Department of Justice

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(202) 514-2008
TDD (202) 514-1888

FACT SHEET

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AN UPDATE ON DETENTIONS CONDUCTED BY THE JUSTICE DEPARTMENT FOLLOWING 9-11

The Department of Justice continues to pursue the most important investigation in this nation's history. Never before has so heinous an act been perpetrated on American soil as the terrorist attacks of September 11th. Our investigation is massive and ongoing. As in other criminal investigations, we seek to bring to justice those responsible for the attacks. This investigation, however, has another important purpose as well – to protect Americans from additional acts of terror. The Department is committed to using all legal tools available to disrupt and neutralize potential terrorist threats by removing dangerous individuals who have broken our nation's laws from the streets of our communities.

Background on Justice Department Detentions:

- **Every Person Detained in the Course of the 9/11 Investigation Was Charged with Violating Our Nation's Criminal Laws or Immigration Laws, or Was Held Under Court Order as a Material Witness.**

- **Every Person Detained Can Choose to Disclose Their Identity and Detention at Any Time.** All lawyers of detainees, criminal defendants, and/or material witnesses can disclose their identities and that of their clients, if their clients so desire.

  - ✓ No one has been held in "secret detention" -- all detainees are free to disclose their identities to the press and the public at any time

- **Treatment of Detainees.** The Justice Department is committed to ensuring that all detainees have the rights and protections afforded by the Constitution, the governing statutes and regulations. It is the Department's policy that:

  - ✓ They are informed of the charges against them
  - ✓ They have access to telephones to contact lawyers
  - ✓ Those detained on material witness warrants are provided court-appointed counsel, while those detained on immigration charges are provided with lists of attorneys who are willing to represent them on a pro bono basis.
  - ✓ They have access to the courts to file habeas petitions and access to file lawsuits complaining of alleged abuses
  - ✓ They have the right to call witnesses
  - ✓ They have the right to prepare and defend their cases, and have access to law libraries and other materials

✓ They are free to contact reporters or members of the public at large

- **Three Categories Of Detainees:**

  ✓ **INS Detainees**: When the September 11 investigation has led us to those who have violated our immigration laws, we have enforced those laws and invoked our statutory authority to detain those individuals. This investigation has led us to individuals we believe to be truly dangerous and others who have provided follow-up leads and other valuable information to the investigation. That a detainee has been deported from the United States does not necessarily indicate that he or she had no knowledge of or connection to terrorism. In many cases, the Department determined the best course of action to protect Americans was to remove potentially dangerous individuals from the country and ensure they cannot return.

  - 765 individuals were detained
  - 478 have been deported to date
  - Only 6 detainees remain in INS custody as part of our active 9-11 investigation
  - NOTE: The fact that an alien has been released from custody does not necessarily mean that he did not have any knowledge relevant to the investigation. In some cases individuals who have provided useful information have been released because they have cooperated with the investigation and we have determined that their release does not pose a danger to the American people.

  - **The government has released information about these individuals:**
    - Place of birth
    - Citizenship status
    - Immigration charges brought against them
    - Date of arrests
    - Date charges filed

  ✓ **Criminal Detainees:** The Justice Department has used the full weight of the federal justice system with its substantial criminal penalties to neutralize potential terrorist threats by getting violators and those who pose a national security risk off the streets by all lawful means. In some cases, the Justice Department has prosecuted individuals for crimes not directly related to terrorism, just as prosecutors from earlier generations used income tax violations and similar offenses to convict dangerous, organized crime figures like Al Capone. The Justice Department has not, and will not, hesitate to use any available charge or tool to remove dangerous individuals from the streets and protect American lives.

  - 134 individuals charged
  - 99 found guilty through trial or pleas
  - 56 are still in custody awaiting sentencing, removal or trial as of November 22, 2002

  - **The government has released information about these individuals:**
    - Names
    - Nature of criminal charges
    - Lawyer's identity
    - Date of charges filed
    - District where complaint was filed

- Date of release, if released

✓ **Material Witness Detainees:** These are individuals ordered held by a federal judge to secure their testimony for a grand jury proceeding, when the federal judge finds that the individual has relevant information to the proceeding and may be a flight risk.
  - The number has not been released, as grand jury proceedings are not public
  - There is a ban on releasing grand jury information contained within Federal Rule of Criminal Procedure 6(e).
  - In addition, the FOIA statute passed by Congress provides legal authority to withhold these names to protect grand jury secrecy (FOIA Exemption 3).

Background on Closure of Select Immigration Hearings:

- **Overview of Closing Immigration Hearings:**

✓ **Closing Immigration Hearings Is Nothing New.** Under regulations dating back almost 40 years, immigration hearings may be closed to protect witnesses, parties, or the public interest.

