

Is *Richmond Newspapers* in Peril After 9/11?

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In response to the attacks that occurred on September 11, the United States government initiated “the Creppy Directive” denying to the press and public any access to deportation proceedings designated as special interest cases by the United States government. The stated purpose in closing such deportation proceedings was to avoid disclosing potentially sensitive information to anybody who may pose a security threat to the United States and its interest. However, such actions necessarily implicated the constitutional right of the press and public to view court proceedings as previously established by the Supreme Court in Richmond Newspapers. Though Chief Justice Rehnquist expressed a heavy dissent in Richmond Newspapers and may indeed have another opportunity to address the issues raised in that seminal case, this note will demonstrate that Chief Justice Rehnquist’s solitary dissent during the era of Richmond Newspapers is still at odds with the constitutional rights of the press and media to view these special interest cases.

I. INTRODUCTION

The events of September 11, 2001 forever altered the landscape of American policy. What had been seen as only occurring beyond the borders of the United States was suddenly and unexpectedly forced into the lives of all United States citizens that fateful day, shattering the firmly held beliefs of security and invulnerability.¹ In response to these loathsome attacks, the United States government swiftly took action and launched a massive investigation² into how these attacks happened, why they happened, and perhaps most importantly, how to prevent such attacks from happening again.³ As a subset of such preventative endeavors, the United States government engaged immigration laws and deportation proceedings to fight the war against terrorism in this country.⁴

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¹ See *infra* notes 95–101 and accompanying text.

² See *North Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198, 202 (3d Cir. 2002) (“Shortly after the attacks of September 11, 2001, the President ordered a worldwide investigation into those atrocities and related terrorist threats to the United States.”) [hereinafter *North Jersey Media Group II*].

³ See *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 682 (6th Cir. 2002).

⁴ See *id.* (“As part of this effort, immigration laws are prosecuted with increased vigor.”); *Ctr. for Nat’l Sec. Studies v. United States Dep’t of Justice*, 215 F. Supp. 2d 94, 96 (D.D.C. 2002). The Court stated:

As part of that effort the Government arrested and jailed—or in the bloodless language of the law “detained”—well over 1000 people in connection with its investigation. Despite demands from members of Congress, numerous civil liberties and human rights organizations, and the media, the Government refused to make public the number of

Specifically, the “Creppy Directive” was issued shortly after the attacks of September 11, which ultimately led to “a complete information blackout along both substantive and procedural dimensions”⁵ in deportation proceedings⁶ that were designated special interest cases by the government—cases involving “aliens who had close associations with the September 11 hijackers or who themselves have associated with al Qaeda or related terrorist groups.”⁷ Immediately after being denied access to such special interest cases, reporters and their respective newspapers challenged the Creppy Directive in court, alleging violation of their First Amendment rights to attend such proceedings as already established in the seminal case of *Richmond Newspapers, Inc. v. Virginia*.⁸

However, as the lone dissenter in that case,⁹ now current Chief Justice Rehnquist may have another opportunity to address the rights of the public and press to view court proceedings as embodied in *Richmond Newspapers*.¹⁰ With a sharp division between the recent decisions of the Third and Sixth Circuit Courts

people arrested, their names, their lawyers, the reasons for their detention, and other information relating to their whereabouts and circumstances.

Id.; see also David Rohde, *U.S.-Deported Pakistanis: Outcasts in 2 Lands*, N.Y. TIMES, Jan. 20, 2003, at A1 (“Justice Department officials say the immigration sweep is intended to thwart terrorist attacks and has produced valuable intelligence information in the campaign against terrorism.”).

⁵ *North Jersey Media Group II*, 308 F.3d at 203. The court found:

The Directive requires immigration judges “to close the hearings to the public, and to avoid discussing the cases or otherwise disclosing any information about the cases to anyone outside the Immigration Court.” It further instructs that “the courtroom must be closed for these cases—no visitors, no family, and no press,” and explains that the restriction even “includes confirming or denying whether such a case is on the docket or scheduled for a hearing.”

Id. (quoting the Creppy Directive).

⁶ Although the Creppy Directive applies to all immigration hearings, the focus of this note specifically addresses the closure of deportation proceedings to the public and the legal implications of such action.

⁷ *North Jersey Media Group II*, 308 F.3d at 202 (“According to Dale L. Watson, the FBI’s Executive Assistant Director for Counterterrorism and Counterintelligence, the designated aliens ‘might have connections with, or possess information pertaining to, terrorist activities against the United States.’”).

⁸ 448 U.S. 555 (1980) (reversing a closure order barring the press and public from a murder trial because the right of the press and public to attend criminal trials is implicit in the guarantees of the United States Constitution).

⁹ *Id.* at 604 (Rehnquist, J., dissenting).

¹⁰ See Jim Edwards, *News Media Mount Amicus Campaign to Preserve Access to Trials*, NEW JERSEY LAW JOURNAL, July 25, 2002, <http://www.law.com/jsp/article.jsp?id=1024079042315> (last visited Nov. 25, 2003) (“Twenty-two years later, Rehnquist may have been handed a chance to undo the *Richmond Newspapers* doctrine, and it’s a chance that an amicus campaign by media groups wants to stanch.”).

of Appeals,¹¹ and with Chief Justice Rehnquist expressing manifest disagreement with the majority in *Richmond Newspapers*,¹² one can only wonder how long the majority decision in that case can continue to persevere.¹³ This Note will demonstrate, however, that Chief Justice Rehnquist's solitary dissent during the era of *Richmond Newspapers* is still at odds with the constitutional rights of the press and media to view these special interest cases.

To begin with, this Note will detail the particulars of the Creppy Directive and the right of access guaranteed the press and public by *Richmond Newspapers*.¹⁴ Second, this Note will establish that non-citizens facing deportation proceedings in the United States are entitled to the same Constitutional protections as United States citizens and therefore, *Richmond Newspapers* is applicable in deportation proceedings regardless of the citizenship

¹¹ Compare *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002) with *North Jersey Media Group II*, 308 F.3d at 201 ("The only Circuit to deal with these issues has resolved them in favor of the media. However, we [the Third Circuit] find ourselves in disagreement with the Sixth Circuit.") (citation omitted).

¹² *Richmond Newspapers*, 448 U.S. at 606. The court stated:

The issue here is not whether the "right" to freedom of the press conferred by the First Amendment . . . overrides the defendant's "right" to a fair trial . . . it is instead whether any provision in the Constitution may fairly be read to prohibit [denying access to the press and public]. Being unable to find any such prohibition in the First, Sixth, Ninth, or any other Amendment to the United States Constitution, or in the Constitution itself, I dissent.")

Id. (Rehnquist, J., dissenting); see also Adam Cohen, *Justice Rehnquist's Ominous History of Wartime Freedom*, N.Y. TIMES, Sept. 22, 2002, at 12:

When America is at war, according to . . . Rehnquist, people have to get used to having less freedom. There is a limit to what courts will do to help those deprived of rights . . . because judges have a natural "reluctance" to rule "against the government on an issue of national security during wartime."

Id.

