UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
LOS ANGELES, CALIFORNIA

In the Matters of:	In Deportation Proceedings:
Khader Musa **HAMIDE**, and Michel Ibrahim **SHEHADEH**, Respondents.	Case No. A 19 262 560, and Case No. A 30 660 528, respectively.
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ORDER OF THE IMMIGRATION JUDGE

I. INTRODUCTION

On why should the spirit of mortal be proud?
Like a fast-flitting meteor, a fast-flying cloud,
A flash of the lightning, a break of the wave,

He passes from life to his rest in the grave.

WILLIAM KNOX, SONG OF ISRAEL (1824), *quoted in* PHINEAS GARRETT, ed., ONE HUNDRED CHOICE SELECTIONS (Penn Publishing Co. 1897).

Since time began to tick, human beings have contemplated their mortality with the certainty that they face a worldly end. *Sic transit Gloria mundi.*

Such certainty must come to cases as well. The finitude of litigation, bereft of the brute force of dispute resolution reserved to an earlier epoch, is an exercise of our evolution to more civilized human beings under the rule of law. It is what restrains and contains the blood-lust for hammer blows between adversaries which dwells dormant but not dead in the dark corners of the human heart. For the rule of law to prevail, litigation must have a beginning and an end. If men and women find no mortality in litigation as they find in themselves, they will seek closure of their grievances in the fiery wreckage of *Götterdämmerung*. One way or another, all things must come to an end. So it must be with the instant proceedings.

For the reasons set forth below, this Court concludes that the government's gross failure to comply with the Immigration Judge's lawful instructions to produce potentially exculpatory and other relevant information constitutes a violation of respondents' constitutional, statutory, and regulatory rights in these proceedings. *See United States v. Caceres, 440 U.S. 741, 749 (1979), citing Bridges v. Wixon, 326 U.S. 135 (1945) and United States v. Tod, 263 U.S. 149, 155 (1923).* Therefore, for reasons also set forth below, this Court concludes that the government has constructively abandoned its cases-in-chief against respondents and has otherwise failed to discharge its burden of proving their deportability. Accordingly, the proceedings against respondents are **TERMINATED**.

II. PROCEDURAL HISTORY

A detailed reiteration of the some 20-year history of these proceedings – already discussed in detail in previous Court orders – would likely numb the senses of even the most dedicated reader.[1] Therefore, for the purposes of this decision, the Court recites below only the current state of litigation in these cases.

A. SUMMARY OF ALLEGATIONS AND CHARGES

The Orders to Show Cause, as amended, now at issue in these proceedings, are attached to this decision as *Appendix B*.

Respondents are charged with deportability under the following provisions:

(1) Section 237(a)(4)(B) of the Immigration and Nationality Act (hereinafter the "INA"), as aliens who have engaged, are engaged, or at any time after admission

[1] Those orders are attached to the instant decision as *Appendix A*.

engaged in any terrorist activity, as defined by INA Section 212(a)(3)(B)(iv)(VI), to wit, aliens who, in individual capacities or as members of an organization, commit an act which the aliens knew, or reasonably should have known, afforded material support for a terrorist organization under INA Section 212(a)(3)(B)(vi)(III).

(2) Section 237(a)(4)(B) of the INA, as aliens who have engaged, are engaged, or at any time after admission engaged in any terrorist activity, as defined by INA Section 212(a)(3)(B)(iv)(IV), to wit, aliens who, in their individual capacities or as members of an organization, have solicited funds for or other things of value for a terrorist organization as described in INA Section 212(a)(2)(B)(vi)(III).

(3) Section 237(a)(4)(B) of the INA, as aliens who have engaged, are engaged, or at any time after admission engaged in any terrorist activity, as defined under INA Section 212(a)(3)(B)(i)(VI), to wit, aliens who, are members of a terrorist organization described in clause (vi)(III), unless the aliens can demonstrate by clear and convincing evidence that the aliens did not know, and should not reasonably have known, that the organization was a terrorist organization.

