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Jeffrey S. Koweeck

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Enemy Combatant Status Hearings: Predicting the Right of Access by the Press and Public

*Jeffrey S. Koweek**

“[T]o the press alone, chequered as it is with abuses, the world is indebted for all the triumphs which have been gained by reason and humanity, over error and oppression.” – James Madison¹

“Gentlemen, I am sorry to find that some one member of this body has been so neglectful of the secrets of the Convention as to drop in the State House a copy of their proceedings, which by accident was picked up and delivered to me this morning. I must entreat gentlemen to be more careful, lest our transactions get into the news papers and disturb the public response by premature speculations.” – George Washington²

Freedom of the press is one of the richest traditions in the United States and, along with freedom of speech, the right that is most associated with protecting the integrity of our democratic republic. Protecting the freedom of the press is of paramount

* Juris Doctor Candidate, University of North Carolina School of Law, 2006.

1. See *Near v. Minnesota*, 283 U.S. 697, 718 (1931) (citing JAMES MADISON, *Report on the Virginia Resolutions*, in 4 MADISON'S WORKS 544). But see ANTONY JAY, *THE OXFORD DICTIONARY OF POLITICAL QUOTATIONS* 191 (1996) (attributing this quote to Thomas Jefferson).

2. 3 MAX FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 86 (3d ed. 1937). For corroboration, see George Washington's letter to David Stuart dated July 1, 1787: "As the rules of the Convention prevent me from relating any of the proceedings of it, and the gazettes contain more fully than I could detail other occurrences of public notice, I have little to communicate to you . . ." *Id.* at 51.

importance for honest government, but the rights of the press have never been absolute as evidenced by George Washington's quote above. In recent years, issues concerning the freedom of the press have focused on rights of access and information gathering rather than the right to publish. This article evaluates the First Amendment right of access to proceedings in which a United States citizen is contesting his or her status as an enemy combatant. This issue first arose in the aftermath of the June 2004 *Hamdi v. Rumsfeld*³ decision, in which the United States government detained Yaser Hamdi as an enemy combatant without representation for more than two years until the Supreme Court granted certiorari to hear an appeal from the Fourth Circuit Court of Appeals.

Part I details the recent history of the freedom of the press and summarizes the First Amendment right of access to news gathering. This constitutional right to access, grounded in the First Amendment, is a limited right, and its various permutations are still evolving.⁴ One of the main components of the constitutional right of access is that the First Amendment "protects the public and the press from abridgment of their rights of access to information about the operation of their government, including the Judicial Branch."⁵ But the "First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally."⁶ If the general public is excluded from a crime scene, disaster area, or government proceeding, the press also may be so restricted.⁷ Thus, any mention in this article of a constitutional or First Amendment right of access in this article applies to both the press and the public.

Part II analyzes the division among the federal circuit courts on the right of access to special interest deportation hearings in the aftermath of the terrorist attacks of September 11, 2001. Special interest deportation hearings are a subset of deportation hearings in

3. ___ U.S. ___, 124 S. Ct. 2633 (2004).

4. See *Branzburg v. Hayes*, 408 U.S. 665, 682-84 (1972).

5. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 584 (1980) (Stevens, J., concurring).

6. *Branzburg*, 408 U.S. at 684.

7. *Id.* at 684-85.

which potential deportees are suspected of having ties to the 9/11 terrorist attacks.⁸ They were established pursuant to a memorandum by Chief Immigration Judge Michael Creppy calling for a “complete information blackout along both substantive and procedural dimensions” in the interests of national security.⁹ Analyzing this circuit court “split” will provide guidance for the framework under which press access can be evaluated for proceedings to determine the enemy combatant status of a United States citizen.¹⁰

Part III describes the facts of *Hamdi* and analyzes the United States Supreme Court’s ruling on contested enemy combatant status hearings. This section will discuss the possible settings for contested enemy combatant status hearings, the likely First Amendment right of access to each, and the impact of the circuit split on special interest deportation hearings on the press’ right of access. This section will predict the press’ constitutional right of access in each of the possible adjudicative settings and show how the constitutional right of access will likely be secondary to national security concerns. Although the settlement between the United States government and *Hamdi* renders this case moot, the analysis remains relevant due to the global mobility of citizens, the continuing war on terror, and the easily accessible and potentially dangerous information available to everyone.

The tension between the constitutional right of access by the press and deference to national security interests is but one example of how the United States government is wrestling with the proper balance between civil liberties and security in the aftermath of the September 11, 2001 terrorist attacks. These issues include the extent to which constitutional liberties should be curtailed in an

8. *North Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198, 203 (3d Cir. 2002), *cert. denied*, 538 U.S. 1056 (2003).

9. *Id.*

10. Previous cases involving citizens captured as enemy combatants did not contest their status, as Justice Scalia made clear in his dissent in *Hamdi*. *Hamdi v. Rumsfeld*, __ U.S. __, 124 S. Ct. 2633, 2670 (Scalia, J., dissenting) (citing *Ex parte Quirin*, 317 U.S. 1, 47 (1942) (holding that a man claiming naturalized United States citizenship was an enemy belligerent as he admitted enemy combatant status)); *Colepaugh v. Looney*, 235 F.2d 429, 432 (10th Cir. 1956); *In re Territo*, 156 F.2d 142, 143-45 (9th Cir. 1946).

effort to be safe and secure, the deference afforded to general or specific claims by the federal government in order to promote national security, and the impact the current war on terror will have on personal freedoms. This article discusses one aspect of the tension between liberty and security in the debate concerning the constitutional right of access by the press.

I. A BRIEF HISTORY OF THE FREEDOM OF THE PRESS

The First Amendment states that there shall be no law abridging the freedom of the press.¹¹ The freedom of the press to publish is uncontroversial by the plain language of the United States Constitution and has been upheld as a fundamental right even against government claims of protecting national security.¹² The freedom of the press to gather news and acquire information is directly related to this freedom to publish. The Supreme Court has held that “without some protection for the seeking out of news, freedom of the press would be eviscerated.”¹³ The exact meaning of “some protection” is not completely clear, but the freedom to gather news is an important function of living in a free and democratic society in which one can challenge and publicize governmental actions.¹⁴

Other Constitutional protections for citizens exist that promote open and transparent government. The First Amendment states that no law shall be made “abridging the freedom of speech, . . . [or] to petition the Government for a redress of grievances.”¹⁵ The Sixth Amendment includes a right to a public trial, thereby providing accountability of government operations

11. U.S. CONST. amend. I.

12. See *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam) (holding that the government had not met its burden to curtail the *New York Times* and *Washington Post* from publishing the leaked Pentagon Papers detailing the uncertain and compromising foreign policy decisions related to operations in Vietnam).