✓ **The Only Hearings that the Government Has Sought to Close Are those Hearings Involving Individuals Who Have Violated Our Immigration Laws and May Have Some Connection to, or Knowledge of, the 9/11 Investigation or Terrorism.** In these limited terrorism-related cases, the Justice Department has closed the proceedings under a directive announced by Chief Immigration Judge Creppy in September of 2001.

✓ **Closing Immigration Proceedings Involving Individuals Who May Have Terrorist Connections or Some Knowledge of Terrorism Protects Sensitive Information:** such as the identities of sources and witnesses, which individuals have cooperated with the investigation, the extent of our knowledge of terrorist networks, and the scope and focus of our investigation.

- **The Justice Department Is Committed to Preserving the Integrity of the Counterterrorism Investigation, the Privacy of Individuals Who Have Chosen Not to Make Public Their Detention, and the Confidentiality of Information that Could Assist Those Who Seek to Harm America.** If these hearings were opened to the press and public, it would enable terrorists to compile a picture of where our 9/11 investigation and terrorism prevention work is currently at, and may reveal our vulnerabilities in a way that could increase the risk of another attack.

✓ **At this Time, Only Three Detainees Remain Subject to the Creppy Directive.**

- **Cases Regarding Closing Immigration Hearings:**

✓ **This Policy of Closing Immigration Hearings Has Been Upheld by the Third Circuit Court of Appeals as a Lawful Means of Protecting the Public from the Ongoing Terrorist Threat.** On October 8, 2002, in *North Jersey Media Group v. Ashcroft*, the Third Circuit said the Department's policy of closing special interest immigration proceedings was appropriate to protect our nation, saying:

- **"Since the primary national policy must be self-preservation, it seems elementary that, to the extent that open deportation hearings might impair national security, that security is implicated. . ."**

- On December 3, 2002, the Third Circuit declined to hear an appeal of this case *en banc*. From this date, North Jersey Media Group has 90 days to request the Supreme Court to review the Third Circuit decision.

✓ The *Detroit Free Press* case in the Sixth Circuit Court of Appeals considered whether the immigration hearings of Rabih Haddad, a Lebanese citizen who admits to having been illegally present in the United States for several years, should be open to the general public and press. The Court ruled against the Government's blanket closure of Haddad's proceedings, but found that the Government has a compelling interest in preventing terrorism and closing immigration proceedings that could reveal information that allows "terrorist organizations to alter their patterns of activity to find the most effective means of evading detection" (see opinion at 43-46). The Department has filed a petition for rehearing en banc, and the Sixth Circuit has ordered the plaintiffs to respond.

- Haddad is a native and citizen of Lebanon. In his removal proceedings, he admitted that he last entered the United States in August 1998, using a six-month tourist visa, and that he unlawfully remained in the country for years after his visa expired. Haddad was taken into custody by the INS in December 2001 and charged as subject to removal from the United States. While in administrative immigration detention, Haddad has had access to and has retained counsel. Haddad and his counsel have had full access to all evidence and testimony introduced at his immigration proceedings.
- On November 22, 2002, an Immigration Judge in Detroit, Michigan denied Rabih Haddad's application for asylum and ordered him and his family removed from the United States, concluding that he presented "a substantial risk to the national security of the United States," on the basis of his direct ties to the Global Relief Foundation, an organization designated a Specially Designated Global Terrorist by the Department of Treasury. Earlier, on October 24, 2002, the same Immigration Judge denied Haddad's request to be released on bond pending the completion of his removal hearing. The Immigration Judge concluded that Haddad presented both a threat to national security and a substantial risk of fleeing the United States.

- **The Government Must Be Able to Close Immigration Hearings to Protect the Counterterrorism Investigation and the American People:**

✓ **The Immigration and Nationality Act, Passed by Congress, Authorizes the Attorney General to Remove Aliens for Violation of Immigration Laws, and to Detain the Aliens Pending Removal.** 8 U.S.C. 1227(a), 1226(a), 1231(a). The Act also authorizes the Attorney General to promulgate regulations to govern removal proceedings. 8 U.S.C. 1229a(b). Longstanding regulations promulgated under this authority provide that removal hearings may be closed to the public. Under a regulation dating back almost four decades, any proceeding may be closed to "protect[] witnesses, parties, or the public interest." 8 C.F.R. 3.27(b); see also 8 C.F.R. 242.16 (1965).

- ✓ **In the Course of Its Terrorism Investigations, the Government Became Aware of Numerous Aliens Who Are Subject to Removal from the United States for Violating Our Immigration Laws.** Those aliens have been detained by the Immigration and Naturalization Service, which has instituted removal proceedings against them. Based on FBI interviews of those aliens and other information learned in the course of the FBI's terrorism investigation, the Department of Justice has identified some of the detained aliens, as well as some aliens who were already in INS detention, as "special interest" cases -- cases in which the FBI has a continuing investigative interest because of the case's relationship to, or involvement of information relating to, the government's investigation of terrorist groups.

