducting further record checks, either via radio or cell phone from the field or in the office. Those record checks are conducted on immigration computer systems that are notoriously inaccurate, lacking updated information and contain many subsystems that do not interface with each other, thereby requiring multiple redundant checks. Frequently, a physical review and analysis of a hard copy paper case file, or the scanned equivalent, is necessary for a final status determination, a case file that often is located in another field office or stored in a central records repository. And all this is just the preliminary workup to determine if an alien may or may not be prima facie lawfully or unlawfully in the US.

That preliminary status process alone can often take hours, even though determining a person is an alien usually is done in a matter of moments. Surely, there are times when an unlawful alien who has surreptitiously crossed the border and has no alien registration documents immediately admits to all that when encountered and is quickly taken into custody. Even in those cases, the full battery of record checks through the convoluted computer systems must still be conducted, to include the standard criminal record checks via the NCIC system.

Once an alien is determined to be in violation of the law and subject to a removal charge, there is a formal processing procedure that must take place before a Notice to Appear, the charging document is issued. In fact, there are usually somewhere on the order of a dozen different forms that must be completed and executed in even the simplest removal cases. The more complex the case, the more forms there are to complete. The process of actually determining a violation and then processing a charging file routinely can take many hours, sometimes the better part of a work day, depending on the complexity of the case, for one alien.

Then there is the matter of when and where the alien may have been initially arrested and detained. If it is late in the day, and the NTA processing might not be expected to be completed until the following day, the alien might be temporarily detained at an immigration detention center or local jail overnight, to be retrieved the next day for completion of processing. This often occurs because an official who is lawfully authorized to actually review and sign a Notice to Appear may not be available until the next day.

These were all standard reasons why, pre-9/11, the "24 hour" rule was in effect and generally worked. After 9/11, things very quickly changed when INS agents, working closely with the FBI, began arresting and detaining aliens identified in suspected terrorism related inquiries. In addition to the usual standard convoluted obstacles INS (and later ICE) agents faced in these matters, the very real potential issues of national security were thrown into the mix.

Very quickly, very many of the aliens encountered in these law enforcement endeavors also had to be queried through a battery of national security databases. Those efforts took an additional period of time, and the gravity of the potential results was even more important. That is what led to the creation of the "48 hour" rule. It was simply a recognition that in certain enforcement situations, field investigative personnel needed additional time to not only fully determine who they were dealing with but, under an institutional structure that, even with the transition to DHS where some improvements have been made, arresting, detaining and processing an alien in removal proceedings can still be a time-consuming and labor-intensive affair.

To remove or shorten this rule without also creating a significantly improved and streamlined infrastructure system under which field immigration law enforcement personnel can work would be asking those law enforcement officers, in those limited circumstances where the rule is required, to do a nearly impossible task.

Blanket detention under Operation Liberty Shield: In March 2003, the White House announced Operation Liberty Shield, which essentially was a series of security and law enforcement enhancements by the Federal Government in its ongoing international counter-terrorism efforts. Among those enhancements was a change in detention policies relative to asylum seekers from certain specified countries, namely, countries "where al-Qaeda, al-Qaeda sympathizers, and other terrorist groups are known to have operated." The policy required those asylum seekers to be detained for the duration of their processing period, so the Government could "determine the validity of their claim." The announcement specifically cited that DHS and the State Department would coordinate exceptions to the detention policy.

This "blanket" detention policy for asylum seekers has come under criticism from a number of sources. The general premise for such criticism is that asylum seekers are the very people least deserving of detention, they are people fleeing repressive regimes and conditions and are seeking freedom and detaining them while their asylum cases are heard is draconian.

On the surface, such criticism might seem to have certain merit. However, such criticism simply appeals to surface emotions and ignores the historic reality of widespread abuse of the liberal political asylum system within the United States. Interestingly, that widespread abuse really began with what could also be described as the beginning of America's conflict with radical Islam, the seizure of the US Embassy in Tehran in 1979 by radical Iranian "students" supported by the Iranian government and the taking of American hostages who were held in captivity in Tehran for more than a year.

One of the domestic responses by the Carter Administration to that event was a so-called "crackdown" on illegal Iranian students and other nonimmigrants in the United States. Within INS, that operation was dubbed the "067 Project." To no one's surprise, INS found it had no idea how many Iranian students were in the US. Over about a year, INS agents were tasked with identifying, locating and determining the immigration status of as many Iranian students and other nonimmigrants as possible. The project identified somewhere on the order of over 30,000 such Iranian students and other nonimmigrants, a very large number of whom were determined to have violated their immigration status in some way or another. Those violators were arrested and charged.

Of those Iranian students who were placed under deportation proceedings under the 067 Project, most were intelligent, savvy young men of some means. Many also turned out to be angry young radical Islamic fanatics, although Federal law enforcement wasn't quite sure what that meant at the time. What did happen, however, is most were released on bond and hired immigration attorneys. Most wanted to remain in the United States. A few began filing for political asylum and that opened the asylum floodgates . . . the few became very many and the system became overwhelmed.

From the 067 Project, of the thousands of illegal Iranians who were placed under deportation proceedings, only a handful were actually deported and a very large number were granted political asylum. How many of those asylum requests were legitimate is anyone's guess, since the process and system was, as I noted, basically overwhelmed by the numbers at the time and the ability to investigate the claims of such Iranians was virtually impossible, so they were essentially taken at face value. This set the sad asylum system "standard" for years to come, until the system saw some degree of reform in the 1990s. Fraud and abuse within the system have been rampant for years, and were the impetus for the eventual reforms that were put into place but which have only somewhat improved matters.

Even with some modicum of reform, the asylum process continues to be abused. While State Department country condition reports, Intelligence Community assessments and NGO reports provide Asylum Officers and Immigration Judges a better perspective on potential case backgrounds in the generic sense, very often, specific issues surrounding individual cases come down to the credibility of the alien claimants themselves. This means an Asylum Officer or an Immigration Judge must decide if the alien claimant is telling the truth or lying. It often really is that simple, and that easy for a claimant to lie and beat the system. They only need a believable story that cannot otherwise be readily disproven, and sound credible to the official to whom they are telling the story.

Within that context, within the larger framework of the ongoing war on terror, wherein alien asylum claimants from known terror producing countries appear and the training doctrine of al-Qaeda and other terrorist organizations teach their operatives to seek asylum in the West and, especially in those cases where the issue truly boils down to the credibility alone of the claimant, combined with a system that has a history of widespread fraud and abuse on the part of claimants, maintaining the detention policy under Operation Liberty Shield makes perfect sense.

Finally, it should be pointed out the policy fully allows for exceptions to the detention policy. DHS and the State Department are allowed, on a case-by-case basis, to consider and release asylum claimants when such release is deemed appropriate. For this reason, the policy really is not a "blanket" detention policy after all, but simply one of reasoned posture in favor of security.

Trial Attorney authority to stay Immigration Judge release orders: In certain removal cases, wherein an Immigration Judge orders the release of an alien respondent and the Government Trial Attorney (now DHS/ICE Counsel) disagrees with the condition of release, the Government Trial Attorney can invoke a legal stay of the Immigration Judge release order while the Government appeals the order to the Board of Immigration Appeals. Since 9/11, the invocation of this process has increased, primarily in detention cases involving aliens suspected of linkage to terrorism or other national security threat matters.

It should be noted this authority by Government Trial Attorneys is not something new under the USA Patriot Act or some new policy implemented after the 9/11 attacks. The authority existed well before 9/11, since the 1990s, and has been utilized selectively in serious criminal alien and a handful of national security deportation cases. The process has not come into serious public scrutiny, however, since after the 9/11 attacks when it's usage became more widespread in removal proceedings. This is simply a matter of more such cases related to potential security threat issues being presented in the Immigration Courts.