13. *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972).

14. See *Potter Stewart, Or of the Press*, 26 HASTINGS L.J. 631, 633-634 (1975) (stating that the freedom of the press is a structural provision of the Constitution and that the publishing business is a protected institution).

15. U.S. CONST. amend. I.

and a check on the government.¹⁶ However, this article restricts itself to the First Amendment right to publish.

The Supreme Court has, for instance, held that the press has no greater right of access than that of the general public and that traditionally closed proceedings such as internal political branch meetings are not deemed to be accessible.¹⁷ Additionally, in the 1970s, the Supreme Court upheld many limitations to the constitutional right of access on military bases and in government-controlled prisons.¹⁸ The 1970s was a turbulent time in this country's history due to Vietnam and Watergate, and the press took a leading role as the watchdog of government integrity and honesty.¹⁹ In 1979, the Supreme Court heard the first of five cases in seven years that more fully addressed the press' constitutional right of access.

The first case to reach the Supreme Court was one in which Gannett newspaper publishers challenged a trial judge's ruling that barred the press and the public from a pretrial suppression hearing.²⁰ The newspaper asserted First, Sixth, and Fourteenth Amendment rights as its constitutional basis for access despite the fact that the defendant, prosecutor, and trial judge agreed that closure was warranted for a fair trial.²¹ The Supreme Court held that "members of the public have no constitutional right under the Sixth and Fourteenth Amendments to attend criminal trials."²² Additionally, the Court concluded that the trial judge's

16. U.S. CONST. amend. VI.

17. *Nation Magazine v. United States Dep't of Def.*, 762 F. Supp. 1558, 1571 (S.D.N.Y. 1991) (stating that the Supreme Court, while never directly addressing the "role and limits of news gathering under the First Amendment in a military context abroad," had ruled definitively on other limitations to access rights of the press).

18. See *Houchins v. KQED, Inc.*, 438 U.S. 1, 16 (1978) (holding the media right to access prisons is no different from – or greater than – that of the general public); *Greer v. Spock*, 424 U.S. 828, 838 (1976) (holding that First Amendment rights are not absolute on military bases because they are not public forums).

19. Jonathan L. Hafetz, *The First Amendment and the Right of Access to Deportation Proceedings*, 40 CAL. W. L. REV. 265, 269-70 (2004).

20. *Gannett Co. v. DePasquale*, 443 U.S. 368, 370-71 (1979).

21. *Id.*

22. *Id.* at 391.

determination that the defendant's Sixth Amendment right trumping the press' First Amendment rights was only temporary, as the transcripts would be made available later.²³

The following year, the Supreme Court overturned its holding in *Gannett* by holding that there is a constitutional right of access to criminal trials.²⁴ In *Richmond Newspapers v. Virginia*, a murder defendant, after three mistrials, wanted his fourth trial to be closed, but the press wanted access. Chief Justice Burger's majority opinion stressed that criminal trials are traditionally open to the public and that denying this First Amendment right would unnecessarily deprive the freedoms of speech and the press of their important functioning for a "liberty-loving society."²⁵ Justice Brennan, in a concurring opinion, introduced the idea that in addition to a tradition of openness, the importance of public access to the trial process itself must also be analyzed.²⁶ Specifically, Justice Brennan argued: if access by the public and press served a positive function for the procedure, it should be a factor in addition to traditional openness. These positive functions include public monitoring of government operations, ensuring due process, or reinforcing public confidence in government operations.²⁷ The traditional openness and positive value arguments from *Richmond Newspapers* eventually evolved into a two-part "experience and logic" test used as the basis for the Court's rationale in three later cases.

In *Globe Newspaper Co. v. Superior Court*, the Supreme Court held in 1982 that a mandatory Massachusetts law closing rape trials where the alleged victims were minors was unconstitutional under the First Amendment according to the *Richmond Newspapers* decision.²⁸ However, the Court held that the First Amendment right of access was not absolute and that:

[t]he circumstances under which the press and public can be barred from a criminal trial are

23. *Id.* at 393.

24. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980).

25. *Id.* at 576-77.

26. *Id.* at 589 (Brennan, J., concurring).

27. *Id.* at 593 (Brennan, J., concurring).

28. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 603 (1982).

limited; the State's justification in denying access must be a weighty one. Where, as in the present case, the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest.²⁹

Thus, the First Amendment right of the press to access courtrooms established in *Richmond Newspapers* can only be curtailed if the countervailing interest can pass the strict scrutiny test. Strict scrutiny is an exacting standard in which the government must show that the interest by the challenged state action is compelling and not just legitimate.³⁰ Additionally, there must be clear evidence that the means used to achieve this interest are narrowly tailored to the results.³¹

Here, the Government arguably had compelling interests in closing the proceedings to protect minors and provide encouragement for others to come forward. However, the law was not narrowly tailored to the Government's interests, as in camera review would likely be sufficient to protect minors' identities. Moreover, post-trial transcripts were available, thereby negating the Government's claim of encouraging other minor victims to come forward. Thus the mandatory closure was deemed not narrowly tailored enough, as a case-by-case basis review was sufficient to determine trial closures.³²

Chief Justice Burger, in a dissenting opinion, wrote that there was no history of openness in these situations, that strict scrutiny should not be applied, and that as long as state interests

29. *Id.* at 606-07.

30. *E.g.*, *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985) ("The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest").

31. *E.g.*, *Miller v. Johnson*, 515 U.S. 900, 920 (1995) ("To satisfy strict scrutiny, the State must demonstrate that its districting legislation is narrowly tailored to achieve an compelling interest").