- ✓ In accord with regulations providing for the closure of removal hearings "for the purpose of protecting witnesses, parties, or the public interest," 8 C.F.R. 3.27(b), the Attorney General, acting through his delegates, has implemented special security procedures for removal proceedings in special interest cases. Those procedures are set out in a September 21, 2001, directive from Chief Immigration Judge Michael Creppy of the Executive Office for Immigration Review, the agency responsible for conducting removal hearings under the Immigration and Nationality Act, to immigration judges and court administrators (the Creppy directive).

    - The Creppy directive establishes security procedures to be followed. For example, special interest cases will be assigned only to judges with secret clearance because the cases may involve sensitive or classified information. Judges are instructed to request additional courtroom security and to hear them separately from other cases. Judges are also directed to instruct courtroom personnel not to discuss these cases.

    - Finally, the Creppy directive limits public access to removal proceedings and the record of those proceedings. Removal proceedings in special interest cases must be closed to visitors, family, and press. In addition, the Record of Proceedings is not to be released to anyone except an attorney or representative who has a notice of appearance on file for the case (assuming the file does not contain classified information). Any other request for information on one of these cases must be submitted in writing and processed as a FOIA request.

- ✓ **Public Hearings Will Reveal Sources and Methods of Investigation to Terrorist Organizations, Allowing Them to Build a Picture of the Investigation.** Even bits and pieces of information whose significance may not be apparent in isolation can be fit into a bigger picture by terrorist groups in order to thwart the Government's efforts to investigate and prevent terrorism.

- ✓ **Open Proceedings Would Disclose Key Information to Terrorist Groups Monitoring the Government's Investigation.** The identity of a detainee and information about his method of entry into the country and means of detention would permit terrorist organizations to ascertain patterns and methods of investigation and the most successful patterns of entry to evade detection.

- ✓ **The First Amendment Does Not Require the Government to Compromise National Security by Disclosing Information that Could Harm Ongoing Criminal, Terrorism**

Investigations. As the Third Circuit recognized, immigration procedures have long been subject to closure, and the First Amendment does not grant a right of access to them.

Background on the Nondisclosure of Detainees' Names:

The Supreme Court has explained, "terrorism or other special circumstances" warrant "heightened deference to the judgments of the political branches with respect to matters of national security." (*Zadvydas v. Davis*, 533 U.S. 678, 696 (2001))

- **Overview -- The Government Opposes Disclosure Because Release:**
  - ✓ Compromises the ongoing terrorism investigation
  - ✓ Threatens public safety
  - ✓ Threatens the safety of detainees and material witnesses
  - ✓ Invades personal privacy
  - ✓ Is protected by a federal statute passed by Congress, through exemptions 7(A), 7(C) and 7(F) in the Freedom of Information Act

1) **The Disclosure Would Compromise the Ongoing Terrorism Investigation.**

- ✓ **The list requested by plaintiffs would identify exactly who has and who has not attracted the attention of the government in connection with the terrorism investigation.** Disclosure of that list - including those persons no longer in custody - would enable onlookers to plot the progress of the government's investigation, to make inferences as to what it has and has not learned, and to assess strengths and vulnerabilities in the government's intelligence-gathering.
  - **As explained to the Court in uncontested declarations filed by senior career government officials responsible for the terrorism investigation, the requested information would allow terrorist organizations to know which persons have been questioned and detained** as part of the terrorism investigation **and would offer them a roadmap** by which to discern the scope and direction of the federal government's ongoing efforts.

- ✓ **The release of the names of detainees, even those already released, could still harm our investigation.** That a detainee has been released does not mean that he did not impart valuable information or that he might not continue to be a source of future information.
  - **That a detainee has been deported from the United States on grounds unrelated to terrorism does not indicate that he or she had no knowledge of or connection to terrorism.** Even if a detainee could also have been charged with removability on terrorism grounds, the INS was not required to include such a charge, which might itself have jeopardized the ongoing investigation.
  - **In some cases the decision to remove the individual rather than bring criminal charges may have been based on the fact that a criminal prosecution would have compromised sources or classified evidence.** In such cases, the Department has sought to protect American lives by detaining the alien, removing him from this country, and ensuring that he cannot return. In other cases, the investigation may have concluded that the individual violated immigration charges allowing removal, but was not involved in terrorism or other criminal activity.

2) **The Disclosure Would Threaten Public Safety.** By compromising the ongoing anti-terrorism investigation, the government's ability to protect our nation's people from future acts of terrorism is threatened. Giving terrorists a virtual roadmap to our investigation may allow terrorists to map out a potentially deadly detour around our efforts, exploiting the weaknesses to bring further tragedy to our country.