Respondents have denied their deportability now set forth against them. It is therefore the government's burden to "establish its allegations and charges by clear, unequivocal, and convincing evidence." *Woodby v. INS, 385 U.S. 276, 285-286 (1966) (footnote omitted).*

B. UNDISPUTED FACTS

On September 30, 2004, the parties filed a *Joint Statement of Undisputed Facts*. On October 20, 2004, respondents filed a *Notice of Withdrawal of Joint Statement of Undisputed Facts Filed September 30, 2004*. On November 10, 2004, the parties filed an *Amended Joint Statement*. On November 30, 2004, the Court ordered that the *Amended Joint Statement* be accepted into the record as binding on both parties. In doing so, the Court acted under the provisions of *8 C.F.R. Section 1003.21(b),* as follows:

The Immigration Judge may order any party to file a prehearing statement of position that may include, but is not limited to: A statement of facts to which both parties have stipulated, together with a statement that the parties have communicated in good faith to stipulate to the fullest extent possible.

The following facts have now been stipulated:

(1) During the period of 1984 to 1986, the Popular Front for the Liberation of Palestine (hereinafter "PFLP") engaged in terrorist activities as defined in *8 U.S.C. Section 1182 (2003).*

(2) During the same period, the PFLP also engaged in lawful activities such as providing social services, day care, health care, and social security, as well as sports, games, cultural events, political demonstrations, literature distribution,

and educational, recreational, and political events.

(3) During that same period, the PFLP engaged in legal military activities, such as defending refugee camps, as well as illegal military activities.

The government in these proceedings has **not** argued that the factual stipulations alone constitute clear, unequivocal, and convincing evidence of respondents' deportability.

III. THE RELEVANT ORDERS

On February 17, 1987, within approximately one year of the first filing of an Order to Show Cause (hereinafter the "OSC") against the respondents (and before the author of this decision was even an Immigration Judge), the Court per the Honorable Ingrid Hrycenko ordered the government to disclose any exculpatory evidence in its possession. *See Respondents' Motion For Production Of Exculpatory Evidence, Exhibit A, April 15, 2005*. Subsequently, on October 26, 1992, June 24, 1993, and February 14, 1994, this Court per the undersigned Judge, issued a series of more specific disclosure orders, compelling the government to disclose any evidence in its possession that would reasonably tend to contradict and/or disprove the allegations and charges contained in the OSC. *See Appendix A*. In its February 14, 1994, Order, which both respondents and the government concede is still in effect, the Court specifically instructed the government (then represented jointly by the Justice Department's Immigration and Naturalization Service and its Office of Immigration Litigation) to include in its evidentiary search the "State Department, Central Intelligence Agency ("CIA"), Federal Bureau of Investigation ("FBI"), and Defense Intelligence Agency ("DIA")." *Id.*

The proceedings are now before this Court under a new OSC, the genesis[2] for which is described in the materials assembled in *Appendix A*. In that regard, the Court held a telephonic status hearing with counsel on October 13, 2004.[3] At that hearing, the government stated that it was "still trying to streamline what exactly [the Department of Homeland Security] was going to submit into evidence.[4] The Court then gave the government until May 19, 2005, to turn over to respondents the identity of all witnesses set to testify against Hamide and Shehadeh, and all documentary evidence which the Department of Homeland Security planned to introduce in its cases in chief. The

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[2] The Court has deliberately elected not to capitalize the word "genesis." Nothing about the birth pangs of the instant proceedings in their current phase could possibly be ascribed to the Divine. Still, it is important that the reader remember both the changes in the prosecution of these cases and the constancy of the Court's intention to *narrow the scope* of contention in these same cases by ordering and reordering disclosure of material which, if existent in key federal agencies, would reasonably tend to disprove the government's claims against respondents.

[3] The records of all such status hearings are among tapes made and maintained by the Court in respondents' Executive Office for Immigration Review ("EOIR") case files.