¹³ See Adam Liptak & Robert Hanley, *Court Upholds Secret Hearings on Deportation*, N.Y. TIMES, Oct. 9, 2002, at A1 ("The decision [by the Third Circuit] was at odds with one rendered by the [Sixth Circuit] . . . and the conflict between the two courts—the only ones to rule so far on the issue—makes it reasonably likely that the United States Supreme Court will consider one of the cases."). The authors go on to explain:

The government asked the Third Circuit to block Judge Bissell's order until the appeal was decided. When the [C]ourt declined to do that, the government asked the Supreme Court to stay Judge Bissell's order. The [C]ourt, in a relatively unusual move given that the case was not before it for any other purpose, blocked Judge Bissell's order.

Professor Freedman said this signal from the Supreme Court might have helped determine the case.

Id.

¹⁴ See *infra* notes 18–40 and accompanying text.

of the individual involved.¹⁵ Third, the two-part *Richmond Newspapers* test will be specifically applied to deportation proceedings in order to establish that the press and the public do indeed possess a constitutional right to these special interest cases.¹⁶ Fourth, the compelling interest asserted by the United States government will be thoroughly analyzed, as well as the means utilized to further that interest.¹⁷ As such, Chief Justice Rehnquist's solitary dissent during the era of *Richmond Newspapers* is still at odds with the constitutional rights of the press and media to view these special interest cases.

II. THE CREPPY DIRECTIVE

Just ten days after the terrorist attacks of September 11, Chief Immigration Judge Michael Creppy issued a memorandum to all United States Immigration Judges and Court Administrators notifying them of additional security implementations, ordered by the Attorney General, for special interest cases in Immigration Court.¹⁸ These additional security measures entailed a complete closure of special interest cases¹⁹ to the press and public, including any family members and friends.²⁰ The Record of the Proceedings was also to be kept secret from everyone "except a deportee's attorney or representative, 'assuming the file does not contain classified information.'"²¹ Even information confirming or denying whether a special interest case was on the docket or scheduled for a

¹⁵ See *infra* notes 41–51 and accompanying text.

¹⁶ See *infra* notes 52–109 and accompanying text.

¹⁷ See *infra* notes 110–22 and accompanying text.

¹⁸ See *North Jersey Media Group, Inc. v. Ashcroft*, 205 F. Supp. 2d 288, 290 (D.N.J. 2002) [hereinafter *North Jersey Media Group I*], vacated by 308 F.3d 198, 203 (3d Cir. 2002); *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 683–84 (6th Cir. 2002).

¹⁹ See *supra* notes 5–7 and accompanying text; *North Jersey Media Group II*, 308 F.3d at 202–03.

²⁰ See *Detroit Free Press*, 303 F.3d at 683–84. See also *North Jersey Media Group I*, 205 F. Supp. 2d at 290. The court in *North Jersey Media Group I* stated:

To these "special interest" cases, the Creppy Memo applies a series of "additional security" procedures. Among these procedures is the requirement that Immigration Judges "hold the hearings individually, close the hearing to the public, and avoid discussing the case or otherwise disclosing any information about the case to anyone outside the Immigration Court."

Id. (citation omitted)). See also David Rohde, *U.S.—Deported Pakistanis: Outcasts in 2 Lands*, N.Y. TIMES, Jan. 20, 2003, at A1 ("Some 1,200 Arab and South Asian men . . . were arrested in sweeps just after Sept. 11. Arguing that the release of information could alert terrorists, the Justice Department has declined to identify the men or describe how and why they were detained.").

²¹ *Detroit Free Press*, 303 F.3d at 684.

hearing was supposedly subject to this complete information blackout.²² Finally, these mandated restrictions of the Creppy Directive apply to all cases chosen by the Attorney General, without the need for an individualized case-by-case analysis for determining whether the case is of special interest.²³

The government's declared purpose in closing special interest deportation proceedings "is to avoid disclosing potentially sensitive information to those who may pose an ongoing security threat to the United States and its interests."²⁴ Potentially sensitive information includes inadvertent disclosure of phone number links between the detainee and a terrorist or terrorist organization, which might put the respective terrorists on notice that the United States government is now knowledgeable about that particular link; how and with what means certain special interest individuals were detained, which would allow terrorists to distinguish the design and methods employed by the United States to detain these special interest individuals; information about how detained individuals sought admission into the United States, which would inform the terrorists of which patterns of entry work and which ones do not work; and sensitive information that the United States government possesses against certain terrorist cells, which "would reveal to the terrorist organization which of its cells have been significantly compromised."²⁵ Furthermore, even evidence and information that may seem innocent enough to be harmless to the United States and its interests may in actuality be potentially damaging.²⁶ Open proceedings "would allow terrorists to piece together information from individual hearings [and evidence] to form a 'mosaic' of the government's anti-terrorism effort."²⁷ In the end, the government claims that if open proceedings are ultimately allowed the potential harm that may result from this information resource ranges from terrorists altering future attacks, destroying useful evidence, threatening potential witnesses, and, finally, immense difficulty by the government in convincing detained aliens to participate in ongoing investigations.²⁸ Though the government presents a persuasive argument as to why deportation proceedings should be closed to the public, any analysis as to whether such a public access right exists must be

²² See *id.*

²³ See *North Jersey Media Group I*, 205 F. Supp. 2d at 290–91. *But see North Jersey Media Group II*, 308 F.3d at 202 ("The Department of Justice has reviewed these [special] designations periodically and removed them in many cases that it determined were less sensitive than previously believed").

²⁴ *North Jersey Media Group II*, 308 F.3d at 203.

²⁵ See *id.* (citation omitted).

²⁶ See *id.* ("Equally important . . . is 'information that might appear innocuous in isolation [but that] can be fit into a bigger picture by terrorist groups in order to thwart the Government's efforts to investigate and prevent terrorism.'" (citation omitted)).

²⁷ See Edwards, *supra* note 10.

²⁸ See *North Jersey Media Group II*, 308 F.3d at 203.

analyzed under the influential ruling found in *Richmond Newspapers* and its progeny.²⁹

III. RICHMOND NEWSPAPERS AND ITS PROGENY

In *Richmond Newspapers v. Virginia*, the Supreme Court established that the right of the press and the public to attend criminal proceedings is guaranteed by the United States Constitution.³⁰ In that case, the trial court decided to close the proceedings of the murder trial to the public after a request by the defendant to do so.³¹ The trial judge cited to the Virginia statutes as authority for his decision to close the trial proceedings.³² Upon review by the United States Supreme Court, the Court observed that despite the lack of any express provision in the Constitution or the Bill of Rights guaranteeing the public the right to attend criminal trials, “[t]he First Amendment, in conjunction with the Fourteenth . . . share a common core purpose of assuring freedom of communication on matters relating to the functioning of government.”³³ In fact, the “presumptive openness of [criminal] proceedings to the public was a constant feature” throughout the history of this country.³⁴ Together, these reasons led the Supreme Court to decide that “in the context of trials . . . the [First Amendment] guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors which had long been open to the public at the time that Amendment was adopted.”³⁵

Although the Court in *Richmond Newspapers* specifically addressed only criminal proceedings, numerous courts outside the criminal proceeding context have cited and utilized *Richmond Newspapers* as authority for their own decisions.³⁶ In fact, “the considerations giving rise to the presumption of

²⁹ See Edwards, *supra* note 10 (“*Richmond Newspapers* became the seminal precedent codifying the right of the public and the press to observe court proceedings.”).

