

June 21, 2002

Director
Regulations and Forms Services Division
Immigration & Naturalization Service
425 I Street, NW, Room 4034
Washington, D.C. 20536

**Re: Interim Rule
Immigration and Naturalization Service:
Release of Information Regarding Immigration and Naturalization
Service Detainees in Non-Federal Facilities
8 CFR Parts 236 and 241, INS No. 2203-02, RIN 1115-AG67
67 Fed. Reg. 19508 (Apr. 22, 2002)**

Dear Director,

The Committee on Immigration and Nationality Law (“Committee”) of the Association of the Bar of the City of New York (“Association”) has reviewed the Immigration and Naturalization Service’s (“Service”) interim rule, effective April 17, 2002, barring the release by any state or local government entity or by any privately operated facility (“non-Federal providers”) of the identity or other information relating to Service detainees being housed or otherwise maintained or provided service on behalf of the Service (“Interim Rule”). The Interim Rule was issued by the Commissioner of the Service and is published at 67 Fed. Reg. 19508-11 (April 22, 2002). While the Association supports the government’s efforts to bring to justice those responsible for the horrific events of September 11 and does not question the importance of the government’s investigation, it also has serious concerns regarding the manner in which the government is conducting this investigation, as exemplified by the promulgation of the Interim Rule. For the reasons set forth below, the Association urges that the Interim Rule be immediately rescinded.

I. SUMMARY OF INTERIM RULE AND THE ASSOCIATION’S CONCERNS

The Interim Rule is intended to establish a uniform policy on the public release of information on Service detainees and to ensure the Service’s ability to support the law enforcement and national security needs of the United States. Specifically, the Interim Rule is intended to address concerns that the release of information about a particular detainee could: (i)

reveal investigative methods, sources, and witnesses; (ii) have a substantial adverse impact on the detainee's privacy and safety; and (iii) interfere with investigative activities stemming from the September 11th terrorist attacks. Given these concerns, the Service determined that it "would make little sense for the release of potentially sensitive information concerning Service detainees to be subject to the vagaries of the laws of various states within which those detainees are being housed." 67 Fed. Reg. at 19510. Relying on the primacy of federal law in the area of immigration, the Service contends that the Interim Rule "supersedes State or local law relating to the release of such information." *Id.*

Although the Association acknowledges the Service's need to act to safeguard these important national security interests, it is of the opinion that the Service, by promulgating a rule that codifies the secret arrest and detention of immigrants, has chosen a constitutionally impermissible, and not particularly effective, method to achieve this goal. The Association questions the validity of the Interim Rule for several reasons. As an initial matter, the Association is concerned that the Interim Rule impermissibly infringes upon the public's First Amendment right of access to the most basic information regarding the Service detainees. In addition, the Service's failure to follow the notice, publication and comment procedures mandated by the federal Administrative Procedures Act ("APA") also gives cause for concern. Further, it is unclear whether the Interim Rule is consistent with the United States responsibilities under various international treaties to which it is a signatory. Finally, the Interim Rule arguably violates the Fifth and Tenth Amendment. The Interim Rule's questionable validity prevents it from serving as a basis for preempting state laws that regulate the release by state jails of information concerning the Service detainees.¹

II. ONLY A VALID FEDERAL LAW CAN PREEMPT STATE LAW

Since an invalid or unenforceable federal regulation cannot be an effective preempting tool, the Interim Rule does not preempt unquestionably valid state laws regarding the public's right of access to records pertaining to inmates within the care of state and local correctional facilities. *See Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982) ("The relative importance to the State of its own law is not material when there is a conflict with a *valid* federal law.") (emphasis added). As discussed below, the Interim Rule's validity is called into question as it arguably violates: (i) the First Amendment of the U.S. Constitution; (ii) the