[4] As a less than casual aside, the Court finds it troublesome that a prosecutor, even one at civil law, should commence proceedings to deport lawful permanent residents from the United States *before* he or she has command of his or her case in chief. It is even more troublesome when the prosecutor's confusion exists despite the fact that similar proceedings had been pressed by the government against the same individuals for a generation.

government did *not* comply with these instructions, despite the fact that during a May 5, 2005, telephonic status hearing, supervisory government counsel told the Court that, "We can submit our revised witness list by May 19th with a summary of their proposed testimony ... We can do that."

On June 16, 2005, the Court issued a written Order which memorialized the instructions it had given the parties during a June 7, 2005, telephonic status hearing. A copy of that Order is attached to this decision as *Appendix C*. In summary, this Order required the government to: (1) "conduct a good faith effort to search for and turn over any potentially exculpatory evidence;" (2) "make a formal request of the FBI to issue a statement with regard to the specific question of the existence or nonexistence of potentially exculpatory evidence regarding the specific activities of the Respondents;" (3) "make a good faith effort to obtain information as to any potentially exculpatory evidence" with regard to specific entities and their relationship if any to the Popular Front for the Liberation of Palestine; and (4) ensure that any statements signed or otherwise adopted by respondents which the government locates be identified and made available to Hamide and Shehadeh. The government was given until June 27, 2005, to comply with these instructions. It failed to do so.[5] Instead, on March 1, 2006 – some *nine months* after the disclosure deadline had passed – the government filed what it called *Exhibits Responsive to Immigration Judge's June 16, 2005, Order*. Those materials are attached to this decision as *Appendix E*.

On April 20, 2006, respondents file a pleading that protested the adequacy of the government's late submissions. *See Appendix F*. In summary, this pleading argued that the government's submissions were untimely (and therefore, *inter alia*, prejudicial to Hamide and Shehadeh) and not in compliance with the substantive parameters of the Court's June 2005 Disclosure Orders.

IV. ANALYSIS

A. AUTHORITY FOR THE COURT'S RELEVANT ORDERS

The 2004-05 Disclosure Orders of this Court were issues pursuant to the authority vested in Immigration Judges by the Attorney General under *8 C.F.R. Section 1003.21(b), supra.*[6] It is firmly established that Immigration Judges exercise the powers and duties assigned to them by Section 240 of the INA and delegated to them by the Attorney General of the United States. *See Mingkid v. Attorney General, 468 F.3d 763, 767-768 (11th Cir. 2006); United States v. Phommachanh, 91 F.3d 1383, 1387 (10th Cir. 1996) (citations omitted); 8 C.F.R. Section 1003.10*. Thus, the authority of this Court to

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[5] On June 24, 2005, the government filed a motion to reconsider the Court's June 16 order on the subject of exculpatory evidence. On June 27, 2005, the Court denied that motion. The government attempted and failed by interlocutory appeal to overturn the Court's June 27, 2005, denial. *Matter of Hamide and Shehadeh, File Numbers A 30 660 528 and A 19 262 560 (Board of Immigration Appeals, October 7, 2005). See Appendix D.* At no time between June 16, 2005, and the present, has there been issued any stay of the Court's Order.

[6] This regulation, which applies to both deportation and removal proceedings, was previously found in almost identical language at *8 C.F.R. 3.21.*

issue its disclosure orders is Congress' plenary power to make policies and rules for the entry and deportability of aliens from the United States. *See Fiallo v. Bell, 430 U.S. 787, 792 (1977) (citations omitted); Kleindienst v. Mandel, 408 U.S. 753, 769-770 (1972); Galvan v. Press, 347 U.S. 522, 531 (1954).* In short, while this Court may be one of limited jurisdiction[7], it is not an impotent institution. Whatever authority is vested in an Immigration Judge should be exercised vigorously, without fear or favor, and with the presumption that the parties before the Court follow its orders and instructions, subject only to appellate review and legitimate collateral attack. Moreover, it follows that the failure of the parties to discharge Court-ordered responsibilities has consequences. Without such consequences, an Immigration Judge is reduced to the status of a Blanche Dubois, who must rely on the kindness of strangers. Such status would gut the statutory and regulatory scheme of deportation proceedings. *See generally* HART, THE CONCEPT OF LAW (Clarendon Press 1961).[8]

B. THE GOVERNMENT RESPONSE TO THE COURT'S DISCLOSURE ORDERS

The government's response to the Court's orders is significantly deficient in several respects.