An ICE Trial Attorney must seek and receive ICE Headquarters General Counsel Office approval before invoking the stay authority; therefore, there is a senior level legal review of the case issues before the authority is implemented in any given case. Further, the invocation is generally employed when the Government possesses additional background information against the alien respondent which it prefers not to release in the Immigration Court proceedings, but believes the evidence already presented would suffice upon appeal to the BIA and the alien's release would be detrimental to the security of the community or pose a notable flight risk.

An important issue to be remembered in this is that while the Immigration Judges and even the Board of Immigration Appeals are quasi-independent semi-judicial entities, they are, in fact, officials of the United States Department of Justice who ultimately report to the Attorney General. As such, they are ultimately Execu-

tive Branch officials of the Federal Government. When an ICE Trial Attorney invokes the stay rule, he/she is essentially telling another Federal Executive Branch official that an administrative directive issued by that official must be temporarily placed on hold while other Executive Branch officials review the decision and issue another administrative ruling. It should be remembered that Immigration Court proceedings, removal (deportation) proceedings, are not criminal judicial proceedings . . . they are administrative proceedings held within the realm of the Executive Branch of the Federal Government.

Which leads me to my summation. When it comes to immigration law enforcement, at least the part that deals with removal (deportation) matters, it appears that far too many people equate such matters with criminal judicial proceedings. This may be due to a genuine lack of understanding on the part of many; but is probably a deliberate misrepresentation of reality on the part of at least some, who do so for other agendas.

While there are parallels: aliens can be arrested and detained, they are charged, they go to court, they can be represented by lawyers, they can be released on bond in certain circumstances, they are entitled to appeals (actually, more appeals than criminal suspects have in the Federal court system); the process and the underlying premise behind it all are notably different.

The process is all administrative. The rules of evidence are different. While there are similarities, the rules of evidence favor the Government, the prosecution, and the Federal Courts up to the Supreme Court have more often than not upheld that posture for many years. And, why is that? Because the entire premise of removal/deportation is different from the criminal justice system.

If an offender is charged with a crime (and, there are actually many immigration crimes, but we are not discussing those here), the prosecution has the burden to prove the defendant's guilt beyond a reasonable doubt and if it does, the violator might go to jail . . . may well lose his/her liberty; they are *punished*. In the immigration removal system, the administrative process, the burden, once the Government proves a person is an alien, falls to the alien to prove they are legally within the US and entitled to be here (8 USC 1361). In reality, the Government almost always has evidence the alien also violated the immigration law, so the real litigation usually ends up over issues related to potential relief from deportation (like political asylum). And it is those issues that usually go to appeal . . . and take such long periods of time for appeal, and why even seemingly simple deportation cases can take literally years before they are finalized. That is probably something the immigration defense bar does not want to have widely known.

But, the end result in such proceedings, if the alien *respondent* (not *defendant*) is found guilty in a deportation case, is not going to prison, but simply they are required to go home . . . to return from where they came. This is not considered a punishment, it is merely considered a revocation of the *privilege* of being allowed to enter or remain in the United States. And that really is what has been lost in much of this.

Foreign nationals, aliens, do not have any right to enter and remain in the United States, though I suspect many would argue they do. Unless Congress changes the law and grants such rights, aliens still only have a legal privilege to enter and remain here. That really is what immigration law enforcement, on the deportation side at least, really is all about. It is very much like a homeowner having the absolute right to deny entry into his home of someone outside asking to come in. And, the homeowner need not have any reason nor give any explanation why he chooses to deny entry to the stranger. And if the homeowner chooses to allow a guest to enter, the homeowner has the absolute right to tell the guest to leave at anytime for any reason.

That may be a simple analogy, but the US Government represents the homeowner for the United States of America. While we may wish to continue allowing certain invited guests into our home, we know there are some dangerous intruders out there who mean to do us great harm. Employing reasonable law enforcement techniques to keep those dangerous intruders out, and to identify and remove those already here, even if some of those techniques might seem somewhat at odds with our traditional criminal justice procedures because it must be remembered they are not part of that system, is a smart common sense approach to helping keep our Nation safe.

Mr. HOSTETTLER. At this time, the panel will now turn to questions.

Ms. Swenson, first to you. What difficulties would an immigration judge face in holding an open hearing to determine whether to close a hearing to the public?

Ms. SWENSON. There are a number of difficulties that an immigration judge could face, especially in the context of a case involving very sensitive secrets, for example, you know, a child abuse case or a national security case. Sometimes the identity of the alien himself is something that is a secret that is sensitive in itself, and it would be difficult in a situation where there is not a protective order or a closure order in place to be able to keep that kind of information secret while a protective order or, you know, a closure order were being adjudicated. So the difficulty could possibly be that, in order to adjudicate the closure itself, that sensitive information could be disclosed. There are procedures to prevent that, but that is a risk.

Mr. HOSTETTLER. Thank you.

Let me ask you some questions about the so-called Creppy memo that authorized the closure of removal cases. You have already mentioned in your testimony that individuals were not precluded from speaking to counsel or their family members or, ultimately, the media. But did aliens subject to the memo have an opportunity to introduce evidence and call witnesses in support of their applications for relief from removal?

Ms. SWENSON. There has been quite a bit of confusion surrounding this issue. As I mentioned in my opening statement, the Creppy memorandum didn't touch in any way the due process procedures that are available to an alien. Aliens in these special interest cases and these cases closed under the Creppy memorandum were given full and fair opportunity to litigate their claims, to present evidence, to present witnesses, to cross-examine the Government's witnesses and to be represented by counsel.

As I mentioned earlier, indeed an unusually high percentage of the illegal aliens who were in these special interest cases were actually represented by counsel.

Mr. HOSTETTLER. Thank you.

Mr. Greene, why would it take more than 48 hours to file immigration charges against an alien? And why would it take more than 48 hours to bring an alien before an immigration judge?

Mr. GREENE. There are issues having to do with logistics. First of all, it may be an arrest made on a Friday afternoon or turned over from a local law enforcement agency on a Friday afternoon, and there would be then a period of roughly 72 hours before you could get the case before the immigration judge. There may also be substantive issues associated with—especially in the circumstances that we were dealing with after the 9/11 attacks—knowing with certainty the identity and the intent of the people that we had in front of us.

So the flexibility—generally, it isn't a problem for us to be able to do 48 hours and to serve the charging documents. But in certain circumstances it may be necessary for us to extend the process of inquiry, particularly with respect to identity and verifying claims that are made about how the alien came into the United States or attempted to enter the United States before we issue the actual charging document.

Mr. HOSTETTLER. Thank you.

Mr. West, in discussing the so-called 48 hour rule, once again in your testimony you note that it can take time for ICE to determine what the appropriate ground of removal should be. In what context would an ICE agent arrest an alien without knowing on what ground the alien was removable?

Mr. WEST. Mr. Chairman, there are often times when an ICE agent, formerly an INS agent, an ICE agent would encounter an alien and determine that that alien was not here lawfully simply by asking questions about how they entered the United States, what kind of documents they may have, and that alien may not present—as they are required by law to carry evidence of alien registration, once alienage is determined, that can be as simple as asking, are you a national or citizen of the United States? They say, no, I am from such and such country; I am a citizen of such and such country. Once they determine that, the burden of proof shifts, actually, now for the foreign national, the alien, to show that they are lawfully here in the United States.

So once that ICE agent has established that this person is a foreign national, is an alien, they know that—the agent then knows that they have a person that must establish what their status is. And the way it really works in the real world is the agent will conduct record checks, either over the radio, on a cell phone. If that person has no documents that are presented or if the documents look bogus, if the record checks determine no lawful status at the time, then the grounds for actually detaining the alien, a prima facie case of probable cause that this alien is unlawfully in the United States has been met.

The ICE agent will, in all likelihood, detain that alien, probably bring him back to his office to conduct further inquiries, further record checks to actually determine what specific charges under the Immigration and Nationality Act should be applied. He knows he has got an unlawful alien. He or she does not know specifically what charge might apply. That requires further inquiry, and that can take some time, that can take hours sometimes, running additional record checks, running down paper documents, that sort of thing.

Mr. HOSTETTLER. Thank you.

