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## Development of the First Amendment Right of Access to Adjudicatory Hearings in the Third Circuit: Does the Ongoing Threat of Terrorism Call for a Secret Justice System

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2003]

## Issues in the Third Circuit

### DEVELOPMENT OF THE FIRST AMENDMENT RIGHT OF ACCESS TO ADJUDICATORY HEARINGS IN THE THIRD CIRCUIT: DOES THE ONGOING THREAT OF TERRORISM CALL FOR A SECRET JUSTICE SYSTEM?

#### I. INTRODUCTION

The First Amendment to the United States Constitution, in conjunction with the Fourteenth, prohibits governments from “abridging the freedom of speech, or of the press.”<sup>1</sup> This language offers little guidance to courts as they determine how much protection to afford the press’s unique role of investigating, criticizing and reporting public affairs.<sup>2</sup> Despite the First Amendment’s lack of guidance, courts agree that at the very least it ensures freedom of communication on matters relating to the function of government.<sup>3</sup>

An important question arises when civil liberties such as freedom of speech and press clash with the government’s interest in national security. Courts have addressed this clash throughout history by fashioning legal rules aimed at striking a balance between civil liberties and national security.<sup>4</sup> The savage events of September 11, 2001 raised questions about the

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1. U.S. CONST. amend. I.

2. *See id.* (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or 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.”). Although the First Amendment does not explicitly grant a right of access to certain government information, the Supreme Court has construed the First Amendment broadly to include those rights that are “necessary to the enjoyment of other First Amendment rights.” *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982) (discussing unenumerated rights encompassed by First Amendment).

3. *See Mills v. Alabama*, 384 U.S. 214, 218-19 (1966) (emphasizing major purpose of First Amendment, which is to protect free discussion of governmental affairs); *see also Globe Newspaper*, 457 U.S. at 604 (interpreting First Amendment to “ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government”).

4. *See, e.g., Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 165 (1963) (stressing that indispensable necessity to observe constitutional rights “under the gravest of emergencies has existed throughout our constitutional history [because] the pressing exigencies of crisis [present] the greatest temptation to dispense with fundamental constitutional guarantees which, it is feared, will inhibit governmental action”). Indeed, the Supreme Court has emphasized that the Constitution protects the recognized liberties of “all classes of men . . . under all circumstances,” in times of war and peace. *See Ex parte Milligan*, 71 U.S. 2, 120-21, 124 (1866) (“[I]f society is disturbed by civil commotion—if the passions of men are aroused and the restraints of law weakened, if not disregarded—these safeguards need, and

extent to which courts would afford more weight to national security interests than to liberty interests.<sup>5</sup> As one court predicted, the government's response to the September 11, 2001 attacks "will test our ability to balance national interests with the nation's profound reverence for order and freedom and its enduring defense of individual liberties."<sup>6</sup> An important issue calling for such a balance is whether courts should curtail the press's First Amendment right to access certain governmental proceedings in order to accommodate the government's war on terrorism.<sup>7</sup>

This Casebrief explores the development of the press's First Amendment right of access to governmental proceedings in the Third Circuit. Specifically, this Casebrief examines the press's right to attend various types of adjudicatory hearings, ranging from criminal and civil trials to Immigration and Naturalization Service (INS) deportation proceedings that involve resident aliens whom the Attorney General has determined might be connected with al Qaeda or have information concerning the September 11, 2001 attacks.<sup>8</sup> To provide background for the Third Cir-

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should receive, the watchful care of those entrusted with the guardianship of the Constitution and laws.").

5. See *United States v. Harrell*, 207 F. Supp. 2d 158, 162 (S.D.N.Y. 2002) (recognizing colossal challenges courts will face as United States government combats unique threats it has encountered in wake of terrorist attacks committed on American soil).

6. *United States v. Al-Marri*, 230 F. Supp. 2d 535, 536 (S.D.N.Y. 2002) (citing *Harrell*, 207 F. Supp. 2d at 161-62); see also Adam Liptak, Neil A. Lewis & Benjamin Weiser, *After Sept. 11, a Legal Battle on the Limits of Civil Liberty*, N.Y. TIMES, Aug. 4, 2002, at A1, available at <http://www.globalpolicy.org/wtc/liberties/2002/0804battles.htm> (discussing how government's vow to hunt down and punish terrorists has begun to "redefine the delicate balance between individual liberties and national security").