³⁰ 448 U.S. 555, 580 (1980) (“We hold that the right to attend criminal trials is implicit in the guarantees of the First Amendment; without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and ‘of the press could be eviscerated.’” (citing *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972))).

³¹ See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 560–61 (1980) (“[T]his was the fourth time [defendant] was standing trial. [Counsel] referred to ‘difficulty with information between the jurors,’ and stated that he ‘didn’t want information to leak out,’ be published by the media, perhaps inaccurately, and then be seen by the jurors.” (citation omitted)).

³² See *id.* at 560.

³³ *Id.* at 575.

³⁴ *North Jersey Media Group I*, 205 F. Supp. 2d at 298.

³⁵ *Richmond Newspapers*, 448 U.S. at 576–77 (“The explicit, guaranteed rights to speak and to publish concerning what takes place at a trial would lose much meaning if access to observe the trial could, as it was here, be foreclosed arbitrarily.”).

³⁶ *North Jersey Media Group I*, 205 F. Supp. 2d at 298.

openness espoused in *Richmond Newspapers* have been distilled into a working standard. . . . [I]n *Press-Enterprise*, the Court determined that the existence of a qualified First Amendment right to access proceedings turns on the complementary considerations of ‘experience’ and ‘logic.’”³⁷ Briefly, the “experience prong” inquires whether a tradition of accessibility is present in a particular place and process, while the “logic prong” considers if public access plays a significant positive role in the functioning of that particular place and process.³⁸ If both the experience and logic factors are satisfied, then the public’s right of access to that particular proceeding is protected by the United States Constitution.³⁹ This *Richmond Newspapers* test has been applied in several other courts and jurisdictions in a variety of settings to determine whether a right of public access exists.⁴⁰ This very same test will now be applied in the instant case of deportation proceedings in order to find a right of access for the public and press as guaranteed by the First Amendment of the United States Constitution.

IV. APPLYING THE TWO-PART *RICHMOND NEWSPAPERS* STANDARD

A. *Non-Citizens Are Also Protected by the United States Constitution*

Before any analysis of the two-part *Richmond Newspapers* test is conducted, it is critical to first establish the breadth of protection allowed under the United States Constitution. Simply stated, non-citizens are entitled to the same constitutional protections of due process enjoyed by United States citizens.⁴¹

³⁷ *Id.* at 299 (citing *Press-Enter. Co. v. Super. Ct. of Cal.*, 478 U.S. 1, 9 (1986)).

³⁸ *Id.* (citations omitted).

³⁹ *Id.*

⁴⁰ See *Press-Enter.*, 478 U.S. at 1 (preliminary hearings); *Press-Enter. Co. v. Super. Ct. of Cal.*, 464 U.S. 501 (1984) (juror selection and voir dire examination); *United States v. Miami Univ.*, 294 F.3d 797 (6th Cir. 2002) (university disciplinary records); *United States v. Simone*, 14 F.3d 833 (3d Cir. 1994) (post-trial examination of juror for potential misconduct); *Cal-Almond, Inc. v. United States Dep’t of Agric.*, 960 F.2d 105 (9th Cir. 1992) (agriculture department’s voters list of almond growers); *United States v. Presser*, 828 F.2d 340 (6th Cir. 1987) (documents and records that pertain to a proceeding in which one or more parties seek to disqualify a judge for bias, and proceedings inquiring into conflicts of interest by attorneys); *First Amendment Coalition v. Judicial Inquiry & Review Bd.*, 784 F.2d 467 (3d Cir. 1986) (administrative proceedings); *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059 (3d Cir. 1984) (civil trials); *Westmoreland v. Columbia Broad. Sys., Inc.*, 752 F.2d 16 (2d Cir. 1984) (civil trials); *Newman v. Graddick*, 696 F.2d 796 (11th Cir. 1983) (civil trials); *United States v. Criden*, 675 F.2d 550 (3d Cir. 1982) (pretrial suppression, due process, and entrapment hearings).

⁴¹ See *Hellenic Lines, Ltd. v. Rhoditis*, 398 U.S. 306, 309–10 (1970) (quoting *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 (1953)) (holding that petitioner, a Greek corporation with its largest office in New York and another office in New Orleans, was an employer under the Jones Act because petitioner’s manager was a lawful permanent resident alien and that the

Even in an area such as immigration, where the United States government possesses extraordinary powers, “[t]he Supreme Court has always interpreted the Constitution meaningfully to limit non-substantive immigration laws⁴² without granting the Government special deference.”⁴³ This is illustrated by prior Supreme Court cases establishing that non-citizens, even if illegally residing in the United States, are entitled to due process protections in deportation proceedings as “persons” within the meaning of the Constitution.⁴⁴

However, in stark contrast to non-citizens already in the United States, “an alien on the threshold of initial entry stands on a different footing”⁴⁵ because they “have no ties to the United States, and are, therefore, not ‘persons’ within the meaning of the Fifth Amendment.”⁴⁶ Therefore, “the Government may exclude a non-citizen seeking initial entry without a hearing or disclosure of the evidence and reasons relied upon.”⁴⁷ Whatever process the United States decides to give non-citizens seeking entry into the United States satisfies the Due Process Clause of the Constitution no matter how insignificant.⁴⁸ The difference in treatment between these two situations, deportation proceedings and exclusion proceedings, revolves around the presence of a constitutional right instead of the simplistic

United States was the place of the injury, the forum court, and the base of petitioner’s extensive business operation).

⁴² Substantive immigration laws answer the question, who is allowed to enter the United States? or who can be deported from the United States?, whereas non-substantive immigration laws, such as the Creppy Directive, regulate the procedural aspects of immigration law. *See* *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 686 & n.6 (6th Cir. 2002).

⁴³ *Id.* at 687–88; *see also* *Zadvydas v. Davis*, 533 U.S. 678 (2001) (holding that there existed a reasonableness limit in a post-removal statute which authorized the detention of two non-citizens indefinitely); *INS v. Chadha*, 462 U.S. 919 (1983) (holding that a statute allowing a congressional veto over any decision by the Attorney General that allowed a deportable alien to remain in the United States violated the Presentment Clause).

⁴⁴ *Detroit Free Press*, 303 F.3d at 688 (citing *Wong Wing v. United States*, 163 U.S. 228, 238 (1896); *Shaughnessy v. United States*, 345 U.S. 206, 212 (1953); *Wong Yang Sung v. McGrath*, 339 U.S. 33, 49–50 (1950); *Kwong Hai Chew*, 344 U.S. at 598).

⁴⁵ *Shaughnessy*, 345 U.S. at 212 (holding that an alien immigrant’s continued exclusion from the United States on security grounds without a hearing, lasting more than twenty-one months, did not constitute an unlawful detention because respondent was an entrant, under the meaning of the regulation, and had no rights conferred upon him, and no protections under the Constitution).

⁴⁶ *Detroit Free Press*, 303 F.3d at 688 (citing *Kwong Hai Chew*, 344 U.S. at 598).