32. *Globe Newspaper*, 457 U.S. at 607-08.

outweighed the impact on First Amendment rights, the Massachusetts law should be upheld.³³ In summary, the Court's position after *Globe Newspaper* is that a First Amendment right to access criminal trials exists as long as the *Richmond Newspapers*' "experience and logic" test is met. This constitutional right of access is not absolute, however, and can be restricted if the law passes strict scrutiny.

In the following years, court rulings extended the constitutional right to access within the context of criminal trials. In 1984, the Supreme Court held that a trial judge's refusal of press access to voir dire transcripts of a criminal trial was unconstitutional since a "presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest."³⁴ In this case, the trial judge made no findings that restricting access to the trial transcripts would serve any higher values.³⁵ Furthermore, the court held that portions of the transcript from the six-week voir dire proceeding that were "reasonably entitled to privacy" could be sealed.³⁶

In a 1986 case, a defendant facing a murder charge exercised his state right to a preliminary hearing rather than a grand jury proceeding.³⁷ The trial court granted the defendant's wish to not release the forty-one day hearing transcript.³⁸ The Supreme Court upheld the press' First Amendment rights, holding that the qualified constitutional right to access criminal trials extended to California's preliminary hearings, as they are traditionally open and there is a "community therapeutic value" in knowing that the proceedings are done fairly.³⁹ Without access, citizens may question the validity of governmental authority, which would have a detrimental effect on society.

These decisions show that the Supreme Court has declared

33. *Id.* at 614-15 (Burger, C.J., dissenting).

34. *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984).

35. *Id.* at 503-04.

36. *Id.* at 513.

37. *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 4-5 (1986).

38. *Id.*

39. *Id.* at 13.

only a qualified First Amendment right to access exists for criminal trials, voir dire proceedings, and preliminary hearings. However, other courts have extended this constitutional right to civil trials⁴⁰ and administrative proceedings.⁴¹ The next stage of this discussion involves an analysis of the different approaches two federal circuits employed in analyzing the press's constitutional right to access special interest deportation hearings.

II. SPLIT IN UNITED STATES COURTS OF APPEALS ON 'SPECIAL INTEREST' DEPORTATION HEARINGS

A. Background

Since the September 11, 2001 terrorist attacks on the United States, there has been much public discussion about the proper balance between liberty and security. The USA PATRIOT Act⁴²; the Joint Resolution Authorizing the Use of Military Force on September 18, 2001⁴³; and the November 13, 2001, Presidential Military Order on the Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism⁴⁴ all provide examples of national legislation curtailing individual liberties in the interest of greater national security. This is not unprecedented. When the United States has been attacked and considered to be at war in the past, civil liberties have been suspended to an even greater extent. For example, President Lincoln, during the Civil War, suspended the writ of habeas corpus⁴⁵ and seized private property in the course

40. MARC A. FRANKLIN, ET AL., *MASS MEDIA LAW* 749-50 (6th ed. 2000) (citing *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059 (3d Cir. 1984); *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*, 980 P.2d 337 (Cal. 1999)).

41. See *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 695 (6th Cir. 2002).

42. Pub. L. No. 107-56, 115 Stat. 272 (2001).

43. Pub. L. No. 107-40, 115 Stat. 224 (2001).

44. Presidential Military Order on the Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57, 883 (Nov. 16, 2001).

45. See *Ex parte Merryman*, 17 F. Cas. 144, 144-45 (C.C. Md. 1861) (No. 9,487).

of a blockade of the South.⁴⁶ Also, the creation of Japanese internment camps via Executive Order during World War II was upheld by the Supreme Court, which resulted in loss of both liberty and property for Japanese citizens.⁴⁷ Notably, in both of these instances, after the cessation of hostilities, federal laws have recognized that these actions were unconstitutional.⁴⁸

Currently, the United States government is engaged in a “war against terrorism” involving known and unknown enemies for an indeterminate length of time. It is beyond the scope of this article to discuss fully the comparisons of the war against terror to other more formal wars against nations where a definitive endpoint can be foreseen. Rather, this article examines the issue of whether the war on terror is an interest compelling enough to support a mandatory closure of special interest deportation hearings, denying the press and the public access to the proceedings, and if this result is naturally extended to contested enemy combatant status proceedings. Two circuits differ in their analysis of special interest deportation hearings, but the background facts are similar.

On September 21, 2001, Chief Immigration Judge Michael Creppy issued a directive (the “Creppy directive”) requiring the closure of deportation hearings involving all persons that might have any connection with the terrorist attacks. The directive required these “special interest” deportation hearings to be closed to the press, the public, and friends and family members and permitted no information on even the existence of the proceedings.⁴⁹ The two circuit court cases discussed below involve

46. See *The Brig Amy Warwick*, 67 U.S. 635 (1863).

47. See *Korematsu v. United States*, 323 U.S. 214, 223-24 (1944).

48. See *Hamdi v. Rumsfeld*, ___ U.S. ___, 124 S. Ct. 2633, 2639 (2004) (describing the legislative history of the Citizen Non-Detention Act, 18 U.S.C. § 4001(a), passed in 1971 in part to repeal the Emergency Detention Act of 1950 which could lead to future internment camps as suffered by Japanese citizens in World War II); *Ex parte Milligan*, 71 U.S. 2, 125-26 (1866) (acknowledging that during emergency situations such as war, suspending the writ may be appropriate, but that the Constitution grants no further powers to resolve the outcome in any emergency format). See generally H.R. Rep. No. 92-116 (1971), reprinted in 1971 U.S.C.C.A.N. 1435.

49. See *North Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198, 199 (3d Cir. 2002); *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 683-84 (6th Cir.

members of the press or public, who, after being denied access to special interest deportation hearings, filed suits to have their constitutional rights of access upheld.

