



UNITED STATES SENATE
**REPUBLICAN
POLICY COMMITTEE**

Larry E. Craig, Chairman
Jade West, Staff Director

April 25, 2002

Case Arising From 9-11 Attack Headed to 6th Circuit

New Appellate Judges Needed Now

In 2001, more than 57,000 cases were filed in the United States courts of appeals. The total probably will be higher this year. Among the tens of thousands of this year's cases are those arising from the terrorist atrocities of September 11. The burden on the courts of appeals is heavy, and the responsibilities grave, but will there be judges on the bench to decide these important cases? Currently, about one of every five Federal appellate judgeships is vacant, and the Senate Judiciary Committee – unlike the President of the United States – is slow to act.

The situation is particularly acute in the 6th Circuit. The bench at the 6th Circuit is half empty. The court is authorized to have 16 judges; it has 8. The President has nominated highly qualified men and women for seven of those eight openings, but none of the seven has moved through the Senate. Some of them have been waiting for nearly a year.

The 6th Circuit has just been handed the most highly publicized case related to the events of September 11, and a panel of the court already (on April 18) denied an emergency motion that was filed by the Federal Government. That case is *Detroit Free Press v. Ashcroft*,* and it is on an expedited schedule with briefs due this month and next.

In *Detroit Free Press*, members of the press and the public (including Representative John Conyers) brought actions against the Attorney General who had sought to close to the public and the press the removal proceedings for an alien, Rabih Haddad, a native of Lebanon, who had overstayed his six-month tourist visa by some four years. The plaintiffs claimed that the closure violated their rights under the First Amendment and the due process clause. They sought an injunction against closing the proceeding, and access to the transcripts of previously closed proceedings in the case. District Judge Nancy G. Edmunds held that the hearings must be opened and transcripts provided because the government's purported interests in closing the proceeding were not compelling, and plaintiffs would

* *Detroit Free Press v. Ashcroft*, 2002 U.S. Dist. LEXIS 5838 (D. E. Mich., April 3, 2002) (denying defendant's motion to dismiss for lack of jurisdiction), and 2002 U.S. Dist. LEXIS 5839 (D. E. Mich., April 3, 2002) (granting plaintiffs' motion for preliminary injunction to deny government's attempt to close alien's removal hearing), on appeal to the United States Court of Appeals for the 6th Circuit, appellate court docket no. 02-1437.

suffer irreparable injury if they were denied access to the proceeding.

The Government may have a difficult time winning this particular case because, as the district court pointed out, any governmental interest in keeping confidential the name, address, date and place of arrest, and other information on detainee Haddad had been overtaken by events: All of that information already had been published in the newspaper. 2002 U.S. Dist. LEXIS 5839 at *24.

The Government will push ahead, though, because it is trying to defend an official directive of September 21, 2001, that requires immigration proceedings to be closed in certain “special interest” cases. *Id.* at *7. The Government’s rationale for closure is contained in an affidavit from the head of the Terrorism and Violent Crimes Section of the U.S. Department of Justice, which says in part:

“Disclosing the names of ‘special interest’ detainees could lead to public identification of individuals associated with them, other investigative sources, potential witnesses, and terrorist organizations, and could subject them to intimidation or harm.

“Divulging the detainees’ identities may deter them from cooperating. Also, terrorist organizations with whom they have a connection may refuse to deal further with them thereby eliminating valuable sources of information for the Government and impairing its ability to infiltrate terrorist organizations.

“Releasing the names of the detainees would reveal the direction and progress of the investigation. Public release of names, and place and date of arrest could allow terrorist organizations and others to interfere with the pending proceedings by creating false or misleading evidence.

“Closure is justified by the need to avoid stigmatizing ‘special interest’ detainees, who may ultimately be found to have no connection to terrorism.” *Id.* at *22-*23 (edited).

The Government’s rationale is appealing, of course. The district court recognized that there may be cases in which closure is justified, *id.* at *25 n. 10, but the Government’s claims must be balanced against competing claims, such as openness and due process, and weighed against particular facts. When those competing interests are balanced and adjudged, the parties themselves – and all Americans – will be best served if the case is submitted to a court that is functioning at full capacity.

With gratitude for the work the incumbent judges are performing, we can’t expect them to perform at the top of their abilities when they are fielding only half a team. And, even if the 6th Circuit successfully manages the *Detroit Free Press* case, as it has done so far, what other cases from other litigants will be adversely affected? Already, the depleted 6th Circuit takes about 50 percent longer than average to dispose of a case.