⁴⁷ *Id.*

⁴⁸ *See* *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950) (affirming the lower court’s holding that exclusion of an alien from the United States by the Attorney General, on grounds that her admission would be prejudicial to the interests of the United States and that the War Brides Act did not relieve petitioner of her alien status, was constitutional because the right to exclude was inherent in the executive power and that whatever procedure authorized by Congress constituted due process as far as an alien denied entry was concerned).

distinction concerning the names of the proceedings.⁴⁹ Non-citizens seeking entry into the United States are not “persons” within the meaning of the Constitution, and therefore are not entitled to due process, while non-citizens already in the United States are “persons” and therefore possess due process rights enjoyed by United States citizens.⁵⁰ As such, any individual subject to deportation proceedings in the United States enjoys due process rights regardless of their citizenship.

Finally, although the issue has never been specifically addressed, it appears that the Supreme Court would also concede that non-citizens possess First Amendment rights in deportation proceedings.

[O]nce an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders. Such rights include those protected by the First and the Fifth Amendments and by the due process clause of the Fourteenth Amendment. None of these provisions acknowledges any distinction between citizens and resident aliens. They extend their inalienable privileges to all “persons” and guard against any encroachment on those rights by federal or state authority.⁵¹

In conclusion, non-citizens enjoy the very same rights possessed by United States citizens under the Constitution in deportation proceedings. As such, *Richmond Newspapers* is applicable in deportation proceedings regardless of the citizenship of the individual involved.

B. Deportation Proceedings Have Historically Been Open to the Public and Press

The first prong of the *Richmond Newspapers* test, as applied in this situation, scrutinizes the degree of historical openness of deportation proceedings. The reason for this examination is “‘because a tradition of accessibility implies the favorable judgment of experience.’”⁵² In other words, “the case for a right of access has special force when drawn from an enduring and vital tradition of

⁴⁹ See *Detroit Free Press*, 303 F.3d at 689.

⁵⁰ See *id.*

⁵¹ *Bridges v. Wixon*, 326 U.S. 135, 161 (1945) (Murphy, J., concurring) (reversing appellate court’s decision that petitioner alien should be deported on the ground of affiliation with the Communist Party because his association and contact with the Communist Party was for cooperative measures relating to legitimate longshoremen’s union activities, he gave no direct support to the Communist Party, and finally he did not advocate subversive conduct; therefore deportation was unwarranted).

⁵² *Globe Newspaper Co. v. Super. Ct. for the County of Norfolk*, 457 U.S. 596, 605 (1982) (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 589 (1980) (Brennan, J., concurring)).

public entree [*sic*] to particular proceedings or information.”⁵³ Therefore, the court must consider “whether the place and process have historically been open to the press and general public.”⁵⁴ As far as deportation is concerned, the first immigration statute in the United States was enacted in the year 1875,⁵⁵ and the first general immigration act was enacted shortly after in the year 1882.⁵⁶ Since then, deportation proceedings have generally been held open to both the public and press, while exclusion hearings have generally been conducted behind closed doors.⁵⁷ For example, in *Detroit Free Press v. Ashcroft*, the court stated, “Congress has [repeatedly] enacted statutes closing exclusion hearings.”⁵⁸ These statutes have never, however, explicitly required the closing of deportation hearings.⁵⁹ In addition, “since 1964, federal regulations have expressly provided a presumption of openness for deportation proceedings.”⁶⁰ Congress has revised these federal regulations, the Immigration and Nationality Act, at least fifty-three times without any change to this presumption of openness.⁶¹ “Having explicitly

⁵³ *Richmond Newspapers*, 448 U.S. at 589 (Brennan, J., concurring) (citing *In re Winship*, 397 U.S. 358, 361–62 (1970)).

⁵⁴ *Press-Enter. Co. v. Super. Ct. of Cal.*, 478 U.S. 1, 8 (1986).

⁵⁵ See *North Jersey Media Group I*, 205 F. Supp. 2d at 300 (citing *INS v. St. Cyr*, 533 U.S. 289, 305 (2001)).

⁵⁶ See *Kleindienst v. Mandel*, 408 U.S. 753, 761 (1972) (upholding the Attorney General’s decision to deny a visa to an author of a book on Marxist Economic Theory on the basis that the United States Congress had granted the Attorney General the right to exclude aliens from the United States on any legitimate basis and judicial intervention with that policy was not appropriate). Before 1875, immigration into the United States was essentially unrestricted. However, the first immigration statute, the Act of March 3, 1875, changed all of that and generally barred convicts and prostitutes. The Act of March 3, 1903 barred anarchists, and in 1918 Congress expanded these provisions to bar aliens who advocated or were members of or affiliated with organizations that advocated violent overthrow of the government of the United States.

⁵⁷ Deportation proceedings decide whether a non-citizen who is already in the United States may continue to reside in this country, while exclusion hearings determine whether a non-citizen seeking initial entry into the United States may do so. See *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 688 (6th Cir. 2002).

⁵⁸ *Id.* at 701 (citing TREASURY DEPARTMENT, IMMIGRATION LAWS AND REGULATIONS 4 (Gov’t Printing Office) (1893)); An Act to Regulate the Immigration of Aliens into the United States, Pub. L. No. 57-162, § 25, 32 Stat. 1213, 1220 (1903) (requiring exclusion hearings to be held closed from the public).

⁵⁹ See *id.*; see also *North Jersey Media Group II*, 308 F.3d at 211–12 (“In contrast, although Congress codified the regulations governing deportation proceedings in 1904 and has reenacted them many times since, it has never authorized the general closure that has long existed in the exclusion context.”).

⁶⁰ *North Jersey Media Group I*, 205 F. Supp. at 300 (citing 8 C.F.R. § 242.16(a) (1964); 8 C.F.R. § 3.27 (2002)).

⁶¹ See *Detroit Free Press*, 303 F.3d at 701 (citing U.S. DEP’T OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE, IMMIGRATION AND NATURALIZATION LEGISLATION FROM THE

closed exclusion hearings, it would have been easy enough for Congress expressly to state that the Attorney General had such discretion with respect to deportation hearings. But it did not.”⁶² The fact that Congress did not give the Attorney General such discretion lends weight to the argument that deportation proceedings have historically held a presumption of openness. In fact, “The Immigration and Nationality Act is replete with examples where discretion is specifically delegated to the Attorney General.”⁶³ It is just not so with deportation proceedings. Clearly, this evidence establishes that deportation proceedings indeed have been historically open to the public and the press.

Further corroboration may also be found in case law. In *The Japanese Immigrant Case*,⁶⁴ the Supreme Court decided that “due process rights attached to proceedings to remove a resident alien, the touchstone of which is the right to an open hearing.”⁶⁵ As such, ever since that case in 1903, deportation proceedings have included the due process element of an open hearing.⁶⁶ This motif is similarly echoed in *Fitzgerald v. Hampton*⁶⁷ and *Pechter v. Lyons*,⁶⁸ where both courts held “that an open hearing is fundamental to guarantee a fair hearing.”⁶⁹ As such, both statutes and cases amply demonstrate the traditional openness of deportation proceedings throughout the history of the United States.⁷⁰

STATISTICAL YEARBOOK, (last modified Sept. 16, 2002) at <http://www.ins.usdoj.gov/graphics/aboutins/statistics/legishist/index.htm>).

⁶² *Detroit Free Press*, 303 F.3d at 702.