*B. The Sixth Circuit Holding: Detroit Free Press v. Ashcroft*⁵⁰

In December 2002, Rabih Haddad had overstayed his tourist visa. His deportation hearing was classified as “special interest” due to suspicions that the Islamic charity he operated provided funding to terrorist organizations. Family members, members of the public, several newspapers, and Congressman John Conyers wanted to attend the hearing but were denied access. Haddad was denied bail, detained, and had been in custody for the six months preceding the Sixth Circuit’s decision. The *Detroit Free Press*, the plaintiff-newspaper, sought three things: a declaratory judgment that the Creppy directive violated their First Amendment right of access to the deportation hearings, an enjoinder of future closures in Haddad’s case, and a release of all previous documents and transcripts. The district court granted an injunction, the Government appealed, and the Court of Appeals heard oral arguments on August 6, 2002.⁵¹

The Sixth Circuit presented the following rationale for determining that the First Amendment right of access was violated. First, the Government has broad authority over substantive immigration law, but the “Constitution meaningfully limits non-substantive immigration laws and does not require special deference to the Government.”⁵² Furthermore, the United States Supreme Court has “repeatedly allowed for meaningful judicial review of non-substantive immigration laws where constitutional rights are involved.”⁵³ The Court also held that non-citizens who lawfully enter and live in the United States are invested with the same due process rights as citizens.⁵⁴

2002).

50. *Detroit Free Press*, 303 F.3d at 681.

51. *Id.* at 684-85.

52. *Id.* at 685.

53. *Id.* at 687.

54. *Id.* at 688. See also *Bridges v. Wixon*, 326 U.S. 135, 154 (1945)

Additionally, the Sixth Circuit held that the Creppy directive did not meet the deference to national security required to override these procedural concerns, given that it encompasses a “broad, indiscriminate range of information” and is not narrowly targeted.⁵⁵ Since the national security risk here is only described broadly, it fails to satisfy the strict scrutiny test introduced in *Globe* and therefore the Government has not provided a convincing argument to curtail the press’ First Amendment rights to access these proceedings.⁵⁶

Furthermore, the Sixth Circuit found the *Richmond Newspapers* “experience and logic” test applicable to deportation hearings, as Circuit courts, including the Sixth Circuit, have used it in non-criminal proceedings such as student disciplinary board proceedings, civil trials, administrative hearings, and municipal planning meetings.⁵⁷ The Sixth Circuit further noted that the United States Supreme Court held that the many similarities between judicial trials and deportation hearings warrant the use of this two-prong test in determining constitutional rights of access. Some of the similarities include the adversarial nature of the proceedings, notice requirements, the existence of burden of proof standards, habeas corpus rights, and a right to counsel.⁵⁸

The Sixth Circuit then applied the *Richmond Newspapers* test to the facts, finding that the experience prong was satisfied since deportation hearings traditionally have been open to the public, albeit with exceptions, since 1882; and, that the numerous revisions to the 1965 Immigration and Naturalization Service (INS) regulations have not undercut the required presumptive openness of deportation proceedings.⁵⁹ The second prong of the *Richmond Newspapers* test was also met as the openness plays a positive role in the hearings themselves. The openness serves as a check on the

(“[D]eportation is a penalty...[m]eticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness”).

55. *Detroit Free Press*, 303 F.3d at 692.

56. *Id.* at 693.

57. *Id.* at 695.

58. *Id.* at 698-99.

59. *Id.* at 701.

Executive branch to ensure fair trials, proper administration of justice, and a community therapeutic value. This community therapeutic value reassures both society and an individual that proper justice is administered and that individual liberties are not being trampled.⁶⁰

Having found a First Amendment right of access under the *Richmond Newspapers* test, the Sixth Circuit then held that the Creppy directive was not narrowly tailored and that the Government did not make a compelling argument why mandatory closure was needed instead of a case-by-case decision regarding secrecy.⁶¹ Here, the Government only had to prove by clear and convincing evidence that Haddad had overstayed his visa and was still in the United States. No evidence needed to be shown at all relating to terrorist activities or national security.⁶² Thus, mandatory closure was not necessary or narrowly tailored, and the Government could petition for secrecy when needed.⁶³ According to the Sixth Circuit, the Government's claims of national security concerns based on bits and pieces of information that could be put together at an open proceeding to form "mosaic intelligence" was too speculative to support such a drastic restriction of First Amendment rights.⁶⁴

To summarize, the Sixth Circuit concluded that special interest deportation hearings are procedural, not substantive, and that the strict scrutiny standard must be met to curtail the constitutional right of access. The Court found the *Richmond Newspapers* two-prong test applicable to these special interest deportation hearings and held that the two prongs were satisfied. There is a tradition of openness (experience) and a positive value (logic) to public access which grants a qualified constitutional right. Finally, the Government has not satisfied strict scrutiny and thus there can be no restriction on First Amendment rights.

C. *The Third Circuit Holding: North Jersey Media Group, Inc v.*

60. *Id.* at 703-04.

61. *Id.* at 707.

62. *Id.* at 709.

63. *Id.*

64. *Id.*

Ashcroft⁶⁵

For three months beginning in November 2001, reporters were denied docket information and access to deportation hearings in Newark, New Jersey pursuant to the Creppy directive.⁶⁶ The reporters, through their employer, North Jersey Media Group, challenged the mandatory closure policy on First Amendment grounds. They also argued that since *detainees* were not prevented by the Creppy directive from releasing information that the secrecy was ineffective anyway.⁶⁷ The United States District Court of New Jersey, echoing the Sixth Circuit's analysis, applied the *Richmond Newspapers* test.⁶⁸ Given the similarities between criminal, civil, and deportation proceedings, and the presumption of openness for deportation hearings, the court found that a qualified First Amendment right of access existed.⁶⁹ The district court granted the plaintiff-newspaper's injunction of the operation of the Creppy directive because the mandatory closures were not narrowly tailored.⁷⁰ The Third Circuit reversed the district court's injunction.⁷¹

The Third Circuit agreed with both the District Court of New Jersey and the Sixth Circuit regarding special interest deportation hearings, holding that "*Richmond Newspapers* is a test broadly applicable to issues of access to government proceedings, including removal" of persons already residing within the United States.⁷² However, the Third Circuit claimed that access to political branch proceedings – certain executive functions, military operations, and even some Congressional records – did not have a presumption of openness like civil or criminal trials. This idea of necessary secrecy for executive functions was supported by both the

65. *North Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002).

66. *Id.* at 203-04.

67. *Id.*

68. *Id.* at 204.

69. *Id.*

70. *Id.* at 204.

71. *Id.* at 198.

72. *Id.* at 208-09.