1. THE RESPONSE IS UNTIMELY

As stated above, the government's response was due on June 27, 2005. It was received by the Clerk's Office of the Court and sent to respondents on March 1, 2006. One could conceive, carry, and deliver a child during the course of the government's delay. The delay grows in significance when viewed in light of the fact that it was in *December 1986* that the government first issued Orders to Show Cause against respondents, charging them with deportability under then Section 241(a)(6) of the INA. On July 20, 2005, the government filed its most recent amendment to the current OSC.[9] The crux of this case

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[7] *See 8 C.F.R. Section 1240.1(a).*

[8] "[U]nless *in general* sanctions were likely to be exacted from offenders, there would be little or no point in making particular statements about a person's obligations."

[9] *See Appendix F.* It is interesting to note that the government was able to amend the OSC eight months before responding to the Court's disclosure orders. Apparently, the government deemed its obligations under those orders to be somehow sidelined by its other prosecutorial activities. The government is about to receive a corrective education in this regard.

Also, the Court concurs with the respondents that the amendments to the OSC found in *Appendix F* and predicated on the REAL ID Act must be dismissed. Section 103(d)(1) of the INA limits the application of the REAL ID Act to *removal* proceedings. The government's assertion in its pleadings before this Court that Section 103 (d)(2) of the INA – which discusses the "acts and conditions" to which the REAL ID Act applies and *not* the type of proceedings to which the statute applies – overrides Section 103(d)(1) assumes that Congress authored a provision of law it intended to be ignored. The Court eschews this rather presumptuous attempt to psychoanalyze Congressional intent and to rewrite Congressional legislation and instead prefers to follow the case law that, "In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *K Mart v. Cartier, Inc., 486 U.S. 281,291 (1988) (citations omitted).* Based on that case law and on a common sense reading of the REAL ID Act, the Court **terminates with prejudice** the government's 2005 amendments to the respondents' OSC. The Court's ruling in this regard is made in addition to, and not in place of, its holdings in the body of this decision.

has always been the issue of respondents' alleged activities in connection with the PFLP, however. Assuming *arguendo* that the government has placed great importance on its longstanding and persistent efforts to deport respondents, its unwillingness or inability to comply in anything close to a timely fashion with the disclosure orders renders its defiance in that regard more outrageous. The Court therefore does not excuse the lateness of the government's attempt to comply with the disclosure orders at issue.

2. THE RESPONSE IS INADEQUATE

Even if the government's response were timely, it would not conform to the substance of the Court's disclosure orders. That response, found at *Appendix E*, is preceded by a letter, dated January 23, 2006, to the National Security Division of the U.S. Department of Homeland Security (hereinafter "DHS") from Mr. John M. Clarkson, III, Assistant General Counsel of the National Security Law Branch of the FBI. The Court finds that the Clarkson letter is not in conformity with the June 2005 disclosure order.

Firstly, the Mr. Clarkson takes it upon himself (and presumably his client, the FBI) to define "potentially exculpatory evidence," which, *inter alia*, this Court ordered the government to search for and if existent, to produce. In the June 2005 Order, the Court instructed the government to make a request of the FBI to issue a statement with regard to the existence or not of "potentially exculpatory evidence" regarding the respondents and their specific activities. However, Mr. Clarkson drops any reference to "potentially" and interprets the phrase "exculpatory evidence" to mean, "'Evidence tending to establish a criminal defendant's innocence.' BLACK'S LAW DICTIONARY 587 (8th ed. 2004)."