The Chair now recognizes the Ranking Member for 5 minutes for purposes of questions.

Ms. JACKSON LEE. Thank you, Mr. Chairman. I am going to yield first to the Ranking Member of the Full Committee, and I will go after Mr. Conyers for his questions at this time.

Mr. CONYERS. If that—

Mr. HOSTETTLER. The Chair recognizes the gentleman from Michigan for 5 minutes.

Mr. CONYERS. Thank you.

Let me raise a question, first of all, to Mr. Rosenzweig.

Is it your general view that the four issues that are raised in the measure that is before us are ones that could be attached to the larger bill that we are working on in the Committee without any serious detriment to our national security concerns?

Mr. ROSENZWEIG. Yes. Most of the objections that I have heard sound more in the nature of administrative, and those are certainly

things that need to be considered, but providing that each—as each of these provisions does, that there are carve-outs, for instances, in which legitimate national security concerns are presented, that seems to me to answer most of that problem.

Mr. CONYERS. I also take it, sir, that you believe that this balance between protecting constitutional and civil liberties concerns is very important as we proceed in this attack on terrorism. Because unless we have something different, unless we are identified differently from our adversaries, we end up losing or compromising our position in another way.

Mr. ROSENZWEIG. It would be hard to disagree with that sentiment.

Mr. CONYERS. Well, let me ask everybody at the table, then, since it is perfect—well, it may not be perfectly obvious. Does everybody agree with that, all of our witnesses? Ms. Swenson?

Ms. SWENSON. Congressman, I would like to just make sure I understand—

Mr. CONYERS. That is all right. I will repeat it.

Ms. SWENSON. Thank you.

Mr. CONYERS. Is it your concern that we protect constitutional rights and liberties under our existing framework as we proceed in the war on terrorism or we become indistinguishable from our opponents?

Ms. SWENSON. Most certainly, Congressman.

Mr. CONYERS. Okay. Mr. Greene.

Mr. GREENE. Yes, Congressman. I think the Department has gone on record that it is a both/and situation, that we can have both homeland security and protection of our constitutional rights as we continue in this struggle to protect the homeland. So not only do I agree, but I agree emphatically.

Mr. CONYERS. Well, the current Attorney General said that, but his predecessor did not come to those conclusions, I am sorry to say, and that was the problem that takes us back to the beginning.

Mr. GREENE. Yes. Speaking from the Department of Homeland Security, sir, I think Secretary Ridge has made clear that he wants to have both homeland security and civil rights and civil liberties, which is why we have created such a division within the Department and actively pursued this—

Mr. CONYERS. Well, I was thinking of the Department of Justice, and I won't hold you to explain that. But I just wanted to make sure that we understand that we have essentially different views on this subject from my interpretation from the Attorney General that was there for 9/11 and the present Attorney General.

How do you stand on this concern, Mr. West?

Mr. WEST. Congressman, I was a Federal law enforcement officer for 29 years, and I believe that I fully understand what constitutional rights mean. Because every day that I worked I had to deal with constitutional protection issues. Now that I am a private citizen, I certainly expect my Government to protect my constitutional rights, but I also want my Government to protect my security, and I hope that that balance is struck. And I want that to happen for all of us.

Mr. CONYERS. Let me ask you about this matter of D-J—oh, my time is up?

Mr. HOSTETTLER. Five minutes. But the gentleman will be given an additional minute to ask a question.

Mr. CONYERS. Thank you.

I just wanted to find out—I suppose I should direct this to the representative from the Department of Justice. In the matter of D-J, we are talking about detaining mass exodus, 18-year-old, and yet we have two different policies dealing with the Cubans and with Haitians, and I am wondering if those can be squared.

Maybe I should ask this to Mr. Greene, more particularly. So here we have Cubans, Haitians, the D-J Issue, in which we, apparently, for some are willing to send them a message that we are turning them back so that they won't bother to come. Can you comment on that briefly?

Mr. GREENE. Yes, sir, I will try, recognizing that it is a very complex issue.

The legislative structure that governs the history of Cuban immigration to this country since the revolution is very, very different from that of other countries in the Caribbean. There were specific legislative provisions provided to Cuban immigrants that go back to the 1960's that affect their availability and their right to come and remain in the United States. It was in an attempt to discourage all forms of mass immigration migration in the Caribbean that the former INS created the wet-foot, dry-foot policy. So if you made it to the United States, then the provisions from those statutes that came out of the Cold War period would apply, but while you were caught on the high seas the attempt was to create a deterrence.

I mean, I will leave it to my colleague from the Justice Department to describe sort of the policy implications of the decisions today itself, but speaking from my knowledge of what operated in the former INS, it was really a different set of Cold War legislation that affected the one nationality as opposed to the other.

Mr. CONYERS. Thank you, Mr. Chairman.

Mr. HOSTETTLER. I thank the gentleman.

The Chair now recognizes the gentleman from California for 5 minutes.

Mr. LUNGREN. Thank you very much, Mr. Chairman, for the time.

Mr. Rosenzweig, as I understand your testimony, you have suggested that the subject matter that we are discussing here today is not really a question of whether there are constitutional violations. That is, the current law procedures that we are talking about are not unconstitutional, but rather your concern that perhaps some additional protective procedures would further the interests of civil liberties.

Mr. ROSENZWEIG. That is correct, Your Honor—I am used to appearing in appellate court—that is correct, Congressman. With the exception of the blanket closure rule, which was held unconstitutional by one circuit court in the Sixth Circuit Court of Appeals, none of the policies that we are addressing today is, in my judgment, unconstitutional. And I would note that that policy was held constitutional by the Third Circuit.

So what I really think we are discussing here today are questions of legislative grace, that is, what it is that this body, in consulta-

tion with the Executive, deems the optimal policy to reflect our values and our best cost/benefit analysis of what to put in place.

Mr. LUNGREN. Thank you.

Ms. Swenson, with respect to closed immigration hearings, you suggested that there were approximately 600 cases that followed the Creppy memo, that that is not the policy of the Department now, has not been for two-and-a-half years, but you believe it imperative that the Executive Branch retain sufficient flexibility to close an entire class of immigration proceedings if circumstances warrant.

How and in what way would that—the long-term policy of the Administration—be hampered if we were to adopt the legislation of Mr. Berman and Mr. Delahunt, specifically section 101, which would have as a general proposition that the removal proceedings be held pursuant—or that they would be open to the public, except when an immigration judge would, on a case-by-case basis, make these specific determinations? And then, also, the requirement that a compelling governmental interest be shown?

Ms. SWENSON. The debate, as I understand it, between on the one hand the current state of affairs and what would be presented under the bill is the difference between whether the Attorney General be shackled from being able to effectuate a closure of a category of cases instead of turning closure decisions exclusively to the province of individual immigration judges in a time of national emergency.

At this time, and at every time in history, our research reveals, other than after 9/11, there is a case-by-case determination. It is not on a strict scrutiny basis by individual immigration judges as to whether or not to close immigration hearings in almost every type of case but for, you know, special cases involving child abuse, which is the only other type of blanket closure that is available right now.

Mr. LUNGREN. But my question is—the legislation here would not permit you to have a blanket policy as you had in the Creppy memo, and so my question is, in what way would this shackle the Justice Department from doing what we want it to do, that is, to protect us from the threat of terrorism?

Ms. SWENSON. Even the Creppy memorandum wasn't actually a blanket closure because each individual special interest case had to be individually determined to be—to warrant special interest treatment. So even the Creppy memorandum had an individualized case-by-case basis.

Mr. LUNGREN. Well, I guess my question would be this: Is it more than just the administrative burden, as suggested by Mr. Rosenzweig, that you are looking at? Is there a concern that there would be failure on the ability of the Department to make its case? Number one.

Or, number two, is it because of the inconsistent rulings of individual immigration judges that you fear would result in an inability for us, as a Government, to protect us from some terrorist threat?

Ms. SWENSON. All three of those concerns, Congressman, are implicated by the bill.