3) **The Disclosure Would Threaten the Safety of Detainees and Material Witnesses.**

✓ **Courts have recognized that individuals often wish their identities withheld for their own protection.** As a result, disclosure of their identity by the government would deter individuals from cooperating. If their names were public, terrorists or their sympathizers would be able to threaten them, their families, or their friends wherever they may be around the world.

- Similarly, the Third Circuit has recognized that because La Cosa Nostra, the Mafia, is "so violent and retaliatory," names of all "interviewees, informants, [and] witnesses" in criminal investigation may be withheld under Exemption 7(A)). (*Manna v. Department of Justice*, 51 F.3d 1158, 1165 (3d Cir. 1995))

4) **The Disclosure Would Invade Personal Privacy.**

✓ **The D.C. Circuit Court of Appeals has often recognized that individuals have strong privacy rights.** The Court has held that "that individuals have an obvious privacy interest cognizable under Exemption 7(C) in keeping secret the fact that they were subjects of a law enforcement investigation." (*Nation Magazine v. Customs Serv.*, 71 F.3d 885, 894 (D.C. Cir. 1995); see also *Stern v. FBI*, 737 F.2d 84, 91-92 (D.C. Cir. 1984) ("[i]ndividuals have a strong interest in not being associated unwarrantedly with alleged criminal activity"))

- **The mere "mention of an individual's name in a law enforcement file will engender comment and speculation and carries a stigmatizing connotation."** (*Fitzgibbon v. CIA*, 911 F.2d 755, 767 (D.C. Cir. 1990)) These concerns are particularly acute given the nature and magnitude of the September 11 attacks – and the fact that many have already been deported to countries with substantial numbers of persons who support or are sympathetic to the terrorist organizations.

- The lawyers representing detainees have made a deliberate choice not to identify themselves or their clients, seeking to avoid the very publicity the plaintiffs seek to impose upon them.

5) **The Withholding of Information Is Authorized by a Federal Statute Passed by Congress:** FOIA exemptions 3, 7(A), 7(C) and 7(F)

✓ **The Freedom of Information Act, 5 U.S.C. 552, represents a balance struck by Congress "between the right of the public to know and the need of the Government to keep information in confidence," and recognizes "that public disclosure is not always in the public interest."** (*John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989); *Baldrige v. Shapiro*, 455 U.S. 345, 352 (1982))

✓ **The identities of the detainees, material witnesses, and their attorneys are protected from disclosure by FOIA exemptions.** Under FOIA, a statute passed by Congress, the following information about these individuals is NOT required to be released:

- Names of individuals detained
- Names and addresses of their attorneys
- *Note:* Both the individuals and/or their attorneys are free to disclose their identities to the public and the press

✓ **Exemption 7(A) bars disclosure to protect ongoing enforcement efforts.** Withholding the identities of all persons detained in connection with the September 11 investigation is reasonably expected to interfere with ongoing enforcement efforts.

✓ **Exemption 7(C) bars disclosure of the detainees' names to protect the privacy of the detainees.** Exemption 7(C) bars disclosure of requested records where disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy."

✓ **Exemption 7(F) bars disclosure of the detainees' names to protect the safety of the detainees as well as that of the public.**

✓ **Exemption 3 bars disclosure of the names of material witness detainees because it protects matters specifically exempted by statute.** Information about the identities of material witnesses is exempted from disclosure under Fed. R. Crim. P. 6(e)(2), which prohibits the government from disclosing matters occurring before the grand jury.

- **There is minimal public interest in the disclosure of a list of names of detainees who have chosen not to identify themselves to the press or public.**

  ✓ **Knowing the names of the detainees who have not chosen to disclose their identities voluntarily would not materially contribute to evaluating the government's investigation or performance of its statutory duties.** For example, the D.C. Circuit has held that the identities of individuals who appear in law enforcement files are rarely "very probative of an agency's behavior or performance." (*Safecard Services v. SEC Reporters Comm.*, 926 F.2d 1197, 1205 (D.C. Cir. 1991))

- **The D.C. District Court said the dates and locations of arrest, detention, and release of detainees can be properly withheld** under FOIA Exemptions 7(A) and 7(F). The Court said disclosure of that information "would be particularly valuable to anyone attempting to discern patterns in the Government's investigation and strategy," and it would make detention facilities "vulnerable to retaliatory attacks." (D.C. District Court opinion, p. 31-32) In fact, "detailed information of this nature . . . would 'inform organizations of routes of investigation that were followed but eventually abandoned . . . [and] could provide insights into the past and current strategies and tactics of law enforcement agencies conducting the investigation.'" (D.C. District Court opinion, p. 33 quoting Supp. Reynolds Dec. ¶ 6)