The FBI should know, and DHS *must* know, that the instant proceedings are *not* criminal. *See Collins v. Youngblood, 497 U.S. 37 (1990); Marcello v. Bonds, 349 U.S. 302 (1955).* Thus, any application of a criminal law standard to the definition of the phrase "exculpatory evidence" – not to mention any decision by Mr. Clarkson to edit "potentially" out of that phrase – taints and places into serious question the sufficiency of the FBI's response. Immigration law imposes its own obligations on the government to produce favorable or exculpatory evidence. *See Ibarra-Flores v. Gonzales, 439 F.3d 614, 620-621 (9th Cir. 2006) (On remand, the Court of Appeals ordered the Immigration Judge to require the government to produce all forms that referenced the alien's departure from the United States where the alien was seeking cancellation of removal under Section 240A(b) of the INA and claimed that he had not voluntarily departed the United States under an administrative order to do so).* Moreover, the Court's instructions regarding "potentially exculpatory evidence" were issued under 8 C.F.R. Section 1003.21, and not under the rule of *Brady v. Maryland, 373 U.S. 83 (1963).* Mr. Clarkson's misuse of black-letter law calls to mind a more appropriate maxim relevant to the confusion expressed in the FBI's (and thus the government's) reply: *Ambigua responsio contra proferentem est accipiendra* – i.e., an ambiguous answer is to be taken against the party who offers it.

During a June 7, 2005, taped telephonic status conference, the government by and through DHS counsel did not object to having the FBI issue "a statement with regard to

the specific question raised today by the respondents on the existence or not of potentially exculpatory evidence regarding the specific activities of Mr. Hamide and Mr. Shehadeh." It was therefore the responsibility of DHS to educate the FBI on the proper parameters of the search ordered by this Court. The errors and extrajudicial rewriting of the Court's instructions found in the Clarkson letter are thus attributable to DHS, the prosecuting agency in these proceedings. DHS had more time than this Court permitted to obtain an appropriate statement from the FBI. That it failed to do so only compounds the seriousness of its untimely response.

The Clarkson letter also chooses to rewrite this Court's orders by stating that the FBI only searched for "information generated and in the possession of the FBI since September 10, 1993." The Clarkson letter argues that the FBI had previously produced exculpatory evidence pursuant to 1992 and 1993 disclosure orders of this Court. However, as respondents correctly note in their pleading of April 20, 2006, the 1992-1993 orders compelled searches for exculpatory evidence relevant to the government's then existing assertions about the PFLP in general, and not specifically Hamide, Shehadeh, or the other organizations identified by the Court in its June 16, 2005, Order. Once again, therefore, DHS has allowed the FBI to play judge with regard to obligations imposed on the government by this Court.

It is also troubling that at page two, the Clarkson letter does not believe that the FBI is under any obligation to "provide information which could not be lawfully disseminated." If there is such information covered by the Court's disclosure orders, then the FBI through DHS should inform the Court of that fact, even if the government is not prepared to reveal the material itself. Alternatively, if such information exists, then the FBI, through DHS, should explain why the material in question is not subject to lawful dissemination. The Court notes that the Department of Justice has established procedures for the submission of documents and information under seal with a protective order where such material would, if disclosed, "harm the national security...or law enforcement interests of the United States." 8 C.F.R. Section 1003.46.[10] Additionally, in its February 14, 1994, Order, the Court has provided that if the government claims that documents otherwise subject to disclosure are classified, "respondents should be provided with summaries in their stead...[and] this Court will reserve its right to review *in camera* the summaries and the classified documents on which they are based." In short, it is not for the government to modify this Court's orders by simply suppressing any possible discussion of information which the FBI has unilaterally decided might not be subject to lawful dissemination.

In response to the Clarkson letter, respondents have also raised objections to the refusal of the FBI to search for information available in the public domain, and to the Bureau's decision to confine its record checks to its Los Angeles field office. *See Respondents'*

[10] The FBI does not claim, and this Court does not assume, that it possesses potentially exculpatory but classified information or other material not subject to lawful dissemination. The FBI has not only failed to produce such potentially exculpatory evidence, it has failed to even identify whether such evidence exists, even without describing the particular material. The FBI's failure to do so is a clear violation of the language, not to mention the spirit, of this Court's June 16, 2005, Order.