Framers and the first Congress.⁷³ The Third Circuit also noted that many current administrative hearings – such as Social Security disability claims, administrative disbarment proceedings, adverse passport hearings, and other hearings of wrongdoing – may be closed, either presumptively or for good cause.⁷⁴ This finding is contrary to the Sixth Circuit’s holding on the tradition of openness to deportation hearings. Ultimately, the Third Circuit determined that the “tradition of open deportation hearings is too recent and inconsistent to support a First Amendment right of access.”⁷⁵

Traditionally, proceedings forbidding aliens from residing in the country were divided into two types: *exclusion* for those seeking entry into the United States and *deportation* for non-citizens already residing in the United States.⁷⁶ Any person within the United States is afforded due process rights under the Constitution but the same rights do not apply to those not yet in the country.⁷⁷ Thus, exclusion hearings were deemed presumptively closed while Congressional silence on the state of deportation hearings left a presumption of openness.⁷⁸ However, for most of the last century, deportation hearings have often been conducted in prisons, hospitals, or private homes where there is no general right of public access.⁷⁹ Thus, according to the Third Circuit, deportation hearings arguably do not meet the “unbroken, uncontradicted history” of public access that Chief Justice Burger set as the standard in

73. *Id.* at 209-10. See also FERRAND, *supra* note 2 at 86.

74. *North Jersey*, 308 F.3d at 210. For proceedings that are presumptively closed, see 12 C.F.R. § 19.199 (2005) (Office of Comptroller of Currency); 12 C.F.R. § 263.97 (2005) (Federal Reserve Board of Governors); 22 C.F.R. § 51.87 (2005) (State Department). For proceedings that are presumptively open but may be closed, see 5 C.F.R. § 185.132(d) (2005) (Office of Personnel Management); 10 C.F.R. § 13.30(d) (2005) (Nuclear Regulatory Commission); 13 C.F.R. § 142.21(d) (2005) (Small Business Administration); 28 C.F.R. § 68.39(a) (2005) (Department of Justice); 31 C.F.R. § 500.713(a) (2005) (Office of Foreign Asset Control); 38 C.F.R. § 42.30(d) (2005) (Office of Veterans Affairs).

75. *North Jersey*, 308 F.3d at 211.

76. *Id.* at 212.

77. *Id.*

78. *Id.*

79. *Id.*

Richmond Newspapers.⁸⁰ This conclusion is in direct contrast to the Sixth Circuit's holding, which concluded that deportation hearings had a tradition of openness.

The Third Circuit then noted that the second prong of the *Richmond Newspapers* logic test was a non-factor because "whenever a court has found that openness serves community values, it has concluded that openness plays a 'significant positive role' in that proceeding."⁸¹ That is, whenever the *Richmond Newspapers* experience test was satisfied, the proceeding in question automatically passed the logic test because one could always find some positive value supporting openness such as fairness, a check on corrupt practices, or informed discussion of government activities.⁸² The Third Circuit held that the Government presented "substantial evidence that open deportation hearings would threaten national security"⁸³ and held that these security concerns made the public nature of these proceedings fail the logic test.⁸⁴ While admitting that the Government's evidence was speculative, the court held that the "*Richmond Newspapers* logic prong is unavoidably speculative" as well.⁸⁵ Thus, the Third Circuit dismissed the logic prong as being non-determinative.

The national security interest plays a positive role in closing these proceedings just as much as the logic prong plays a positive role in opening the proceedings. These positive values cancel each other out. Since the Third Circuit found no tradition of openness, the constitutional right of access was not found. Consequently,

80. *Id.* at 212.

81. *Id.* at 217.

82. *Id.*

83. *Id.* at 219. The Government's evidence was the Watson Declaration, filed by the Counterterrorism Chief of the Federal Bureau of Investigations. The Watson Declaration noted that information and insights coming from open trials might warn terrorists of investigative tactics and knowledge that the government has or does not have. Even small pieces of information could be put together and terrorists could learn and adapt their strategies. The Watson Declaration also said case-by-case closures were not reliable as immigration judges could not be expected to be experts in small bits of information that might tip off terrorists. The Watson Declaration is considered "substantial evidence" by the Third Circuit. *Id.* at 218-19.

84. *Id.* at 219.

85. *Id.* at 212 (italics added).

there was no need to even address the issue of whether the Creppy directive passes a strict scrutiny test or whether the district court's use of a national injunction was too broad since it failed to find a tradition of openness. The Third Circuit held that the Creppy directive, which required mandatory closures of special interest deportation hearings, was constitutional.

In summary, special interest deportation hearings are now closed nationally except in the Sixth Circuit, even though all circuits are in agreement that the two-prong *Richmond Newspapers* test is proper for determining whether a qualified First Amendment right of access exists to any proceeding. The Sixth and Third Circuits agreed on the use of the experience and logic test but differed in their interpretation of the history of deportation hearings. Furthermore, this issue is not soon to be resolved, as the United States Supreme Court declined to adjudicate the issue in the spring of 2003.⁸⁶

III. THE PROSPECTS OF ACCESS TO ENEMY COMBATANT STATUS HEARINGS UNDER THE FIRST AMENDMENT

A. Hamdi v. Rumsfeld

Yaser Esam Hamdi, born in Louisiana but raised in Saudi Arabia, was captured in Afghanistan alongside Taliban troops in 2001, classified as an "enemy combatant," and held by the United States government for over two years without formal charges or proceedings.⁸⁷ Hamdi contested his classification and detention through the federal system to the Supreme Court.⁸⁸

86. *North Jersey Media, Inc. v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002), cert. denied, 538 U.S. 1056 (2003).

87. *Hamdi v. Rumsfeld*, ___ U.S. ___, 124 S. Ct. 2633, 2635-36 (2004) (plurality opinion).

88. *Id.* at 2633.