⁶³ *Id.*

⁶⁴ *Yamataya v. Fisher*, 189 U.S. 86 (1903).

⁶⁵ *North Jersey Media Group I*, 205 F. Supp. 2d at 300 (citing *The Japanese Immigrant Case*, 189 U.S. at 101); see also *Zadvydas v. Davis*, 533 U.S. 678, 678 (2001) (illustrating the established history of due process rights in deportation proceedings).

⁶⁶ See *North Jersey Media Group I*, 205 F. Supp. 2d at 300.

⁶⁷ 467 F.2d 755 (D.C. Cir. 1972) (finding that due process entitled a civil servant to an open and public removal hearing before the Civil Service Commission in his appeal of his separation from his job).

⁶⁸ 441 F. Supp. 115 (S.D.N.Y. 1977) (holding that the immigration judge abused his discretion in barring the public from an immigration deportation proceeding even though the press was free to view these proceedings.) (citing *United States v. Kobli*, 172 F.2d 919, 924 (3d Cir. 1949)).

⁶⁹ *Haddad v. Ashcroft*, 221 F. Supp. 2d 799, 803 (E.D. Mich. 2002) (granting an immigrant’s motion for a preliminary injunction, and holding that the U.S. government must either release the immigrant from detention within ten days or hold a new detention hearing that is open to the public and press (citing *Fitzgerald*, 467 F.2d at 766; *Pechter*, 441 F. Supp. at 120)).

⁷⁰ *But see North Jersey Media Group II*, 308 F.3d at 212 (stating that deportation proceedings have also historically been closed to the public; for example, deportation proceedings have been closed when the subject matter involved alien children and spouses, or when they have been conducted in prisons, hospitals, and private homes).

The argument has been made, however, that even such an extensive display of historical evidence does not constitute a tradition of openness for deportation proceedings sufficient to satisfy the first aspect of the *Richmond Newspapers* test. For example, the government has argued before that in order to satisfy the first prong of *Richmond Newspapers*, the tradition of openness “must have existed from the time ‘when our organic laws were adopted,’ presumably at the adoption of the Bill of Rights.”⁷¹ This is clearly not so. The Supreme Court relied on history well after the adoption of the Bill of Rights when deciding that preliminary hearings in criminal cases have been traditionally open to the public.⁷² Other courts similarly have used post-Bill of Rights history in order to evaluate whether a tradition of openness exists or not.⁷³ Therefore, the argument that the tradition of openness must extend back to the time when the Bill of Rights was adapted, in order to satisfy the first prong of *Richmond Newspapers* simply lacks any credibility in the face of such overwhelming contradicting evidence.⁷⁴

C. Public Access Plays a Significant Positive Role in the Functioning of Deportation Proceedings

According to the second prong, or the logic prong of the *Richmond Newspapers* test, the court must ask “whether public access plays a significant positive role in the functioning of the particular process in question.”⁷⁵ Both

⁷¹ *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 700 (6th Cir. 2002) (citing *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569 (1980)).

⁷² *See Press-Enter. Co. v. Super. Ct. of Cal.*, 478 U.S. 1, 10 (1986) (“From *Burr* until the present day, the near uniform practice of state and federal courts has been to conduct preliminary hearings in open court.”).

⁷³ *See Whiteland Woods, L.P. v. Township of W. Whiteland*, 193 F.3d 177, 181 (3d Cir. 1999) (relying on the Pennsylvania Municipalities Planning Code of 1968 and the Sunshine Act of 1986); *United States v. Simone*, 14 F.3d 833 (3d Cir. 1994) (holding that public access to juror misconduct proceedings existed despite the lack of any historical evidence); *Cal-Almond, Inc. v. United States Dep’t of Agric.*, 960 F.2d 105 (9th Cir. 1992) (relying on state statutes passed after the Bill of Rights); *United States v. Presser*, 828 F.2d 340 (6th Cir. 1987) (surveying reported Sixth Circuit cases involving the disqualification of judges from 1924 to 1984); *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059 (3d Cir. 1984) (reviewing case law history that occurred well after the passage of the Bill of Rights).

⁷⁴ *See supra* notes 72–73 and accompanying text.

⁷⁵ *Press-Enter. Co.*, 478 U.S. at 8 (citing *Globe Newspapers Co. v. Super. Ct. for the County of Norfolk*, 457 U.S. 596, 606 (1982)). Though public access often plays a significant positive role in a wide range of situations, the court offers the grand jury system as an example where public access does not play a significant positive role in the functioning of the particular process in question. In fact, in order for grand jury systems to operate, secrecy is of the utmost importance in order for this process to function as intended.

facets of the test are in actuality complimentary considerations,⁷⁶ because “although historical context is important, a brief historical tradition might be sufficient to establish a First Amendment right of access where the beneficial effects of access to that process are overwhelming and uncontradicted.”⁷⁷ The historical tradition of deportation proceedings has already been thoroughly established.⁷⁸ However, the beneficial effects of public access are also overwhelming and uncontradicted as demonstrated below.

To begin with, openness is extremely important to the proper functioning of a trial.⁷⁹ This is because openness gives “assurance that the proceedings [are] conducted fairly to all concerned [and] it discourage[s] perjury, the misconduct of participants, [and] decisions based on secret bias or partiality.”⁸⁰ In the specific instance of deportation proceedings, opening up these proceedings to the press and public may very well act as a check against abusive government actions.⁸¹ This is because “[w]ithout publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account. Recordation, appeal, whatever other institutions might present themselves in the character of checks, would be found to operate rather as cloaks than checks”⁸² This check is especially significant in an area such as immigration where extreme deference is often allowed by the judiciary to the government.⁸³ This point was recognized

⁷⁶ See *Detroit Free Press*, 303 F.3d at 701 (“In cases dealing with the claim of a First Amendment right of access to criminal proceedings, our decisions have emphasized two complementary considerations.”) (citing *Press-Enter. Co.*, 478 U.S. at 8).

⁷⁷ *Detroit Free Press*, 303 F.3d at 701 (citing *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 589 (1980)).

⁷⁸ See *supra* notes 52–74 and accompanying text.

⁷⁹ See *Richmond Newspapers*, 448 U.S. at 569 (citing Matthew Hale, *THE HISTORY OF THE COMMON LAW OF ENGLAND* 343–45 (6th ed. 1820) (citation omitted)).

⁸⁰ *Richmond Newspapers*, 448 U.S. at 556.

⁸¹ See *Detroit Free Press*, 303 F.3d at 703–04. The host of benefits—assurances that proceedings are conducted fairly, the discouragement of perjury, misconduct of participants, and decisions based on secret bias or partiality—derived from opening trials up to public scrutiny can also be readily applied in the deportation proceedings context. See also *Morrow v. District of Columbia*, 417 F.2d 728, 741–42 (D.C. Cir. 1969) (though in a different context, the court here stated that “[t]he requirement that arrest books be open to the public is to prevent any ‘secret arrests,’ a concept odious to a democratic society . . .”).

⁸² *Richmond Newspapers*, 448 U.S. at 569 (citing 1 J. BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE* 524 (1827)).