Response To Government's Exhibits Responsive To Immigration Judge's June 16, 2005, Order. The Court declines to rule on the appropriateness of these matters, inasmuch as the FBI's response to the June 16, 2005, order is fatally flawed for all the reasons set forth above. The Court, as it must, holds DHS responsible for the inadequacy of that response.

3. THE INADEQUACY OF THE RESPONSE RAISES CONSTITUTIONAL CONCERNS

Although there is no question that the United States has extraordinarily broad powers in the area of immigration and border patrol, it is also well established that aliens facing deportation from this country are entitled to due process rights under the Fifth Amendment. *Mathews v. Diaz, 426 U.S. 67, 77 (1976).* As the Supreme Court has explained on a number of occasions, "once [an] alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly." *Landon v. Plasencia, 459 U.S. 21, 32 (1982). Walters v. Reno, 145 F.3d 1032, 1037 (9th Cir. 1998). See also Reno v. Flores, 507 U.S. 292 (1993); The Japanese Immigrant Case, 189 U.S. 86, 100-101 (1903); Campos-Sanchez v. INS, 164 F. 3d 448 (9th Cir. 1999); Barraza Rivera v. INS, 913 F.2d 1443 (9th Cir. 1990).* The protracted failure of the government to comply with the Court's disclosure orders in the instant deportation proceedings against lawful permanent resident respondents Hamide and Shehadeh constitutes a violation of the latter's due process rights.

In assessing whether Hamide and Shehadeh's procedural due process rights have been violated, this Court looks to the decision of *Mathews v. Eldridge, 424 U.S. 319, 335 (1976)(citation omitted)*, as follows:

> *[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.*

The private interests of respondents that will be affected by the lateness and inadequacy of the government's response to this Court's disclosure orders are grave. Both respondents have been lawful permanent residents of the United States for over 30 years. Both have been the subject of deportation proceedings for approximately 20 years.[11] The repeated actions of the government in not complying with the Court's orders have prevented respondents from obtaining fair hearings and closure in their cases. The

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[11] To be sure, not all of the delays that have arisen in these proceedings are the fault of the government. *See Appendix A*. However, the failure of the government to comply with the Court's disclosure orders dates from February 1994, and the ongoing pressures of the instant proceedings have been like a Sword of Damocles, hanging over the heads of respondents and their families, including their United States citizen children.

attenuation of these proceedings is a festering wound on the body of these respondents, and an embarrassment to the rule of law. *See Sharma v. INS, 89 F.3d 545, 548 (9th Cir. 1996) (due process in deportation proceedings includes the right to a full and fair hearing, and includes the opportunity to be heard at a meaningful time and in a meaningful manner) (citing Getachew v. INS, 25 F.3d 841, 845 (9th Cir. 1994)). See also Casas Chavez v. INS, 300 F.3d 1088 (9th Cir. 2002), citing Mathews v. Eldridge, supra, 424 U.S. at 348 ("The essence of due process is the requirement that a person in jeopardy of serious loss [be given] notice of the case against him and an opportunity to meet it.")*

It is also questionable whether any additional or substitute procedures could be employed now to redress the burdens to respondents posed by the government's failure to comply with the disclosure orders. The use by respondents of the Freedom of Information Act (hereinafter "FOIA")[12] would amount to a massive undertaking to peruse decades worth of material that would delay even further the fair completion of these proceedings. Alternatively, even if respondents were willing to endure such delay, there is no guarantee that the deportation proceedings would be continued until their FOIA requests are fully processed. *See Matter of Benitez, 19 I. & N. Dec. 173 (BIA 1984) (Immigration Judge's denial of continuance upheld even when FOIA response not completed).*