¹ While the New Jersey appeals panel in *ACLU of New Jersey v. County of Hudson* (No. HUD-L-463-02, 2002 WL 1285110 (N.J.Super.A.D. Jun. 12, 2002)) recently ruled that the Interim Rule preempted any inconsistent New Jersey state public disclosure laws, the court was careful to point out the limited nature of its holding. Specifically, the court made clear that it was not addressing various other legal issues, including "the rights of the detainees to representation by counsel, or to consular notice and assistance, or to other access, including information on file" (*id.* at *5) or First Amendment claims bearing on the Service's non-disclosure policies, such as have been addressed in several recent federal courts decisions. *Id.* This omission, however, severely undermines the court's finding that the Interim Rule preempted the New Jersey disclosure laws. As the court in *County of Hudson* itself acknowledged, "Obviously, if [the Interim Rule] is invalid or unenforceable for any other reason, it is ineffective as a pre-empting provision." *Id.* at *17. As discussed below, recent, and more compelling, federal decisions cast serious doubt on the validity of the Interim Rule under the U.S. Constitution. *See infra* at II.B.

procedural requirements of the APA; (iii) various international treaties signed by the United States, (iv) the Due Process clause of the Fifth Amendment; and (v) the Tenth Amendment.

A. The Congress' Plenary Power Over Immigration Matters

Although Congress' power to create substantive immigration law is plenary, that power "is subject to important constitutional limitations." *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001). While the plenary power doctrine gives Congress significant leeway over *substantive* immigration decisions regarding who may enter and remain in the United States, the power does not extend to the *procedures* Congress may use to implement or enforce its substantive immigration decisions. It is true that the Supreme Court has long recognized the preeminent role of the Federal Government with respect to the regulation of aliens within our borders. *See, e.g., Mathews v. Diaz*, 426 U.S. 67 (1976); *Graham v. Richardson*, 403 U.S. 365, 377-380 (1971). The Supreme Court has equally established, however, that this plenary power must be administered in a manner that respects procedural safeguards of due process. *Galvan v. Press*, 347 U.S. 522, 531 (1954) ("In the enforcement of [Congress' substantive immigration] policies, the Executive Branch of the Government must respect the procedural safeguards of due process.").

As even the court in *County of Hudson* has acknowledged, the Interim Rule at issue here "does not purport to regulate the conduct or status of aliens, nor does it address the legal processes afforded INS detainees. Rather, the regulation deals solely with public access to records concerning detainees." 2002 WL 1285110 at *15. It is essentially a procedural mechanism that has been chosen to implement the substantive dictates of immigration policy. Moreover, "the real focus of the regulation, as evidenced by the rationale presented in its preamble, may be seen to be on the facilitation of law enforcement efforts in the wake of September 11." *Id.* Accordingly, the extreme judicial deference required by the plenary power doctrine does not extend to the Interim Rule at issue here.

B. The Interim Rule Violates The First Amendment

"The requirement that arrest books be open to the public is to prevent any 'secret arrests,' a concept odious to a democratic society" *Morrow v. District of Columbia*, 417 F.2d 728, 741-42 (D.C. Cir. 1969). The Interim Rule seeks to change that basic principle of American governance and in so doing, violates the press' and public's right of access under the First Amendment to basic information regarding individuals arrested and detained since September 11. Although it does not appear that any court has addressed this specific issue, two recent federal district court decisions have recognized similar First Amendment rights, and in so doing, specifically rejected many of the same arguments that the Service makes here for withholding information on the detainees. *See North Jersey Media Group, Inc. v. Ashcroft*, No. Civ. A. 02-967 (JWB), 2002 WL 1163637 (D.N.J. May 28, 2002) (*affirmed* by the United States Court of Appeals for the Third Circuit on June 18, 2002) (government's policy of blanket closure of deportation hearings violates the Constitution); *Detroit Free Press v. Ashcroft*, 195 F. Supp. 2d 937 (E.D. Mich. 2002) (same). Although these decisions involved the right of access to deportation proceedings under the First Amendment, they both addressed the release of the same type of information that is at issue here – information that is traditionally available to the public

to ensure that the government's actions are consistent with due process and constitutional protections. Moreover, the challenged action in those cases, as here, was not one inextricably related to a particular substantive judgment by Congress in setting immigration policy – rather it was a “blanket directive issued by the Executive Branch . . . attenuated from any particular policy determination made by Congress with respect to the admission of immigrants.” *North Jersey Media*, 2002 WL 1163637 at *7.