⁸³ *Mathews v. Diaz*, 426 U.S. 67, 81–82 (1976) (“The reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization.”); *Boutilier v. INS*, 387 U.S. 118, 123 (1967) (“It has long been held that the Congress has plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden.”); *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909) (“[O]ver no conceivable subject is the legislative power of Congress more complete than

in *Detroit Free Press*, where the court stated “[i]n an area such as immigration, where the government has nearly unlimited authority, the press and the public serve as perhaps the only check on abusive government practices.”⁸⁴

In addition, “open proceedings enhance[s] the performance of all involved, protect[s] the judge from imputations of dishonesty, and serve[s] to educate the public.”⁸⁵

Accurate performance is exceedingly important in deportation proceedings because of the dramatic consequences that flow from incorrect deportation decisions.⁸⁶ “It is better that many...immigrants should be improperly admitted than that one natural born citizen of the United States should be permanently excluded from his country.”⁸⁷ When deportation proceedings are conducted fully

it is over [the admission of aliens.]”); *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892):

[E]very sovereign nation has the power, as inherent in sovereignty . . . to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe. In the United States this power is vested in the national government, to which the Constitution has committed the entire control of international relations, in peace as well as in war. It belongs to the political department of the government.

Id. (citation omitted); *The Chinese Exclusion Case*, 130 U.S. 581, 609 (1889):

The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States as a part of those sovereign powers delegated by the Constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one.

Id.

⁸⁴ *Detroit Free Press*, 303 F.3d at 704.

⁸⁵ *Richmond Newspapers, Inc.*, 448 U.S. at 569 n.7 (citing BENTHAM, *supra* note 82, at 522–25).

⁸⁶ See *Woodby v. INS*, 385 U.S. 276, 285 (1966) (“This Court has not closed its eyes to the drastic deprivations that may follow when a resident of this country is compelled by our Government to forsake all the bonds formed here and go to a foreign land where he often has no contemporary identification.”). See also *Bridges v. Wixon*, 326 U.S. 135, 154 (1945):

Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty—at times a most serious one—cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness.

North Jersey Media Group I, 205 F. Supp. 2d at 301 (“[T]he ultimate individual stake in these proceedings is the same as or greater than in criminal or civil actions.”).

⁸⁷ *Kwock Jan Fat v. White*, 253 U.S. 454, 464 (1920) (reversing the decision of the Ninth Circuit which had denied the petitioner entry back into the United States). The Court found that the Secretary of Labor had abused its extraordinary power over Chinese immigrants when it failed to preserve a record of the testimony of three witnesses on which its officers had

in view of the public and the press, any mistakes can be immediately identified and corrected at once.⁸⁸ As far as protecting the judge from imputations of dishonesty,⁸⁹ the court in *Detroit Free Press* noted that, “the natural tendency of government officials is to hold their meetings in secret.”⁹⁰ By opening up the meetings to the public and press, “[t]hey can thereby avoid criticism and proceed informally and less carefully. They do not have to worry before they proceed with the task that a careless remark may be splashed across the next day’s headlines.”⁹¹ Finally, a public educated through open deportation hearings is not only important to the deportee, but to the government as well. The legitimacy of government’s leadership is partly achieved through unremitting adherence to the proper procedures and rules.⁹² When trials, proceedings, or any other kind of hearings are open to the public and the press, the general populace who do not attend such proceedings are comforted by the fact that any other individual, such as the press, is free to attend to ensure the appropriate procedural and legal safeguards are being followed.⁹³ “The most stringent safeguards for a deportee

proceeded to judgment against petitioner. See David Rohde, *U.S.—Deported Pakistanis: Outcasts in 2 Lands*, N.Y. TIMES, Jan. 20, 2003, at A1:

Mr. Mehmood is one of six Pakistani men interviewed who were recently deported from the United States for entering the country illegally or overstaying visas . . . they now find themselves stranded between countries and cultures, their lives upended, since being detained and deported under a post-Sept. 11 crackdown. Back in Pakistan, which many had not seen for a decade or more, they are out of place. Many Pakistanis see them as victims of an anti-Muslim witch hunt. But others view them as traitors in a country where anti-Americanism is on the rise.

Id.

⁸⁸ See *Haddad v. Ashcroft*, 221 F. Supp. 2d 799, 804 (E.D. Mich. 2002) (stating the fact that the presence of the public and press helps ensure that the judge performs his or her task correctly based on the evidence presented instead of fears or allegations). See also *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 704 (6th Cir. 2002) (citing *Soc’y of Prof’l Journalists v. Sec’y of Labor*, 616 F. Supp. 569, 575–76 (D. Utah 1985)).

⁸⁹ See *Richmond Newspapers*, 448 U.S. at 557 (citing BENTHAM, *supra* note 82 at 522–25).

⁹⁰ *Detroit Free Press*, 303 F.3d at 704 (citing *Soc’y of Prof’l Journalists*, 616 F. Supp. at 575–76).

⁹¹ *Id.*

⁹² See *id.*; see also *First Amendment Coalition v. Judicial Inquiry & Review Bd.*, 784 F.2d 467, 486 (3d Cir. 1986) (stating that secretive proceedings breed suspicion and that legitimacy of government rests in large measure on public understanding attained only through education by the observance of the procedures and rules followed by the government) (Adams, J., concurring in part, dissenting in part).

⁹³ *Press-Enter. Co. v. Super. Ct. of Cal.*, 464 U.S. 501, 508 (1984); see also *Haddad*, 221 F. Supp. 2d at 805 (“An open detention and removal hearing will assure the public that the Government itself is honoring the very democratic principles that the terrorists who committed the atrocities of 9/11 sought to destroy.”).

'would be of limited worth if the public is not persuaded that the standards are being fairly enforced. Legitimacy rests in large part on public understanding.'⁹⁴

The significant positive role that public access plays in deportation proceedings extends in other ways as well. Throughout history, trials have been open in part to reflect the understanding that public access confers important beneficial and curative effects to the community.⁹⁵

When a shocking crime occurs, a community reaction of outrage and public protest often follows. Thereafter the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion. Without an awareness that society's responses to criminal conduct are underway, natural human reactions of outrage and protest are frustrated and may manifest themselves in some form of vengeful "self-help," as indeed they did regularly in the activities of vigilante "committees" on our frontiers. "The accusation and conviction or acquittal, as much perhaps as the execution of punishment, [operate] to restore the imbalance which was created by the offense or public charge, to reaffirm the temporarily lost feeling of security and, perhaps, to satisfy that latent "urge to punish."⁹⁶

This "outlet for community concern, hostility, and emotion"⁹⁷ in the province of deportation proceedings is tremendously significant at this very moment because of the devastating attacks of September 11.⁹⁸ It is only natural that the

⁹⁴ *Detroit Free Press*, 303 F.3d at 704 (citing *First Amendment Coalition*, 784 F.2d at 486 (Adams, J., concurring in part, dissenting in part)).

⁹⁵ See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 570 (1980) ("The early history of open trials in part reflects the widespread acknowledgment, long before there were behavioral scientists, that public trials had significant community therapeutic value."). This significant community therapeutic value is needed at this very moment, for while "[w]e will recover from the physical damage inflicted by those attacks [of September 11] . . . [t]he psychic damage suffered by the body politic of our country may take far longer to heal." *Ctr. for Nat'l Sec. Studies v. United States Dept. of Justice*, 215 F. Supp. 2d 94, 96 (D.D.C. 2002) (ordering the government to disclose under the Freedom of Information Act the names of all those detained in connection with the September 11 terrorist attack investigations, and their lawyers, except as to material witness whose identities were sealed by court orders).