First, it would be an administrative burden, that is true. But, more importantly, in a situation where there is a national emergency, it is not clear that the Government would be able to prove on a case-by-case basis and a strict scrutiny basis the closure of each individual case. And if it is not able to do that, whether it be as a result of the number of individual closure requests or because immigration judges would decide each case inconsistently, that could be the type of thing that would cause individual bits of information to be disclosed to terrorist groups, who could then fit that information to a larger mosaic that would thwart Government efforts.

Mr. LUNGREN. Mr. Chairman, I have more questions, but I hope we can have another round.

Mr. HOSTETTLER. I don't know if we will have another round. If the gentleman would like to ask unanimous consent for an additional minute.

Mr. LUNGREN. I would like to ask unanimous consent for an additional minute.

Mr. HOSTETTLER. The gentleman is recognized.

Mr. LUNGREN. What I am trying to determine is this: Is it because of the uncertainty that necessarily occurs in cases such as this? That is, if we are under an imminent threat of terror that, as we are responding to an unknown threat out there, that we believe that we need this for the Attorney General?

Because in normal circumstances we would have the luxury, if you will, of having more knowledge of what it is we are looking for, not only generally but specifically with the individual, and that that sort of unique set of circumstances is at the basis of what you and the Justice Department think you need. I am trying to figure out why you say—every time I ask you the question about the Creppy memo, you tell me, well, under most circumstances in the history of the country we haven't done this. I understand that. That is why we are asking why you should retain this flexibility, as opposed to the Berman-Delahunt construction, which would say, no, even in those situations we think the Government ought to have the burden.

Ms. SWENSON. Well, if ever we were to face another attack, God forbid, there could be—well, the easiest way to look at this is to actually take the actual events of 9/11, because that actually happened, and look at what happened there.

The number of closure cases that came in the immediate aftermath of the terrorist attacks made it necessary for the Attorney General to be able to say, look, for this class of cases we need to have closure, we need to have uniformity in decision, and we need to be able to close the cases without having to do an individual case-by-case determination that would take a great amount of time.

Mr. LUNGREN. Thank you, Mr. Chairman.

Mr. HOSTETTLER. I thank the gentleman.

The Chair now recognizes the Ranking Member of the Subcommittee for 5 minutes for purposes of question.

Ms. JACKSON LEE. I thank the gentleman very much; and as I have said, this is a, I think, an important effort at remedy, on a remedy that I think is necessary.

Professor Rosenzweig, let me say to you that—and I like utilizing the term “professor”, and I also am glad to see you again. Only because my time was short that I did not get a chance to probe you during the questioning dealing with privacy issues. Maybe we will have another opportunity.

But I do believe we have common ground because we are offended, mutually, not because of what we did after 9/11—there was general unanimity on that issue—but because I think we can do better in balancing both concerns as we move forward.

I do want to say to Ms. Swenson—I just want to acknowledge a statement. I am just going to make this statement, that you indicated in your statement that the closed hearings are not really closed in an ordinary sense because aliens and their counsel are free to release information about their proceedings to their family members, friends, witnesses and the press. So to me that is inconsistent with any argument by Justice and others for the closing of the hearings, which are allegedly to protect confidential information. I make that as a broad statement.

I would ask you, in your statement that you made mention of the automatic stay provision for bond appeals has only been used a few hundred times since they were enacted in 2001, and I would like to know how long those aliens were incarcerated while their appeals were being—pending before the Board of Immigration Appeals, and what the danger would be for having those individuals having bond hearings to allow them to be released to their families.

I am asking that, but I want to get Professor Rosenzweig, if you would, one, to expound on the theory that you offered. At the same time, I want you to finish the two points that you wanted to make. But I would like you to expound on something that I think was extremely salient, and that is that the overall argument of our good friends here at the table alongside of you, at least those from the Government, is that it poses an administrative burden if we begin to do case-by-case analyses.

To me, we need to move swiftly to fix it. Because I slightly disagree with you. You are absolutely right that constitutional rights do not fall upon an immigrant coming to the shores, but if you are here, there are some constitutional protections that you have.

So my idea is that we need to immediately rush to fix these problems because we should not be standing on administrative principles if we can find a balance.

I yield to the professor.

Mr. ROSENZWEIG. If I said that there were no constitutional rights for immigrants at all, that would certainly be wrong. They certainly possess some rights, and the courts have so held, in coming to the United States. So I would agree with you.

I guess I would take the opportunity to speak to the other two provisions—

Ms. JACKSON LEE. And the other administrative.

Mr. ROSENZWEIG. And the administrative.

With respect to 201, the notice of charges idea, again, it strikes me that what we are talking about here is something that has—it serves an important transparency function. You can't answer charges you don't know about, and it is only when you are notified

of them that you begin to have the opportunity to develop an answer.

We have set up a system in which each immigrant is entitled to such a notice at some point in time, and it doesn't strike me as unreasonable to set that time as at the same time that the INS—or ICE now—determines what those charges should be.

Again, most of what I heard Mr. Greene say, and Mr. West, sounded like very real administrative concerns about the difficulty of collecting the information and making it—but those same concerns actually, to my mind, apply in any system we administer, the criminal justice system as well, and yet we try and find the way to do that. I mean, if it is really a resource problem, then the answer is probably more resources, which I am sure would make ICE very happy to hear me say that, rather than using the lack of resources as a justification for a legal regime.

With respect to the automatic stay provision, which is 203, again, I hear the concern that, you know, if the release order is not stayed there is a possibility that the immigrant may abscond, and that is a legitimate and real concern. But, again, it seems to me the analogy to the criminal sphere is the appropriate one. We don't have a system or a set of rules that allows for the automatic detention of criminal defendants who have been convicted. We have a presumption against their release, to be sure, and that seems to me to make a great deal of sense for a convicted criminal defendant, but it is only a presumption that the individual is entitled to rebut, and it is subject to an individuated determination, in the first instance, in front of the district judge, and in the second instance, if there is an adverse determination for either party on appeal.

It does not strike me as unreasonable, since we have created a system of immigration judges and Bureaus of Immigration Appeals, to repose with those neutral third parties the ability to make the determination on stay, and to provide for appeal of an adverse determination by the Department if it loses and if it can demonstrate a reason to think that the immigration judge was wrong. And those are all very reasonable things.

It is the kind of unilateral exercise of automatic authority by a trial attorney that strikes me as getting the checks and balances idea out of kilter a bit, since then the authority reposes not with the judges of the immigration court and the Bureau of Immigration Appeals, but with the trial attorney himself. And, again, I assume that the decisions they will make are not for bad motivation, but they remain human.

Ms. JACKSON LEE. If I may, Mr. Chairman, just have him finish his administrative question quickly, and Ms. Swenson on her—if they will do it quickly—Ms. Swenson on her incarceration question that I asked you.

Mr. HOSTETTLER. Without objection, the gentlelady will be given an additional minute.

Ms. JACKSON LEE. I thank the Chairman. Let the professor—
Mr. ROSENZWEIG. I think I have captured most of what I wanted to say about administration along the way, which is, essentially, it is a real problem, but it shouldn't be the decider on a set of legal rules. It should be—the decider on a set of legal rules should be the values that we think are the optimal resolution, and we should

then provide the right resources to meet our ideals, not let our ideals be driven by our resources.

Ms. JACKSON LEE. Thank you very much.

Ms. SWENSON, you heard my earlier question about those incarcerated, the automatic stay provision. How long were they incarcerated? Do you have any—

Ms. SWENSON. Just so I understand the Congresswoman's question, if you don't mind repeating it.

Ms. JACKSON LEE. I would be happy to.

In your statement, you mention the automatic stay provision for bond appeals has only been used a few hundred times since October, 2001; and I would like to know how long were those aliens incarcerated while their appeals were pending before the Board of Immigration Appeals? If you have some sense of how long, on the average, they were held.