In *North Jersey Media* and *Detroit Free Press*, as here, the government sought to justify its secrecy by insisting that the restrictions on the First Amendment right of access were within the plenary substantive authority of Congress over immigration. The courts there rejected the government's contention that the plenary power doctrine insulated the government's decision to close deportation hearings. See *North Jersey Media*, 2002 WL 1163637 at *7; *Detroit Free Press*, 195 F. Supp. 2d at 946. Recognizing that the First Amendment right to access is not absolute, however, both courts applied the strict scrutiny analysis employed by the Supreme Court in cases such as *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) to determine the limitations of this right. See *North Jersey Media*, 2002 WL 1163637 at *11; *Detroit Free Press*, 195 F. Supp. 2d at 945. Under *Globe Newspaper Co.*, government action that infringes upon a First Amendment right of access “in order to inhibit the disclosure of sensitive information” must be supported by a showing “that denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest.” *Globe Newspaper Co.*, 457 U.S. at 606-607.

In *North Jersey Media* and *Detroit Free Press*, as here, the government's asserted interests in withholding of information fall into two main categories: (1) avoidance of setbacks to its terrorism investigation; and (2) prevention of stigma or harm to detainees. See *North Jersey Media*, 2002 WL 1163637 at *11; *Detroit Free Press*, 195 F. Supp. 2d at 946-47; 67 Fed. Reg. at 19509. Further, the government's asserted interests in the federal actions were supported by the same document that the government relies on to support the Interim Rule – the affidavit of James S. Reynolds, Chief of the Terrorism and Violent Crime Section in the Criminal Division of the United States Department of Justice. See *North Jersey Media*, 2002 WL 1163637 at *11; *Detroit Free Press*, 195 F. Supp. 2d at 946-47; *County of Hudson*, 2002 WL 1285110 at *2.

Both federal district courts found that the interests the government offered did not support the denial of the right to access and that the withholding of access was not narrowly tailored to serve the government's interests. See *North Jersey Media*, 2002 WL 1163637 at *11; *Detroit Free Press*, 195 F. Supp. 2d at 946-47.² In marked contrast to the cursory and deferential analysis of the New Jersey state court in *County of Hudson*, these two federal courts carefully scrutinized the government's argument and noted its numerous deficiencies. See *North Jersey Media*, 2002 WL 1163637 at *11 (“the problem” is that nothing prevents “disclosure of this very information by the ‘special interest’ detainee or that individual's lawyer”). *Accord Detroit Free*

² On April 18, 2002, the U.S. Court of Appeals for the Sixth Circuit denied the government's motion for a stay of the district court's order in *Detroit Free Press*. In denying the motion for a stay, the Sixth Circuit also rejected the government's assertions that the integrity of the terrorist investigation would be compromised, finding the government's allegations of harm to be “speculative” and “theoretical.” Slip Op. No. 02-1437 (6th Cir. April 18, 2002).

Press, 195 F. Supp. 2d at 947. Moreover to the extent the denial of access “is said to serve the interest of insulating the individual detainee from humiliation or stigma, its mandates sweep too broadly because it does not permit the individual to elect such protective treatment. Surely this interest is coextensive with the individual’s preference to see it invoked, given that closure may be seen by some detainees as having a negative impact upon them and their interests.” *North Jersey Media*, 2002 WL 1163637 at *11. Tellingly, the information revealed in deportation hearings is qualitatively more revealing of substantive facts than the basic pedigree information that the Interim Rule seeks to withhold, and yet the courts in *North Jersey Media* and *Detroit Free Press* rejected the government’s argument that disclosure of such information would harm the national interest.

The Interim Rule will frustrate the ability of public interest organizations, state and federal elected officials, and the general public to access information concerning Service detainees that is vital to ensuring that their rights are respected. The conclusions of the federal courts in *North Jersey Media* and *Detroit Free Press* with respect to secret immigration hearings apply with equal force here to secret detentions, and support a finding that the Interim Rule violates a First Amendment right of access to information on detainees.