Finally, the Court rejects the notion that the government would suffer an undue fiscal and administrative burden in discharging its duties under the disclosure orders. Firstly, the government has never advanced such a burden as the primary reason for not adhering to the Court's orders, not even in the Clarkson letter.[13] Secondly, the government has provided no estimate of how much money and time it would have taken to comply with the disclosure orders on time and in full. Thirdly, the government has proposed no feasible and less burdensome alternative to the requirements it has failed to meet in either a timely or meaningful manner. Fourthly, the Court stresses that any cost-basis analysis of the impact of its disclosure orders on the government must take into account the nature of the serious charges against respondents: i.e., that they have engaged in *terrorist* activity. Is it not a reasonable burden on the government to comply with the disclosure orders and proceed to the business of bringing such allegedly deportable aliens to justice? Indeed, a reasonable argument could be made that if Hamide and Shehadeh have engaged in terrorist activity, particularly in the context of today's world, then the government would be prepared to move heaven and earth – not to mention some mounds of paper – to complete the trial and deportation of these respondents.

Based on the foregoing analysis provided in *Mathews*, the Court concludes that the untimeliness and insufficiency of the government's response to the disclosure orders has deprived respondents of their Fifth Amendment right to due process of law.

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[12] *See 8 C.F.R. Section 103.8.*

[13] As already noted above, the Court is not now ruling on whether the failure of the FBI to search the public domain for documents to be a violation of the disclosure orders. Accordingly, any arguable financial or administrative burden associated with such a search is presently moot.

V. THE APPRORIATE REMEDY

The government has violated the orders of this Court issued under 8 C.F.R. Section 1003.21(b). The effect of the government's defiance of this Court has been to prejudice respondents' constitutional right to a fundamentally fair hearing, and to erode public confidence in the authority of this Court to conduct deportation proceedings in a manner delegated to it by Congress and the Attorney General. The right to due process, and the authority of the Court, are not mere trifles. They are part of a legal regime to which all parties must submit, "not to be varied in particular cases, but to have one rule for rich and poor, for the favourite at court, and the countryman at plough." LOCKE, WORKS, THE SECOND TREATISE OF GOVERNMENT, SECTION 142 (1823). It does no public good to argue that because Hamide and Shehadeh are alleged to have engaged in terrorist activity, their status as lawful permanent residents entitles them to no legal protection from government misconduct.[14] The credibility of the rule of law is tested not by how the latter is applied to protect those we love, but to protect those we loathe. Moreover, the credibility of a Court – whether Article III, Article I, or administrative – is measured by its independence, its willingness to protect and apply even its limited authority against the power of the prosecutor, be he criminal or civil. Where there is a rule reasonably applied, there must be a sanction for those who violate it, whatever their rank.[15] Homeland security begins and ends with fidelity to the safety of the law as a shield against unregulated governmental power.

In this case, the government has violated the Court's application of 8 C.F.R. Section 1003.21(b). As a remedy for that violation, the Court now holds that the government is barred from presenting its cases in chief against respondents. Accordingly, the Court finds that the government has failed to carry its burden of proving respondents deportable based on clear, unequivocal, and convincing evidence. Therefore, the proceedings against Hamide and Shehadeh are **TERMINATED**.

Dated this 29th day of January, 2007.

Bruce J. Einhorn
U.S. Immigration Judge

[14] The misconduct found here is institutional, not personal. The Court has great respect for DHS counsel, as it does for defense counsel.

[15] For example, an Immigration Judge may order the parties to exchange exhibit lists prior to a hearing. *8 C.F.R. Section 1003.21(b).* The Judge also may order the parties to produce prehearing statements in which they interpose objections to the exhibits listed by each other. *8 C.F.R. Section 1003.21(c).* If a party fails to interpose such objections to a proposed exhibit, the Immigration Judge may deem the evidence unopposed at the time of hearing. *Id.* In such a way, a respondent may waive objection to evidence that forms the basis for a judgment of deportability, or the government may waive objection to evidence that forms the basis for the termination of a charge. Therefore, the decision of this Court to find that the government's violation of the disclosure orders bars or waives its right to present cases in chief against respondent is neither radical nor inappropriate.