⁹⁶ *Richmond Newspapers*, 448 U.S. at 571 (citing H. WEIHOFEN, *THE URGE TO PUNISH* 130-131 (1956); Gerhard O.W. Mueller, *Problems Posed by Publicity to Crime and Criminal Proceedings*, 110 U. PA. L. REV. 1, 6 (1961)).

⁹⁷ *Id.*

⁹⁸ See *Haddad*, 221 F. Supp. 2d at 804:

Adherence to the rule of the open forum is especially important in cases such as this one—where our nation's borders recently have been invaded and, as a result, our citizens feel threatened. Few could disagree that the events of September 11 altered the way we view our world and the safety of our nation.

Id.; see also *Detroit Free Press*, 303 F.3d at 704.

public will experience anger and bitterness after such a horrendous and cowardly attack,⁹⁹ and as a result, lash out at anybody on whom they may pinpoint the blame.¹⁰⁰ It is times like these, when public condemnation is nearly universal and the crime committed especially shocking, that the constitutional rights of targeted individuals are especially vital.¹⁰¹ These observations are aptly summarized by the Sixth Circuit in *Detroit Free Press*:

It is important for the public, particularly individuals who feel that they are being targeted by the Government as a result of the terrorist attacks of September 11, to know that even during these sensitive times the Government is adhering to immigration procedures and respecting individuals' rights And if in fact the Government determines that [the individual] is connected to terrorist activity or organizations, a decision made openly concerning his deportation may assure the public that justice has been done.¹⁰²

The prophylactic benefits against "vengeful self-help"¹⁰³ are only experienced when deportation proceedings are opened to the public instead of behind secretive closed doors.¹⁰⁴ "To work effectively, it is important . . . [the] process 'satisfy the appearance of justice,' and the appearance of justice can best be provided by allowing people to observe it."¹⁰⁵

⁹⁹ See *supra* note 96 and accompanying text.

¹⁰⁰ See *Haddad*, 221 F. Supp. 2d at 804 ("Traditionally in such a climate, individuals (including some in government) are more willing to abridge the constitutional rights of people who are perceived to share something in common with the 'enemy,' either because of their race, ethnicity, or beliefs.").

¹⁰¹ See *Detroit Free Press*, 303 F.3d at 704 ("[A]fter the devastation of September 11 and the massive investigation that followed, the cathartic effect of open deportations cannot be overstated. They serve a 'therapeutic' purpose as outlets for 'community concern, hostility, and emotions.'").

¹⁰² *Id.* at 704 (citing *Detroit Free Press v. Ashcroft*, 195 F. Supp. 2d 937, 944 (E.D. Mich. 2002), *aff'd* by 303 F.3d 681 (6th Cir. 2002)).

¹⁰³ See *supra* note 96 and accompanying text.

¹⁰⁴ See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 571 (1980) ("The accusation and conviction or acquittal, as much perhaps as the execution of punishment, [operate] to restore the imbalance which was created by the offense or public charge, to reaffirm the temporarily lost feeling of security and, perhaps, to satisfy that latent 'urge to punish.'").

¹⁰⁵ *Id.* at 571 (citing *Offutt v. United States*, 348 U.S. 11, 14 (1954)). This "appearance of justice" is extremely important, for without it no community catharsis can occur:

It is not enough to say that results alone will satiate the natural community desire for "satisfaction." A result considered untoward may undermine public confidence, and where the trial has been concealed from public view an unexpected outcome can cause a reaction that the system at best has failed and at worst has been corrupted.

Last but not least, public access in deportation proceedings helps guarantee, via the First Amendment, that “the individual citizen can effectively participate in and contribute to our republican system of self-government.”¹⁰⁶ Through open access to deportation proceedings, knowledge is attained by the public concerning the intimate details of these proceedings.¹⁰⁷ This in turn, leads to the enhanced ability of U.S. citizens to effectively participate in the republican system of self-government by affirming or protesting the actions of government.¹⁰⁸ “When government selectively chooses what information it allows the public to see, it can become a powerful tool for deception.”¹⁰⁹

¹⁰⁶ *Globe Newspaper Co. v. Super. Ct. of Norfolk*, 457 U.S. 596, 604 (1982); *see, e.g., Richmond Newspapers*, 448 U.S. at 575:

The First Amendment, in conjunction with the Fourteenth, prohibits governments from “abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” These expressly guaranteed freedoms share a common core purpose of assuring freedom of communication on matters relating to the functioning of government.

Id.; *see also Thornhill v. Alabama*, 310 U.S. 88, 95 (1940) (upholding the First Amendment rights of a picketer who was a member of a picket line located very close to the place of business of his former employer because the freedom of speech and of the press guaranteed by the Constitution embraced the liberty to disseminate information concerning the facts of a labor dispute). The Court stated:

The safeguarding of these rights to the ends that men may speak as they think on matters vital to them and that falsehoods may be exposed through the processes of education and discussion is essential to free government. Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth. Noxious doctrines in those fields may be refuted and their evil averted by the courageous exercise of the right of free discussion. Abridgment of freedom of speech and of the press, however, impairs those opportunities for public education that are essential to effective exercise of the power of correcting error through the processes of popular government.

Id.

¹⁰⁷ *See Detroit Free Press v. Ashcroft*, 303 F.3d 681, 704–05 (6th Cir. 2002):

Public access to deportation proceedings helps inform the public of the affairs of the government. Direct knowledge of how their government is operating enhances the public’s ability to affirm or protest government’s efforts. When government selectively chooses what information it allows the public to see, it can become a powerful tool for deception.

Id.

¹⁰⁸ *See id.*

¹⁰⁹ *Id.* at 705.

V. THE GOVERNMENT'S COMPELLING INTEREST IS NOT NARROWLY TAILORED

When government action, such as the Creppy Directive, infringes upon the press and public's First Amendment right of access, it must be shown that the encroachment is necessitated by a compelling governmental interest furthered by narrowly tailored means.¹¹⁰ After the tragic events of September 11, the government's war against terrorism¹¹¹ certainly constitutes a compelling interest; however, the Creppy Directive definitely is not narrowly tailored to advance this compelling interest.¹¹² As such, the government's actions in this case unconstitutionally infringe upon the First Amendment rights of the public and the press.

As for the compelling interest necessary to survive strict scrutiny by the court, the government maintains that "closure of removal proceedings in special interest cases is necessary to protect national security by safeguarding the Government's investigation of the September 11 terrorist attack and other terrorist conspiracies."¹¹³ While much of this information that the government seeks to protect from public access may seem innocuous at first blush, "[b]its and pieces

¹¹⁰ See *Globe Newspaper*, 457 U.S. at 606–07; *Brown v. Hartlage*, 456 U.S. 45, 53–54 (1982) ("When a State seeks to restrict directly the offer of ideas by a candidate to the voters, the First Amendment surely requires that the restriction be demonstrably supported by not only a legitimate state interest, but a compelling one, and that the restriction operate without unnecessarily circumscribing protected expression."); *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 101–03 (1979); *NAACP v. Button*, 371 U.S. 415, 438 (1963) ("The decisions of this Court have consistently held that only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms."). See also *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293, 297 (1961) ("[R]egulatory measures . . . , no matter how sophisticated, cannot be employed in purpose or in effect to stifle, penalize, or curb the exercise of First Amendment rights."); *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960) ("Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling."); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 461 (1958) ("In the domain of these indispensable liberties, whether of speech, press, or association, the decisions of this Court recognize that abridgment of such rights, even though unintended, may inevitably follow from varied forms of governmental action.").