C. The Interim Rule Was Promulgated In Violation Of The APA

The Service’s failure to comply with the procedural requirements of the APA also renders the Interim Rule invalid. *See San Diego Air Sports Ctr., Inc. v. Federal Aviation Admin.*, 887 F.2d 966, 971 (9th Cir. 1989). The APA requires that all regulations be published for comment for no less than 30 days prior to its effective date. 5 U.S.C. § 553. The regulation at issue here was promulgated as an interim rule, effectively immediately upon signing. Notice of the rule-making was not published in the Federal Register as required under 5 U.S.C. § 553(b), nor was the public afforded a comment period prior to its promulgation, as required by 5 U.S.C. § 553(c). As such, the Interim Rule is presumptively invalid. *See Kelley v. U.S. Dept. of Interior*, 339 F. Supp. 1095, 1101 (E.D. Cal. 1972).

The Service contends that publication of the Interim Rule was not required, relying on the “good cause” exception to the APA. 67 Fed. Reg. at 19510. Federal courts have held, however, that exceptions to the provisions of the APA’s rule-making requirements should be “narrowly construed and only reluctantly countenanced.” *Thrift Depositors of America, Inc. v. Office of Thrift Supervision*, 862 F. Supp. 586, 591 (D.C.D.C. 1994) (citation omitted). Under the APA, “good cause” exists only “when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefore in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.” 5 U.S.C. § 553(b)(B).

The exemption of situations of emergency or necessity is not an “escape clause” in the sense that any agency has discretion to disregard its terms or the facts. *A true and supported or supportable finding of necessity must be made and published.* “Impracticable” means a situation in which the due and required execution of the agency function would be unavoidably prevented by its undertaking public-rule making proceedings. “Unnecessary” means unnecessary so far as the public is concerned, as

would be in the case if a minor or merely technical amendment in which the public is not particularly interested were involved

National Nutritional Foods Ass'n v. Kennedy, 572 F.2d 377, 385 (2d Cir. 1978) (citing S. Rep. No. 752, 79th Cong., 1st Sess. (1945)) (emphasis added).

The Interim Rule fails to meet this high standard. The Service again relies on the ubiquitous affidavit of James S. Reynolds to support application of the “good cause” exception. Compare 67 Fed. Reg. at 19510 with *Detroit Free Press*, 195 F. Supp. 2d at 947. It is important to note that Mr. Reynold’s affidavit is couched carefully in terms of what the adverse effects of delayed promulgation “could” be. *Id.* The speculative nature of these allegations of harm has already been discussed above. See *supra*, at 4.³ Accordingly, the Service has failed to make the requisite showing of “supported or supportable finding of necessity” to bring the Interim Rule within the narrowly-construed “good cause” exception to the APA.

D. The Interim Rule Denies The Detainees Of Various International Law Guarantees

Secret detention is anathema to the civilized nations of the international community. The secret arrests and detention codified by the Interim Rule represent violations of various treaties to which the United States is a signatory. For example, the *Vienna Convention on Consular Relations and Optional Protocol on Disputes*, November 12, 1969, art. 36(1)(b), 21 U.S.T. 77, mandates that a foreign national who is detained in any countries bound by the treaty be granted access to his or her consulate. Yet there are credible reports that pursuant to the Service policies embodied in the Interim Rule, detainees are being refused, or hindered in, the exercise of their undoubted legal right to contact consular officials from their country of citizenship. See, e.g., *Amnesty International’s Concerns Regarding the Post-September 11 Detentions in the USA* (March 2002) AI Index: AMR 51/044/2002 (documenting lengthy detentions without charge, serious impediments to detainees’ rights to access counsel, and other abuses) (hereinafter “*Amnesty International Report*”). In addition, both the *Universal Declaration of Human Rights*, G.A. Res. 217A (III), U.N. GAOR, U.N. Doc. A/810 (1948) and the *International Covenant on Civil and Political Rights*, G.A. Res. 22000A (XXI), U.N. GAOR, U.N. Doc. A/6316 (1966) prohibit arbitrary arrest, detention or exile. The Interim Rule’s arguable violation of these treaties, which are “the supreme Law of the Land” (*U.S. Const.* art. VI, cl. 2), also casts doubt on its validity.

³ The New Jersey appeals court in *County of Hudson* came to a contrary conclusion, finding proper the Service’s reliance on the good cause exceptions for promulgation of the Interim Rule. 2002 WL 1285110 at *19. As discussed above, the New Jersey appellate court’s [blind] acceptance of the government’s characterizations of the interests affected is at odds with the opinions of at least two federal district courts and the rulings of the Third and Sixth Circuits.