Hamdi's father filed a petition for a writ of habeas corpus in June 2002, and legal counsel was ordered for Hamdi. The United States Court of Appeals for the Fourth Circuit reversed this order, holding that the district court failed to give proper deference to national security and intelligence interests. The Fourth Circuit remanded for a "deferential inquiry into Hamdi's status" and

The Supreme Court's plurality held that Congress' Authorization for Use of Military Force (AUMF) did grant the President the power to detain Hamdi⁸⁹ despite the fact that no specific language was present in the Joint Resolution.⁹⁰ The Court introduced the term "enemy belligerent"⁹¹ and recognized that a citizen is just as dangerous to the United States as a non-citizen if he takes up arms against the United States and is then released from custody.⁹² Moreover, as long as active operations are ongoing, the continued detention is lawful pursuant to the AUMF, as the Authorization prevents detainees from returning to battle against the United States.⁹³

noted that his detention was lawful if he was indeed an enemy combatant. *Id.* at 2636.

The district court, on remand, found that the government's only evidence (the "Mobbs Declaration") was insufficient to justify Hamdi's detention and held that it amounted to "little more than the government's 'say-so.'" The district court ordered an in camera review, requiring the Government to produce evidence sufficient to conduct a "meaningful judicial review." *Id.* at 2637.

The government appealed and the Fourth Circuit reversed the order, holding that the Mobbs Declaration, "if accurate," provided a sufficient Constitutional basis for detention according to Article I and II war powers. *Id.* at 2638. The United States Supreme Court ultimately vacated the judgment and remanded the case back to the district court. *Id.* at 2639.

89. The plurality opinion, written by Justice O'Connor and joined by Chief Justice Rehnquist and Justices Kennedy and Breyer, held that the detention was Congressionally authorized. *Id.* at 2639. Justice Thomas, in his dissent, also concluded that the AUMF authorized Hamdi's detention, thereby providing a majority of the court on this particular issue. *Id.* at 2683. *See* Authorization for Use of Military Force, 115 Stat. 224 (2001).

90. *Hamdi*, 124 S. Ct. at 2641. This holding was pursuant to 18 U.S.C. § 4001(a) which states that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." 18 U.S.C. § 4001(a) (2004). This statute was passed in 1971 as part of a bill to repeal the Emergency Detention Act of 1950, fearing a reprisal of internment camps that arose in this country during World War II. *See* H.R. Rep. No. 92-116 (1971), reprinted in 1971 U.S.C.C.A.N. 1435. The Supreme Court relied on *Ex parte Quirin*, which held that capture and detention of combatants, both lawful and unlawful are "important incidents of war" that were universally agreed upon. 317 U.S. 1, 35-36 (1942).

91. *Hamdi*, 124 S. Ct. at 2640 (quoting *Quirin*, 317 U.S. at 37).

92. *Id.* at 2641.

93. *Id.* at 2642.

The Supreme Court recognized that the military has the authority to detain citizens who concede their status as enemy combatants, and that those engaged in armed conflict against the United States forfeit any additional due process protections guaranteed to citizens.⁹⁴ However, Hamdi was *contesting* his status as an enemy. This distinguishes his case from the facts of two previous Supreme Court rulings.⁹⁵

The Supreme Court held that “Hamdi was properly before an Article III court to challenge his detention under 28 U.S.C. § 2241 [habeas corpus].”⁹⁶ The Court then determined the appropriate nature of the process and standard of proof required for the proceedings. The Government argued that the courts should “review its determination that a citizen is an enemy combatant under a very deferential ‘some evidence’ standard.”⁹⁷ However, Hamdi contended that these proceedings should be similar to a criminal trial in which the Government’s evidence against Hamdi would be considered hearsay and the already-ordered extensive discovery would be required.⁹⁸ The Supreme Court weighed the national security interest, deference to the Executive branch in wartime, and the due process rights of citizens. It ultimately held that:

while the full protections that accompany challenges to detentions in other settings may

94. *Id.* See *Quirin*, 317 U.S. at 37-38 (finding that a U.S. citizen who was captured along with foreigners in a bungled attempt to invade the United States is “subject to trial and punishment” by a military tribunal). *Id.* at 37. See also Presidential Military Order: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57, 883 (Nov. 16, 2001) (authorizing detainment and trial of non-citizens by the military).

95. Compare *Ex parte Milligan*, 71 U.S. 2, 122 (1866) (finding that Milligan was detained due to conspiring, affording aid, and inciting, but never took up arms against the United States and was never present at any formal battles) with *Quirin*, 317 U.S. at 20 (holding that Haupt, a captured member of the German forces, conceded enemy combatant status and never contested it. Additionally, he claimed to be a naturalized citizen because he was not born in the United States).

96. *Hamdi*, 124 S. Ct. at 2644.

97. *Id.* at 2645.

98. *Id.* at 2646.

prove unworkable and inappropriate in the enemy-combatant setting, the threats to military operations posed by a basic system of independent review are not so weighty as to trump a citizen's core rights to challenge meaningfully the Government's case and to be heard by an impartial adjudicator.⁹⁹

The Court further held that although the "some evidence" standard is inadequate, a military tribunal is also eligible to adjudicate these proceedings as long as it is "appropriately authorized and properly constituted."¹⁰⁰ However, since the writ was received by the district court, it is the district court's responsibility to "ensure that the minimum requirements of due process are achieved."¹⁰¹ Finally, the Supreme Court recognized and anticipated that the Article III court will proceed cautiously in matters of national security.¹⁰²

The *Hamdi* case presents a unique situation concerning the constitutional right of access to a new type of proceeding in which a party contests his status as an enemy combatant. Three types of proceedings are possible results of the *Hamdi* decision: a military tribunal proceeding, an Article III United States District Court hearing, or a district court proceeding similar to a special interest deportation hearing. This article contends that the First Amendment right of access to any resulting proceeding would be severely limited due to the deference afforded to national security

99. *Id.* at 2650.

100. *Id.* at 2651.

101. *Id.* at 2651.

102. *Id.* at 2652. Despite the numerous legal proceedings and rulings, a federal district court will most likely not adjudicate *Hamdi's* status as an enemy combatant. On September 22, 2004, a negotiated settlement was announced whereby *Hamdi* would be released if he renounced his United States citizenship, returned to Saudi Arabia, agreed to travel restrictions to certain Middle Eastern countries including Afghanistan, and agreed not to sue the United States. Eric Lichtblau, *U.S., Bowing to Court Ruling, Will Free 'Enemy Combatant'*, N.Y. TIMES, Sept. 23, 2004, at A1. However, as of October 8, 2004, the deal still had not been finalized due to questions concerning the continued supervision of *Hamdi*. *A Very Bad Deal*, N.Y. TIMES, Oct. 8, 2004, at A26.

concerns.