Ms. SWENSON. I just want to make a small clarification. I think it is very easy, in the context of immigration bond hearings, to think of bond as criminal bond, and you even use the word incarceration in connection with it. I think it is a very easy thing to sort of confuse, and I know the Congresswoman understands this. But, unlike in a criminal bond context, an alien that is held on bond for the most part can be released immediately if he or she returns to the country from where he or she is from. So it is not an involuntary incarceration type scenario. I mean, it is not a full answer, but it is, indeed, not like the criminal context.

Ms. JACKSON LEE. But it is if you are in fear of returning to the country from which you have come and if you have been here and your family is here and there is no place for you to go. So do you know how long they have been held?

Ms. SWENSON. I don't want to give you the wrong information. The amount of time is, obviously, as a rule, dictates only as long as it takes for the Board of Immigration Appeals to consider the appeal.

Ms. JACKSON LEE. So it might be a long time.

Ms. SWENSON. I can get back to you on specific figures if you would be interested.

Ms. JACKSON LEE. I would, Ms. Swenson.

Thank you very much, Mr. Chairman. I yield back.

Mr. HOSTETTLER. The Chair now recognizes the gentleman from California for 5 minutes. Yes.

Mr. BERMAN. Thank you very much, Mr. Chairman.

The great thing about a hearing like this is issues come up you don't expect, and you have to sort of deal with them.

The Chairman raised, right at the beginning of his questioning, an obvious thing that I hadn't spent a lot of time thinking about: How do you make the case that the hearing should be closed when you don't have blanket closures? Do you have to tell the immigration judge or do you have to reveal the national security issues, the privacy issues, the compelling Government interests for closure in an open hearing?

Well, that would be crazy. But it turns out—I checked it out, and it is done. There is a prehearing hearing, and the prehearing hearing is closed. And that was before the Creppy memo. Because there was always the power to ask for a hearing to be closed based on

these issues. So the Chairman's very legitimate question, existing rules provide for a closed prehearing on whether the hearing should be closed or open, and that is how it is predicted.

Now, Ms. Swenson, a lot of what you say is different than what we read in the Inspector General's report. And what is so funny is I met with the Deputy Attorney General and I asked him about blanket closures, and he said, I think that was a mistake, we never should have done that. And I asked the Attorney General about it at a hearing, and he said, well, mistakes were made. In other words, your vigorous defense of your right to have these blanket closures is not consistent with what I have heard from both the Attorney General and the Deputy Attorney General.

But I want to get into what the Inspector General told us. You sort of said the proceedings that were required to be closed to family members and the public and the press weren't really secret because all detainees were free to publicize them as they liked.

Here is what the IG says: The decision to house these special interest detainees in the most restrictive confinement conditions possible severely limited a detainee's ability to obtain and communicate with legal counsel. Detainees interviewed by the Inspector General, the Justice Department Inspector General, said that each time the unit counselor made rounds through the facility he asked the detainees, are you okay? The detainees said that initially they did not realize that this question was shorthand for, do you want a weekly telephone call?

A unit counselor confirmed to the Inspector General that when he made rounds to the facility to provide legal calls he asked the September 11th detainees "are you okay" to determine whether they wanted to make legal calls. Detainees who were interviewed reported that an affirmative response to the question of whether they were okay resulted in them not receiving a legal telephone call that week. A number of other sources suggest there were communications blackouts imposed on the detainees.

The picture you paint in the hindsight, detainees could have coordinated a publicity campaign if they wanted to but probably didn't because they were embarrassed, maybe, I think, overreaches in terms of what really was going on.

But I also—you are the first person I know who has said that 75 percent of the special interest detainees, this group of 600 that you referred to, retained private counsel. Since the names are a secret and the transcripts haven't been made public, you're the first source of information. If there is a way in a closed basis you can provide the information that 75 percent were, in fact, represented by counsel, I would be curious to know about it.

And then the final thing that I would like you to—or the third thing I would like you to comment on is your claim that we shouldn't be concerned about the detainees' due process rights just because the hearings were closed to the public, press and family members. That is what—the public's first amendment right to attend trials in which people's liberty is at stake does serve to protect due process rights of individuals. That is what the Sixth Circuit says in the Detroit Free Press case.

Having heard Mr. Rosenzweig's testimony regarding the benefits of openness and how to treat the presumption and not using legal

rules as the basis for lack of resources, and understanding that there's always potentials that judges have different interpretations of facts, but deciding whether something is a special interest case is a decision made by FBI agents in different parts of the country. They could have different views of who should be in that special interest category—we don't have an automatic formula that looks and makes an automatic decision that says, in the special interest category, not closed, open. I mean, it is part of our system. But I am just curious as to your response to Mr. Rosenzweig's testimony, and do you really think a compelling Government interest standard is too high for the Government to meet?

Ms. SWENSON. I guess there are—you have raised a number of issues there. I will just start with just taking apart one piece of what you mentioned and that is whether the Department or the Government would prefer to have hearings, whether they would be judicial proceedings or immigration proceedings like this open to the public; and the answer there is most certainly. Indeed, the vast majority of immigration hearings are open to the public. There are—

Mr. BERMAN. I didn't know I asked that question.

Ms. SWENSON. Forgive me, Congressman. Maybe you want to direct me to one particular point that you want me to address first.

Mr. HOSTETTLER. Without objection, the gentleman will be given an additional minute.

Mr. BERMAN. Thank you very much.

Some of my points were, I guess you could say, rhetorical. But—

Ms. SWENSON. I am starting to learn how it works here.

Mr. BERMAN. And I certainly wasn't asking you to comment why you would say one thing when I got a different reaction from the Attorney General. That is unfair to ask you. I am mostly concerned about why you think a compelling Government interest standard is too high for the Government to meet in the context of presumption of openness but an ability to get it closed where there is a compelling Government interest in doing so.

Ms. SWENSON. The current standard now is actually quite high. It is the Government, in order to close or to obtain a protective order over sensitive information, needs to be able to demonstrate a substantial likelihood of harm as a result of this closure—

Mr. BERMAN. That is for your individual closures, right?

Ms. SWENSON. That is for the individual closures. That is correct.

Mr. BERMAN. I am for going back to that, right.

Ms. SWENSON. And that is actually what the current state of affairs is now.

Mr. BERMAN. Except when you have a blanket closure policy.

Ms. SWENSON. Right. Aside from the Creppy memorandum, that is the normal state of affairs.

In a state of emergency, which is really the only situation that we think is an appropriate time for, you know, for a directive like the Creppy memorandum, it would be very difficult not only to meet a strict scrutiny standard on a case-by-case basis, but the amount of time it would take to be able to make that kind of a showing in individual cases and the possibility that immigration judges would, especially in that kind of a heightened standard,

come up with inconsistent decisions on whether or not to close individual special interest cases would be unacceptably, you know, threatening to the national security. We would be unable to keep those—

Mr. BERMAN. What about FBI agents having to decide whether something is a special interest case and the possibility that the FBI agents in the West look at it differently than the ones in the East or the Midwest or the South? You always have individual decisions about classification. Individuals can come to different conclusions about the same set of facts. How do you deal with that?

Mr. HOSTETTLER. The gentleman's time has expired.

The Chair now apologizes to the gentleman from Texas for not recognizing him in proper order, and he is recognized for 5 minutes.

Mr. GOHMERT. Well, sometimes people say they don't recognize me in a crowd, so it is not unusual.

First of all, I want to address something that, Ms. Swenson, you had said. You had indicated if ever we were to face another event, God forbid. I think God has not forbidden, because I think we face another event every day, which makes your job all the more serious.

I heard a fellow that believes God is sovereign say one time, just because God is sovereign doesn't mean you lean on your shovel and pray for a hole. I think our Creator would certainly know our abilities, and we are expected to use them. So the trouble becomes in balancing self-protection versus, you know, the rights that we should have ourselves.

So I want to ask each of you, and start with Mr. Rosenzweig—we have talked before. I admire so much of your writings. But I want to ask each of you to answer this question: Do you believe there is a U.S. Constitutional right to remain in this country in violation of U.S. Immigration laws that are constitutional?