E. The Interim Rule Violates The Due Process Clause Of The Fifth Amendment

There are credible reports that the government's policy regarding the secret detention of Service detainees has created severe obstacles to their procurement of legal counsel. For example, "the ACLU of New Jersey and other organizations have coordinated statewide efforts to attempt to ensure that all detainees who desire legal representation have it afforded to them." ACLU Press Release (March 27, 2002). *See also, Amnesty International Report, supra* at 6. "New Jersey rights advocates had experienced frustration at the lack of information available about the detainees, including reports from the federal government on the number of detainees that seem inconsistent with estimates from observers who have visited the Passaic and Hudson County Jails." *Id.* The codification of these secret detentions that the Interim Rule represents therefore violates the Service detainees' due process rights under the Fifth Amendment. The Supreme Court has recently reaffirmed the principle that aliens are entitled to protection under the Due Process Clause. *See Zadvydas v. Davis*, 533 U.S. 678, 679 (2001) (stating "the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence is lawful, unlawful, temporary, or permanent").

F. The Interim Rule Is An Unconstitutional Derogation Of State Autonomy And Sovereignty That Violates The Tenth Amendment

The Interim Rule violates the Tenth Amendment by forcing the states to implement a policy of secret detentions in contravention of their own laws. The Tenth Amendment to the U.S. Constitution states: The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people. *U.S. Const.* amend. X. In *New York v. United States*, 505 U.S. 144, 157 (1992), the Supreme Court viewed the Tenth Amendment as "confirm[ing] that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States." For example, the Tenth Amendment limits the power of Congress to regulate by "directly compelling [states] to enact and enforce a federal regulatory program." *Id.* at 161 (citation omitted). Since State governments are not federal regulatory agencies, "however plenary Congress' power to legislate in a particular area may be, the Tenth Amendment prohibits Congress from commandeering states to administer a federal regulatory program in that area." *City of New York v. United States*, 179 F.3d 29, 33 (2d. Cir. 1999).⁴

⁴ The New Jersey appeals court's denial of plaintiff's Tenth Amendment in *County of Hudson* rested on the view that the Interim Rule implicated the plenary power to regulate aliens, which resides exclusively in the federal government, 2002 WL 1285110 at *21. Yet the New Jersey appeals court also acknowledged in the same decision that the Interim Rule itself "does not purport to regulate the conduct or status of aliens." *Id.* at *15. The *County of Hudson* court also noted that in any event, the Interim Rule does not require State officials "even to accept federal prisoners or detainees" – rather this was a "choice" made by the State of New Jersey. *Id.* at *22. As the court noted in *City of New York*, however, the "prohibition [against forcing states to administer policies or programs adopted by the federal government] stands even if state officials 'consent' to such federal directives." 179 F.3d at 35, n.4 (citing *New York*, 505 U.S. at 182). "Again, 'consent' and 'choice' are not, by themselves, significant for the purposes of Tenth Amendment analysis." *Id.*

A state's agreement to house federal immigration detainees under a voluntary contract does not license the Attorney General to force state officials to follow the misguided federal policy of secret detentions and keep secret the names and other information regarding those detainees contained in their own state records.⁵ This is particularly true when the state's legislature has expressly required a different policy. For example, after the events of September 11, 2001, the New Jersey legislature reaffirmed its interest in public disclosure by *expanding* the Right to Know Law. *See* A1309, Pub. L. 2001, c.404 (effective July 7, 2002).

III. CONCLUSION

The Interim Rule violates the public's right of access to information concerning detainees under the First Amendment, was promulgated in contravention of the procedural requirements of the APA, denies to the Service detainees various international law guarantees, violates the Due Process Clause of the Fifth Amendment, and forces the states to enforce the federal government's policy of secret detentions in violation of the Tenth Amendment. Accordingly, the Interim Rule should be rescinded.

Very truly yours,

Cyrus D. Metha

⁵ *Cf. City of New York*, 179 F.3d at 35 (upholding Congressional provisions because they "do not directly compel states or localities to require or prohibit anything. Rather, they prohibit state and local officials only from directly restricting the voluntary exchange of immigration information with the INS.").