B. Access to Enemy Combatant Status Hearing as a Military Tribunal

The most straightforward analysis accounts for the possibility of adjudication by a military tribunal since the Supreme Court did leave that possibility open.¹⁰³ If a military tribunal adjudicated an enemy combatant hearing, the press would likely not have access as the *Richmond Newspapers* test would not have any weight outside of an Article III court. Military tribunals are governed by different rules than civil courts.¹⁰⁴ Fewer due process claims are likely to be upheld in a military tribunal even if “appropriately authorized and properly constituted.”¹⁰⁵ According to Army Regulations 190-8, 1-6 (b), “[a] competent tribunal shall determine the status of any person not appearing to be entitled to prisoner of war status who has committed a belligerent act or has engaged in hostile activities in aid of enemy armed forces. . . .”¹⁰⁶ The press would likely have no right of access, as these “[p]roceedings shall be open except for deliberation and voting . . . or other matters which would compromise security if held in the open.”¹⁰⁷ Thus, these restrictions would likely deny any First Amendment right of access to a military adjudication of enemy combatant status.

The press and public, however, could likely raise legal and vocal opposition to military tribunal adjudication as long as civil courts are open and functioning.¹⁰⁸ Although the President could

103. *Hamdi*, 124 S. Ct. at 2651.

104. *Id.*

105. *Id.* at 2651-52.

106. Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, Army Regulation 190-8, § 1-6 (b) (1997).

107. *Id.* at § 1-6 (e)(3).

108. See *Ex parte Milligan*, 71 U.S. 2, 123 (1866) (holding that if civil courts are available, all persons are privileged to a trial by jury and not to a military tribunal). See also *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 683-84 (6th Cir. 2002) (reporting that the potential special interest deportee’s family, Congressperson, and local media groups all protested the closed nature of the hearing).

cite national security interests as a valid reason to keep the proceedings closed, there are political risks in such an apparent attempt at violating separation of powers by commandeering the proceedings from the judiciary.¹⁰⁹ In any case, if a contested enemy combatant status hearing were to be adjudicated in a military tribunal, there would be no First Amendment right of access for the press or the public.

C. Access to Enemy Combatant Status Hearing in an Article III Court

The *Hamdi* proceedings would be a case of “first impression” if the federal court system were to resolve Hamdi’s enemy combatant status. Two major considerations for the court would include balancing national security interests against the First Amendment right of access for the public and press, and determining the tradition of such proceedings under the *Richmond Newspapers* test in light of the Third and Sixth Circuit’s disagreement over the history of deportation hearings. The current war on terror casts a long shadow over security issues and it would tend to tilt the balance between liberty and security away from a constitutional right of access.

The United States Supreme Court in *Hamdi* did remand the case back to the district court, an Article III court, for an in camera review. This review affords the trial judge great discretion in the determination of how much of the proceedings and transcripts can be accessed by the press. The Supreme Court’s only guidance is to honor the minimum requirements of due process and proceed cautiously in national security matters.¹¹⁰ It is likely, for interests of judicial efficiency, that the proceedings would be closed, but that the transcripts could be available after review by the government to

109. The political risks could include: impeachment, Congressional censure, loss of political capital, Congressional retaliation via the budgetary process or the Senate blocking appointments. See, e.g., *Morrison v. Olson*, 487 U.S. 654, 701-02 (1988) (Scalia, J., dissenting) (arguing that the effects of political consequences would be substantial under a mere suspicion of law-breaking by the President or Attorney General).

110. *Hamdi*, 124 S. Ct. at 2651-52.

remove sensitive information. The trade-off between monitoring every detail the government insists is sensitive with the interests of a fair and speedy trial, would likely spur a more secret determination with a review of the transcript afterward.

D. Comparing Enemy Combatant Status Hearings to ‘Special Interest’ Deportation Hearings

There are many similarities between a special interest deportation hearing and a contested enemy combatant status hearing. The facts surrounding *Hamdi* and *Detroit Free Press* are analogous in many respects. Pending the completion of his settlement with the United States government, Hamdi will renounce his citizenship and be deported to Saudi Arabia.¹¹¹ While citizens are granted more rights than non-citizens, persons already residing in the United States are given greater due process rights than those not on United States soil.¹¹² Hamdi is a citizen but is contesting his status of being an enemy-combatant – as opposed to being a special interests deportee who is a non-citizen, currently residing in the United States, suspected of terror-related activities. These two situations are analogous in the type of person being judged and the similarity in suspected activity.

Comparing *Hamdi* and *Detroit Free Press*, the similarities between enemy combatant and special interest deportation hearings are clear: the Executive branch is bringing the suits for national security reasons, they both involve individuals suspected of supporting terrorist activity, and both men are currently in the United States. In addition, they are both in a gray area regarding citizenship. Haddad is a “person” protected under the Due Process Clause since he is currently living in the United States. Hamdi, however, has not lived in the United States for years, but is a citizen due to the location of his birth. This classification of “citizen” affords him greater protections but distinguishing the validity of

111. See *supra* note 102.

112. U.S. CONST. amend. V (“[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law”). It specifically says person, not citizen, and refers to anyone within the United States.

these greater protections under a normative analysis is not simple.¹¹³ The distinguishing facts of the two cases - citizen versus non-citizen, allegations of taking up arms against United States troops versus funding terrorist organizations, capture in foreign country versus detention in the United States - arguably do not outweigh the applicability of the *Richmond Newspapers* test to the *Hamdi* proceedings. Additionally, nothing in the Sixth or Third Circuit's rationales prevent the two-prong test application to enemy combatant hearings.

The Sixth and Third Circuits agree that the *Richmond Newspapers* test is appropriate to determine if a First Amendment right of access exists in special interest deportation hearings. It is then a seemingly natural extension to consider the application of the *Richmond Newspapers* two prong test to contested enemy combatant status hearings.