Mr. ROSENZWEIG. No.

Mr. GOHMERT. Mr. Greene?

Mr. GREENE. No.

Mr. GOHMERT. Ms. Swenson.

Ms. SWENSON. I don't want to be flippant and just say no, but no.

Mr. GOHMERT. Okay. You and Nancy Reagan can just say no.

Mr. West?

Mr. WEST. No, sir.

Mr. GOHMERT. All right. Thank you.

Now, Ms. Swenson, you had mentioned that aliens have the right to voluntarily return to their country of origin, which would end the proceedings at any time; is that correct?

Ms. SWENSON. That is right, Congressman.

Mr. GOHMERT. Well, how does one actually go about communicating the desire to get out of jail free and go home? How is that communicated? How is that actually accomplished?

Ms. SWENSON. This is probably more a question for Mr. Greene.

Mr. GOHMERT. Mr. Greene, if you can help.

Mr. GREENE. Thank you, sir.

Through the lawyer or direct contact from the respondent in a hearing, the respondent, him or herself, can make an indication of a willingness to return; and at that point—

Mr. GOHMERT. To whom?

Mr. GREENE. To the Government's counsel or to the immigration judge or, frankly, to any number of Government officials who have legal authority to maintain custody over that alien.

Mr. GOHMERT. So they drop by every day and say, hey, are you ready to go home voluntarily, or—

Mr. GREENE. The alien is generally the moving party. So it isn't like we go to them every day and say, have you had enough? Are you ready? It is more like they would come to us and say, this is what we would like to do.

Mr. GOHMERT. They come to you even though they are locked up.

Mr. GREENE. They come to us in the metaphorical sense. Our people—

Mr. GOHMERT. Metaphorically it is very difficult for them to come to you to if they are behind bars.

Mr. GREENE. Physically it is, but our people are there on site or are making visits or are in contact with our officials.

Mr. GOHMERT. Because I have heard of people who have been in for weeks, would like to go home voluntarily, and can't ever find anybody to communicate that to so they can.

Mr. GREENE. I don't know how—that doesn't—that isn't consistent with the sorts of things that I'm hearing from our detention people.

Mr. GOHMERT. Well, I would appreciate if you would check on that, how that can actually be accomplished.

The next question is a follow-up to that. If somebody does want to voluntarily go, they are able to communicate that, the U.S. Department of Justice says, great, take off, how do we make sure they actually exit the country?

Mr. GREENE. Oh, we still escort them.

But let me step back for a minute and just say that while the regulations authorize us to be able to accept a request of that nature, terminate the proceedings and allow that person to return home, it doesn't always happen that way. And the reason that we don't is that if I'm a person from a foreign country under arrest for a state charge of violence, for example, against an individual and in INS custody or in ICE custody or in Department of Homeland Security custody, the Government may not choose to allow that person to flee the consequences of the state criminal proceeding that is going on.

That is an example of where we might want to—

Mr. GOHMERT. And as a judge, I can tell you anecdotal situations where, for example, one individual had a bunch of DWIs. INS never did anything until he came to my court as a felon. He has hurt people. He couldn't stop getting drunk—and I would ask for an additional minute if I could.

Mr. HOSTETTLER. Without objection, the gentleman has an additional minute.

Mr. GOHMERT. I sent him to prison so he's not a continuing threat to society, and within a couple months apparently he was out, because he came back to my court after he had another DWI

and hit somebody. And I said, how are you back? And he said, well, they came and got me out of prison right after I got there, took me to the border, and that is how I got back here.

So outside of—if INS is not going to get him out of the country, at least send him to treatment so if he's going to be here he's not gonna kill somebody. They let him stay 3 or 4 months, I think, before they deported him; and I don't know whose county he ended up in.

So my question is, how do we make sure that if they are—whether they leave voluntarily or leave involuntarily, how long do you stay there to make them wait to come back in? Do you stay 15 minutes to make sure they don't come back in? Do you make them wait a whole hour before they turn around and come back in? How often do they beat you back to the county, as this guy did? What do we do to make sure they're not coming back?

Mr. GREENE. Our people will—especially on the southern border, our people will escort the person to the border and turn them over to the Mexican authorities, and they return.

The Border Patrol will tell you that they have people on the border 24/7 precisely for the purpose of making that easy return to the United States much more difficult, if not impossible, but that is a whole set of other—

Mr. GOHMERT. You'd go on record as saying “if not impossible”?

You are aware there are a few people that come in every day, so apparently it is not impossible.

Mr. GREENE. I didn't say that it wasn't impossible. I said that the Border Patrol are there.

So your characterization that they beat us—we wait there for 10 minutes before he comes back or an hour before he comes back, the Border Patrol are there all the time. They are at the border 24/7 precisely for the purpose of managing that border, and that was my point.

Mr. GOHMERT. All right. My time has expired. Thank you.

Mr. HOSTETTLER. I thank the gentleman.

The Chair now recognizes the gentleman from Massachusetts, Mr. Meehan, for 5 minutes.

Mr. MEEHAN. Thank you, Mr. Chairman.

My question is for Mr. Greene. In December, 2003, the Department of Homeland Security suspended a requirement that all individuals previously registered with the National Security Entry-Exit Registration System, known as the NSEERS, that they register within 30 days and 1 year in the United States. But NSEERS' call-in program—that was suspended. The call-in program continued, and I am wondering what the current status of the NSEERS program is.

As I mentioned in my opening statement, I had read and worked with the Iranian-American Bar Association relative to their study, and I am wondering whether anything has been done to address some of the issues that were uncovered in this study, specifically deplorable conditions that the NSEERS' registrants endured at the centers.

One item of concern that arose from the NSEERS' process was a status of men who did not come forward at the registration. Common sense would tell me that if somebody didn't show up, they're

probably of more interest than those who did show up, and these people have been sent underground while—and it seems to me unlikely to cooperate with immigration officials. So what, if anything, has been done to investigate known immigrants that didn't show up for the NSEERS' program?

Mr. GREENE. Congressman, I don't have that information available with me now, so I am unable to sort of address the current state of the NSEERS' program beyond what you have already characterized. I will be happy to get specific information on that program to you as quickly as we can. As soon as I get back to the office I will get that process started.

I know that there are—what I do know is that there are a number of cases that have—that flowed out of that program that are still under way, but how we can characterize beyond that? I will need to verify my information before I can do so. I am not aware of the status of the report that you have described, but I will look into that as soon as I return.

Mr. MEEHAN. Does the characterization of the NSEERS' program sound consistent with what you know?

Mr. GREENE. It does. That is right. All we are working on is the call-in system that I am aware of, but that is dated information. And I say that with the caveat that, without going back and talking to the folks who are involved in that program, I would be reluctant to say that—

Mr. MEEHAN. But, as you may know, the legislation that—Mr. Berman and Mr. Delahunt and others' legislation would terminate NSEERS and provide relief to those adversely affected. Has there been an effort to create or analyze a list of names, nationalities and a total number of registrants, do you know, that were detained under this program, including any impending applications that you know of?

Mr. GREENE. I think that data was looked at in connection with the decisions that affected the way the NSEERS' program was being deployed and utilized, so that some of the decisions that resulted in the termination of certain features of that program were based upon an analysis of some of that data. Again, I would need to go back—

Mr. MEEHAN. If you could get back to me on that, that would be great.

Mr. MEEHAN. Would you support legislation to codify an existing homeland security memo related to the prosecutorial discretion to allow factors such as family ties to contribute favorably toward immigration proceedings?

Mr. GREENE. I think the exercise of discretion and, frankly, the importance of family ties is crucial as the future of our immigration policy. And I base that certainly on my roughly 29 years of experience with the INS, 10 of which were as the District Director in the Denver District.

I have always been concerned from a policy point of view of a legislative code going to the question of discretion. It seems to me that in working with the Committee we may find measures short of actual legislation that will create a spectrum of factors to be considered in the exercise of discretion; and, frankly, we would be happy to continue to discuss that with you.