¹¹¹ See *supra* notes 2–7 and accompanying text (describing the United States government's brief response to the tragic events of September 11).

¹¹² See *Detroit Free Press*, 303 F.3d at 705 ("The Government's ongoing anti-terrorism investigation certainly implicates a compelling interest. However, the Creppy Directive is neither narrowly tailored, nor does it require particularized findings. Therefore, it impermissibly infringes on the Newspaper Plaintiffs' First Amendment right of access.").

¹¹³ See *id.*; see also *supra* notes 18–28 and accompanying text (the specific reasons mentioned for governmental nondisclosure were provided in an affidavit by James S. Reynolds, the Chief of the Terrorism and Violent Crimes Section of the Justice Department's Criminal Division).

of information” can be utilized by terrorist groups to construct an overall picture of the United States anti-terrorism efforts.¹¹⁴ “The Government describes this type of intelligence gathering as ‘akin to the construction of a mosaic,’ where an individual piece of information is not of obvious importance until pieced together with other pieces of information.”¹¹⁵ As such, the reasons stated for closing special interest deportation proceedings certainly constitute a compelling governmental interest.

The inquiry does not end there, however. In order for the Creppy Directive to pass constitutional muster, the means chosen to further the compelling governmental interest must be narrowly tailored.¹¹⁶ The government has yet to give any reasonable justification for the closure of all special interest deportation proceedings; there is no reason why the compelling interest stated cannot be served just as effectively on an individual case-by-case basis.¹¹⁷ In addition, “the Creppy directive [*sic*] is ineffective in achieving its purported goals because the detainees and their lawyers are allowed to publicize the proceedings.”¹¹⁸ As already stated, the dangers inherent in public deportation proceedings are that

¹¹⁴ See *Detroit Free Press*, 303 F.3d at 706.

¹¹⁵ *Id.* (citing *J. Roderick MacArthur Found. v. FBI*, 102 F.3d 600, 604 (D.C. Cir. 1996). The court illustrates exactly how constructing a mosaic works by stating:

[T]o appreciate the full import of a single piece may require the agency to take a broad view of the whole work. Suppose, for example, that a citizen is contacted by a foreign agent but the FBI, after investigation, determines that the contact is innocent. If the same individual is later contacted by another foreign agent and perhaps thereafter by a third, then what had earlier appeared to be innocent when viewed in isolation may, when later viewed as part of a larger whole, acquire a more sinister air. Simply put, information that was once collected as part of a now-closed investigation may yet play a role in a new or reopened investigation. If the earlier record had been purged, however, then the agency’s later investigation could not be informed by the earlier event(s).

Id.

¹¹⁶ See *supra* note 110 and accompanying text.

¹¹⁷ See *Detroit Free Press*, 303 F.3d at 707. See also *Cabell v. Chavez-Salido*, 454 U.S. 432, 440 (1982) (stating a classification that is substantially overinclusive will likely undercut the Government’s claim that the means utilized are narrowly tailored to further a compelling governmental interest). In this case, the closure of all special interest deportation proceedings is extremely overinclusive, and as such undermines the Government’s claim that it is narrowly tailored.

¹¹⁸ See *Detroit Free Press*, 303 F.3d at 707. In fact, the Newspaper Plaintiffs in *Detroit Free Press* pointed out that the reasoning advanced by the Government is illogical; to the extent that the detainee discussed the deportation proceeding and disclosed documents and other information generally relevant to the proceeding with his family, friends, and media, the information that the Government endeavors to protect is disclosed to the public already. If the danger is that any piece of information may reveal potentially sensitive and damaging information to United States interests when combined with other bits and pieces of information, then allowing detainees and their lawyers to reveal such information would defeat the Government’s entire stated purpose.

terrorists may piece together an accurate picture of ongoing anti-terrorism efforts by the United States.¹¹⁹ Any piece of information, no matter how harmless on its face, may reveal potentially sensitive and damaging information to United States interests when combined with other bits and pieces of information.¹²⁰ However, the government interest in inhibiting the flow of such information does not make sense when detainees and their lawyers are allowed to broadcast their proceedings.¹²¹ If any tiny piece of information is potentially sensitive, then the Creppy Directive certainly does not adequately prevent the flow of such information.¹²² As such, the means employed by the government to further their compelling interest is not narrowly tailored.

VI. CONCLUSION

The two-part *Richmond Newspapers* test resolves the question whether the public and press possess a constitutionally protected right of access to deportation proceedings. This history of openness with regard to deportation proceedings is well documented and has withstood the test of time long enough to clearly satisfy the experience prong of the *Richmond Newspapers* test. As for the logic prong of the test, the significant positive role that public access plays in deportation proceedings extends in numerous ways as already documented above. Taken together, fulfillment of both these factors ensures the press and public their

¹¹⁹ See *supra* notes 114–15 and accompanying text.

¹²⁰ See *supra* notes 114–15 and accompanying text.

¹²¹ See *Detroit Free Press*, 303 F.3d at 707. *But see North Jersey Media Group II*, 308 F.3d at 219 (stating that although a First Amendment right to attend deportation hearings does not exist, and therefore a strict scrutiny analysis is inappropriate, the court still would extend much deference to Executive expertise, especially in the area implicating national security concerns). The Executive expertise referred to is the declaration of Dale Watson, the FBI's Executive Assistant Director for Counterterrorism and Counterintelligence, which stated:

“[T]he government cannot proceed to close hearings on a case-by-case basis, as the identification of certain cases for closure, and the introduction of evidence to support that closure, could itself expose critical information about which activities and patterns of behavior merit such closure.” Moreover . . . given judges' relative lack of expertise regarding national security and their inability to see the mosaic, we should not entrust to them the decision whether an isolated fact is sensitive enough to warrant closure.

Id. As such, the court stated that assessments conducted by senior government officials in charge of investigating the terrorist attacks on September 11th that have gone un rebutted should not be “second-guess[ed]” by the Court. *Id.*; see also *CIA v. Sims*, 471 U.S. 159, 180 (1985) (“And it is the responsibility of the Director of Central Intelligence, not that of the judiciary, to weigh the variety of complex and subtle factors in determining whether disclosure of information may lead to an unacceptable risk of compromising the Agency's intelligence-gathering process.”).

¹²² See *supra* note 118 and accompanying text.

constitutional right to freely view the deportation proceedings in question. Any ruling contrary to this conclusion disregards past and current case law, as well as the rich tradition of openness that has always remained present throughout the history of the United States. Therefore, because the *Richmond Newspapers* two-part test constitutes the law to be applied in these categories of cases, the government's argument that the public and press do not possess a right to view deportation proceedings ultimately must fail.