If the hearings were in federal district court, the *Richmond Newspapers* "experience and logic" test should be employed to determine if a qualified right of access exists. Federal Courts of Appeals have consistently determined its broad applicability to criminal, civil, and administrative proceedings.¹¹⁴ On the one hand, criminal habeas corpus proceedings are presumptively open¹¹⁵ and the openness serves a positive role in ensuring fair treatment of a citizen's due process rights. This was the Sixth Circuit's position in *Detroit Free Press v. Ashcroft* concerning the special interest deportation hearing.¹¹⁶ But the current state of the federal circuit split means that only if Hamdi was detained within the Sixth Circuit, for example on a naval brig on Lake Michigan, would this analysis even apply.

The later Third Circuit decision in *North Jersey Media Group*, found no tradition of openness in deportation hearings.¹¹⁷ It

113. For example, Hamdi is protected by the Citizen Non-Detention Act whereas Haddad is not. See *supra* note 48. Haddad is subject to the Presidential Military Order on the Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism whereas Hamdi is not. See *supra* note 42 and accompanying text.

114. *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 695 (6th Cir. 2002).

115. See *Mason v. Schriver*, 14 F. Supp. 2d 321, 324-25 (S.D.N.Y. 1998).

116. *Detroit Free Press*, 303 F.3d at 702.

117. *North Jersey Media, Inc. v. Ashcroft*, 308 F.3d 198, 212-13 (3d Cir.

is unlikely that the first contested enemy combatant status proceeding would be found presumptively open. The distinguishing feature here is that the Third Circuit has upheld the constitutionality of the mandatory closure for special interest deportation hearings that are directly connected with September 11 and the war on terror. In *Hamdi*, the United States Supreme Court held that a “citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice... and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker.”¹¹⁸ Furthermore, “enemy combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict.”¹¹⁹ Presumptions in favor of the Government would not offend the Constitution and hearsay may be accepted as evidence which would include the Government’s evidence against Hamdi.¹²⁰ However, the “some evidence” standard is not appropriate since Fifth Amendment due process rights are the procedural standard for a United States citizen.¹²¹ The Court further held that the district court would proceed with caution and “pay proper heed both to matters of national security that might arise in an individual case and to the constitutional limitations safeguarding essential liberties that remain vibrant even in times of security concerns.”¹²²

Safeguarding essential liberties certainly could include the First Amendment right of access to the contested enemy combatant status as long as national security concerns were properly heeded. However, the Third Circuit’s analysis of the logic prong would work against a presumptive openness to the proceedings, considering the Supreme Court’s directives to pay proper heed to security concerns. The Third Circuit, as discussed previously, held that a positive value to open proceedings could always be found and that the test was unconvincing and non-determinative. Thus, even if the experience

2002).

118. *Hamdi v. Rumsfeld*, __ U.S. __, 124 S. Ct. 2633, 2648 (2004).

119. *Id.* at 2649.

120. *Id.* See *supra* note 88 for description of the procedural history and the government’s evidence.

121. *Id.* at 2651.

122. *Id.* at 2652.

prong was established, the Third Circuit would likely curtail the right of access due to the countervailing national security interest for secrecy.

In *Hamdi*, the Government's case includes specific allegations about his activities. This evidence is likely to be admitted as credible evidence as per the Supreme Court's ruling on hearsay evidence. In *Detroit Free Press v. Ashcroft*, there was only a generic and broad assertion of national security interests in Haddad's special interest deportation hearing.¹²³ The more specific allegations in *Hamdi* and the existence of stronger ties to the Taliban and al-Qaeda should be sufficient evidence for a court to hold that the national security interest is best served by limiting the First Amendment right of access.

United States officials released Hamdi because the Government had "no interest in detaining enemy combatants beyond the point that they pose a threat to the U.S. and our allies."¹²⁴ Since he was no longer a threat, there seems to be no reason why the transcripts of the hearings could not be released. In future cases, it seems probable that national security interests would keep a citizen's contested enemy combatant proceedings closed during active military operations. There does not seem to be a powerful reason to curtail the First Amendment right to access the transcripts as most of the details about capture and past travel does not seem damaging to national security or difficult to strike from the transcript. Additionally, there is no justification to prevent access to the transcripts after military operations had ceased.¹²⁵ To summarize, contested enemy combatant status proceedings are likely to be closed based on the Third Circuit decision and the fact that First Amendment rights are traditionally counterbalanced by national security interests, especially in times of active military operations.

123. *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 692 (6th Cir. 2002).

124. See Lichtblau, *supra* note 102.

125. The question of how long records should be kept sealed during a war on terror with no determinate length is beyond the scope of this article.

IV. CONCLUSION

The *Richmond Newspapers* test, as developed by the Sixth and Third Circuits in their holdings on special interest deportation hearings, provides a viable framework to evaluate the constitutional right to access enemy combatant status hearings for United States citizens. The Supreme Court in *Hamdi* has emphasized the need for deference to the government in wartime, but that any extra deference still must be balanced by constitutional guarantees of individual liberties. Since September 11, 2001, the United States government has typically endorsed national security interests over the protection of individual freedoms in an attempt to insure greater safety against future terrorist attacks.¹²⁶ One can only speculate as to when or if this balance will shift again.

When balancing the qualified First Amendment right of access with national security interests in contested enemy combatant status hearings, national security concerns will likely and appropriately be accorded greater weight during active military operations. This may or may not require mandatory closure, but the Supreme Court is clear that appropriate deference needs to be made to security interests even at the expense of First Amendment rights of the press and public. In regard to this one facet of the ongoing struggle between liberty and security, a citizen's contested enemy combatant status proceeding is likely to be presumptively closed during wartime. However, there is no compelling reason to restrict access to court records after the abatement of hostilities or when the information no longer poses any risk to current operations. Access to government proceedings or records after wartime activity has always served as a collective check on our actions in stressful or dangerous times. Yet, our first response is legitimately, to "insure domestic tranquility, provide for the common defence... and secure the Blessings of Liberty to ourselves and our Posterity."¹²⁷ The three branches of government have a responsibility to protect our people, Constitution, and country. Thus, as evidenced by this country's historical practices

126. See *supra* notes 42-44 and accompanying text.

127. U.S. CONST. pmbl.

during wartime and the prevailing Third Circuit decision curtailing the constitutional right of access, First Amendment rights can be temporarily restricted by national security interests.