Mr. MEEHAN. Thank you. And I will get you those questions in writing before the end of the hearing.

Thank you, Mr. Chairman.

Mr. HOSTETTLER. I thank the gentleman.

The Chair now recognizes the gentlelady from California for 5 minutes.

Ms. LOFGREN. I thank you, Mr. Chairman. I think this is an important hearing to sort through the legal issues.

I want to specifically hone in on section 202 of the bill that we are talking about and mention again—maybe I will just talk about two cases that personally come to my attention just because they are in California, to put a human face on the discussion.

The first case is a gentleman who entered the United States legally in the '70's. He is a legal, permanent resident of the United States. He is married to a United States citizen, has three United States citizen children and is a successful businessman, employs hundreds of American citizens in his business in California.

Ms. LOFGREN. In the seventies, he was caught up in an unfortunate matter where he pled guilty to a crime and nothing ever came of that. He went out on a business trip. When he attempted to re-enter, the criminal conviction came up and he was put into exclusion. He was told that he would remain in jail forever unless he waived his right to appeal. And ultimately, I think he made big a big mistake, but in order to get out, agreed not to pursue his appeal.

The second case is a Jewish woman from Russia who came into the United States on very shaky documents, personally, as a young girl. She straightened out. She married an American citizen. She had a U.S. citizen child. She was teaching violin at the Jewish community center in my county. She wanted to become a citizen and she got caught up in the entry. She was held in jail and told that she would only be allowed out if she agreed not to appeal her situation. And she had, at least arguably, one appeal that might have been successful. I wrote to our former colleague, Mr. Hutchinson, last year, asking him—this appears to be extortion, both individuals—in fact, the lady from Russia has been deported and has been separated from her husband and child, and her parents are also U.S. citizens.

The other businessman is still here. They're not flight risks. So the only issue was the Government extorting a waiver of their rights in order to get out of jail. It strikes me that that is not a good policy for the United States.

And when I wrote to Mr. Hutchinson, he answered on April 15 of last year: We appreciate your concerns regarding due process rights in relation to the release of detained aliens. We are, however, unable to provide any policy materials for your review, because the DHS does not have a policy regarding releasing detained aliens in exchange for a waiver of rights.

It strikes me, therefore, that section 202 is an important element to putting some kind of order, due process and law into this situation. And I am wondering, this is Mr. Greene's bailiwick, and I would appreciate a comment from Mr. Rosenzweig whether you think section 202 of the proposed act would regularize the two cases that I have described here today.

Mr. GREENE. Congresswoman, it is always a pleasure to deal with your questions. I think it is true, that, again as both a matter of law and as a matter of good public policy and good governance, an individualized bond determination is a critical feature of that structure. I also think that there are certain public interests that need to be balanced against the individual bond determination, and particularly the kind of experience that those of us who come from the former INS had in Miami in 1980 as one of those examples. And it seems to me that knowing what we do know about the drain of resources that is involved in dealing with a mass migration emergency, especially now at a time when those resources are also committed to dealing with potential terrorist threats in the homeland, speaks to some prudence with respect to applying an individualized bond determination in every case or in every circumstance.

I don't—I am not comfortable with the situation you have described either. And if I can interpret the former Under Secretary's memo, it could be that the sense was we don't have a *quid pro quo* policy because that would be a bad policy, it would seem to me.

Ms. LOFGREN. I would be happy to provide the letter to you.

Mr. GREENE. And I would be happy for you to do that because I'd like to look into those cases if you don't mind.

Ms. LOFGREN. I ask unanimous consent for an additional minute.

Mr. HOSTETTLER. Without objection.

Ms. LOFGREN. What he said, the decision is discretionary and we are balancing the risk of flight and public endangerment against the benefit of release. He did not address the issue of extortion of the waiver of rights in order to gain release, which I think is not very American.

Mr. GREENE. Without knowing the facts—

Ms. LOFGREN. As a matter of policy.

Mr. GREENE. As a matter of policy, what comes as close to what we are describing here is the circumstance we spoke about earlier.

Ms. LOFGREN. If I may, these are just two cases. I have seen actually at least a dozen of these cases just pop through my office, and none of them have anything to do with terrorism, and most of them are people who have very strong ties to United States citizens, spouses and children.

Mr. ROSENZWEIG. I am going to offer a pseudoacademic response, which is I think what you are saying is probably endemic to all of our systems. Waivers of rights of appeal are often part of plea bargains in the criminal justice system. And a large fraction of that is because we can't—we don't have the resources to deal with the throughput.

So I concur with you that in many ways it is a very unfortunate circumstance. It sounds quite unAmerican. And I would think that a systematic reexamination of that and provision for individualized bond determinations may be, except in extraordinary circumstances, like mass migrations from Haiti. I don't know how you couch that exception to the statute either, precisely. Tries to capture both ends. But unless we are going to massively expand the resources available in the immigration and adjudication system and parallel in the criminal justice system, which we are not going to do, you are going to see that no matter what. And it is an unfor-

tunate thing, but I don't know that we can bemoan it. But I don't know we can necessarily fix it except in individual cases.

Mr. HOSTETTLER. The Chair now recognizes the gentleman from Massachusetts for 5 minutes for questions.

Mr. DELAHUNT. You know, Mr. Rosenzweig, you used the word "resources" again, and everything that I have heard here today tells me that—and with all due respect to both Mr. Greene and Ms. Swenson, there really are no sound policy reasons that I think that have been articulated that would contradict what the bill would propose to do. But, you know, in the end, democracy isn't cheap. I mean, that's the bottom line.

And I'm reflecting back on our own history during World War II, the internment of the Japanese. And I'm not suggesting that they're the same, but there are some parallels in the larger sense. And earlier, I quoted from the GAO about how we are perceived throughout the world, and, with all due respect, Mr. Greene, I receive a huge number of complaints from people coming to this country who say they are never coming back because they feel mistreated when they come to our borders. And I know you are the director of training. I mean, we have got to change, if you will. And I understand that we justifiably have a concern about our national security in the aftermath of our national tragedy, but there are real consequences that are long term in nature that affect our national security. And that GAO report enumerates them extremely well.

But when I think that the people in a survey that apparently reflect the sentiment of the British people say they prefer China over the United States and we both have democratic traditions, we better wake up. We are not trying to do anything to diminish our national security here. But I think we've got to put this in a larger context. I mean, what is America really about if not about individualized justice and transparent government? When you think of the concept of America, that to me is the essence of what we are in terms of a body politic.

And, Ms. Swenson, you talk about, you know—we are talking about 24 hours, 48 hours, I don't care if it's 72 hours or a week. We did a week in the PATRIOT Act, and concerns about, you know, during the course a motion, you know—I'm using terms from the criminal law to close a hearing—I don't think—I can't speak for Mr. Berman, but I would presume that that motion to close a hearing would be conducted in camera. I mean, there just doesn't seem to be any policy issues.

I think in response to Mr. Berman's raising the potential inconsistency among individual FBI agents, in terms of who is a potential bad guy and who is not, is a very real one. I understand we don't operate in a perfect world. But I just fail to see, you know, why there would be any objection, obviously, with some tweaking, to the bill that is under consideration here today.

I think it was Mr. Rosenzweig who put it out there, and he said this is about recalibrating checks and balances. And you know, we have got to really remember our own history here and what we're about and what we stand for as a Nation. And I'd invite any comment from any of the panelists.

Mr. GREENE. I would only say this, Congressman, that both as a citizen, as a employee of the executive branch and as a 32-year

public servant with the Government, that I am equally concerned—and I know my department is equally concerned—about the perceptions that we create by the policies that we implement to make our country safe. And our willingness to work with the Committee, with everybody here to find the right calibration, is unstinted in that regard.

Mr. ROSENZWEIG. I guess I would just add I think you have it exactly right. The genius of the framers of the Constitution was the context of both giving, as Hamilton said, energy to the executive to address our national needs while constraining that energy with the checks and balances. Those checks and balances are sometimes legislative—oversight of legislation. They are sometimes judicial oversight, but they are captured in the idea that we should be skeptical of any set of rules that operates in a broad brush without individuated consideration, and we should be skeptical of rules that tend toward the presumption against that oversight.

That is not to say that there aren't perfectly legitimate reasons in many, many instances, in which the end result of the policy ought to be exactly the same as either under the Creppy memo or under the process proposed. But how you get there, I think, matters.

Ms. SWENSON. Clearly my turn since, you are looking at me, Congressman.

Mr. DELAHUNT. It is not necessary. I just, you know, articulated my feelings. I want you to know that they are heartfelt. I understand that the problems that you encounter on a regular basis are considerable. If the Chair would indulge me for an additional minute.

Mr. HOSTETTLER. Without objection, the gentleman is recognized for an additional minute.

Mr. DELAHUNT. I have a question here, and I'll direct it to Ms. Swenson and Mr. Greene. You lay out in your testimony the dual authorities of the Department of Homeland Security and the Attorney General under 236 (a). That is a small a. I'm curious about 236, large A, that was added by section 412 of the PATRIOT Act. We have been informed that this power has never been used.

Can you tell us who now has the power of certification granted in section 412? And has it ever been exercised? If it hasn't, is it still necessary? You know, the Members of this Committee worked hard in negotiating that language and we unanimously agreed—because I participated in those discussions—that the power to hold somebody for 6 months at a time essentially on the word of the Attorney General was an extraordinary power. It was something we were willing to do in an emergency, but we knew it had to be monitored closely. So whoever has the authority to—over 236 A—one of you owes us six out of the last seven reports required by that provision of the PATRIOT Act, and I'm sure they will be forthcoming shortly after the conclusion of this hearing, Ms. Swenson. I yield to my friend from California.

Mr. HOSTETTLER. The time for the gentleman has expired. And by unanimous consent, he has been given an additional minute, and that will be used by the witnesses to respond to the question at this time.

Ms. SWENSON. Well, I won't use too much of that minute, but I'm not prepared to talk about the PATRIOT Act today, but I would be happy to take any questions back to the Department and get you an answer.

Mr. GREENE. Thank you. My bench tells me that is not entirely resolved and we will get back to you.

Mr. BERMAN. The only other issue I want to bring up in all my second round—and I don't need any of that—is just on this one issue. This was an interesting case where the Justice Department came to us with this need to be able to detain longer. And then in extraordinary circumstances, based on the certification, to hold—this is about removal versus indictment and how long you have to decide and to hold.

We give in the PATRIOT Act this authority 7 days to make that decision and extend the time to appear before an immigration judge. And then the authority, I guess, is totally unused, and on its own; you promulgate a regulation or exercise some preexisting authority to do it without any of the safeguards or balances. I think this is one of the four issues that is directly connected to the PATRIOT Act where the Congress here—it is appropriate for us to set the ground rules. And that is all I wanted to say.

Mr. HOSTETTLER. The gentleman's time has expired. The Chair wishes to thank members of the panel for your contribution to this deliberation as well as the record. At this time, I would like to yield shortly to the gentlelady from Texas if she wishes to make a comment.

Ms. JACKSON LEE. I want to again thank the Chairman of the Full Committee and yourself and the Ranking Member of the Full Committee and Mr. Berman and Mr. Delahunt for I think focusing on a very important issue.

I leave the witnesses with this sort of backdrop. Yesterday we experienced another wonderful exercise of running without your shoes on at a fast pace, and those of us who are ladies with high heels, faster than you could have imagined we could have run. It was a second incident of a private airplane entering nearby our secured airspace. And on the second time around, as a Member of the Homeland Security Committee, my first response is to ban all private airplanes nationally. And then I narrowed my thought processes and then said anywhere within 1,000 miles of Washington, D.C.

I use that to say, even though we will probably have to address that, Mr. Chairman, is probably overbroad. And I would only hope that out of this hearing, with the humor I have just offered you, my good friends from Justice and ICE would recognize that what we are saying to you is that we are in sympathy. We are your colleagues on this issue on the war on terror, but we find there are aspects of what is being utilized that are overbroad, and that we can find the balance that Professor Rosenzweig has indicated and this legislative initiative has indicated. And I hope the Chairman and myself will be able to work through these issues and find some common ground.

We welcome the Justice Department and ICE. And I want to thank Mr. West for his service of 29 years. We welcome you in participating in this process.

And with that, Mr. Chairman, I yield back.

Mr. HOSTETTLER. Thank the gentlelady and wish to amen her in the ban of 1,000 miles of any private aircraft. Once again, I thank the members of the panel.

All Members are advised that they will have 5 legislative days to make additions to the record. Without objection, this Subcommittee is adjourned.

[Whereupon, at 12:20 p.m., the Subcommittee was adjourned.]

A P P E N D I X

MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF THE HONORABLE SHEILA JACKSON LEE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS, AND RANKING MEMBER, SUBCOMMITTEE ON IMMIGRATION, BORDER SECURITY, AND CLAIMS

I have said many times that immigration does not equate with terrorism, but I understand that it was difficult to maintain that distinction during the aftermath of the September 11th attacks. The purpose of this hearing is to take a calmer look at some of the immigration removal procedures and detention policies that were implemented during that period.

On September 21, 2001, Michael J. Creppy, the Chief Immigration Judge for the Executive Office for Immigration Review (EOIR), issued a memorandum to all Immigration Judges advising them that the Attorney General had implemented additional security procedures for certain cases. In these cases, the Immigration Judges were required to close the hearings to the public and to avoid the disclosure of any information about the cases to anyone outside the Immigration Court.

Secret hearings are inconsistent with our most basic principles of fairness. Immigration removal proceedings determine whether individuals will spend months in detention, be separated from their families, and then be removed from a country in which they may have lived for years. Hearings should not be conducted behind closed doors unless there is a compelling reason for such secrecy.

This practice is addressed by Congressman Berman's Civil Liberties Restoration Act of 2005, H.R. 1502, which I have cosponsored with Congressman Delahunt. Section 101 of the Civil Liberties Restoration Act would prohibit blanket closures of immigration hearings. It would permit closure only when the government can demonstrate a compelling privacy or national security interest.

Before September 11, 2001, the former Immigration and Naturalization Service (INS) was required to decide whether it was going to initiate deportation proceedings within 24 hours of arresting an alien. On September 20, 2001, this was changed to 48 hours or an additional reasonable period of time in emergency or other extraordinary circumstances.

Section 102 of the Civil Liberties Restoration Act would require DHS to initiate proceedings within 48 hours of an alien's arrest or detention. It also would require that any alien held for more than 48 hours be brought before an immigration judge within 72 hours of the arrest or detention. This would not apply to aliens who are certified by the Attorney General to have engaged in espionage or a terrorist offense.

Although the Supreme Court has upheld mandatory detention when Congress has expressly required such detention for a discrete class of non-citizens, it has not authorized the executive branch to make sweeping group-wide detention decisions. Nevertheless, since September 11, 2001, the Department of Justice (DOJ) and the Department of Homeland Security (DHS) have mandated the detention of certain classes of non-citizens without any possibility for release until the conclusion of proceedings against them.

Section 202 would require DHS to provide all alien detainees with an individualized assessment as to whether the detainee poses a flight risk or a threat to public safety, except detainees in categories specifically designated by Congress as posing a special threat.

On October 31, 2001, the Justice Department issued a rule that enables the government to nullify a judge's order to release an individual on bond after finding that he is neither a flight risk nor a danger to the community. The rule permits the Department to automatically stay an Immigration Judge's decision to release an alien if the government originally denied bond or set it at \$10,000 or more. No standards

govern the granting of a stay in these cases; it is simply at the discretion of the government.

Section 203 permits the Board of Immigration Appeals to stay the immigration judge's decision to release the alien for a limited time period and only when the government is likely to prevail in appealing that decision and there is a risk of irreparable harm in the absence of a stay.

I hope that we can work together to resolve these issues. Thank you.