7. See, e.g., *N. Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198, 199 (3d Cir. 2002) (addressing issue of whether media has right of access to deportation hearings that involve prospective deportees whom Attorney General Ashcroft has stated might have information concerning September 11, 2001 attacks or connections to al Qaeda or other terrorist groups threatening United States interests); *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 705-07 (6th Cir. 2002) (dealing with issue of whether government's interest in national security is sufficiently compelling to outweigh public's and press's First Amendment right of access to INS deportation hearings); *Ctr. for Nat'l Sec. Studies v. United States Dep't of Justice*, 215 F. Supp. 2d 94, 111 (D.D.C. 2002) (determining whether certain public interest groups were entitled to ascertain names of persons apprehended in connection with investigation of major terrorist event, as well as dates and locations of persons' arrest, detention and release); *United States v. Lindh*, 198 F. Supp. 2d 739, 741-42 (E.D. Va. 2002) (acknowledging need to weigh interest in protecting information vital to national security against impact such protection might have on public and press's First Amendment right of access, which may be abridged only in limited circumstances); *United States v. Moussaoui*, 2002 WL 1987964, at \*1 (E.D. Va. 2002) (denying Court TV's argument that press's right of access to criminal trials requires court to allow Court TV to photograph and videotape proceedings, given that case involved allegations of al Qaeda conspiracy whose members may monitor trial proceedings involving its members).

8. For recent accounts of deportation hearings conducted in secret, see generally Letter from Congress to Attorney General John Ashcroft (June 21, 2002) (on

cuit's approach, Part II describes the leading United States Supreme Court cases addressing the media's First Amendment right to attend criminal proceedings.<sup>9</sup> Part III then considers the Third Circuit's treatment of the media's right of access and, particularly, how the Third Circuit has expanded the scope of that right.<sup>10</sup> Part IV analyzes the Third and Sixth Circuits' contrasting decisions regarding the press's right of access to "special interest" INS deportation hearings.<sup>11</sup> Finally, Part V summarizes the issues discussed in this Casebrief and considers the impact of the Third Circuit's approach on practitioners.<sup>12</sup>

## II. AN INTRODUCTION TO THE PRESS'S FIRST AMENDMENT RIGHT OF ACCESS TO GOVERNMENTAL PROCEEDINGS

### A. Richmond Newspapers: *The Supreme Court Establishes a Right of Access to Criminal Trials*

The Supreme Court initially interpreted the First Amendment guarantees of free speech and press to embody a right to attend criminal trials in *Richmond Newspapers, Inc. v. Virginia*.<sup>13</sup> *Richmond Newspapers* involved a third retrial of a defendant for murder.<sup>14</sup> The defendant convinced the

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file with author), *available at* [www.cdt.org/security/usapatriot/020621ashcroft.pdf](http://www.cdt.org/security/usapatriot/020621ashcroft.pdf). (admonishing Department of Justice's (DOJ's) blanket policy of secret arrests and detentions as not having "withstood public, congressional, and, now, judicial scrutiny" and warning DOJ that it "risks handing the terrorists a victory, if, as it works to prevent terrorism, it cedes a commitment to fundamental constitutional principles").

9. For a discussion of Supreme Court cases establishing and applying the First Amendment right of access, see *infra* notes 13-43 and accompanying text.

10. For an examination of how the Third Circuit has broadened the scope of the public and press's right of access, see *infra* notes 47-66 and accompanying text.

11. For an analysis of the Third and Sixth Circuits' approaches to the question of whether the public and press have a right of access to special interest deportation hearings, see *infra* notes 83-128 and accompanying text.

12. For a brief summary of the issues discussed in the Casebrief and implications of how the Third Circuit has dealt with the First Amendment right of access, see *infra* notes 129-36 and accompanying text.

13. 448 U.S. 555, 564 (1980) (plurality opinion). The Supreme Court was asked for the first time to decide whether the press can be excluded from criminal trials. See *id.* (stating issue presented) Prior to *Richmond Newspapers*, the Court dealt with the issue of whether a criminal defendant's Sixth Amendment right to a public trial required that the press and the public have a right to attend a pre-trial suppression hearing. See *Gannett v. Depasquale*, 443 U.S. 368, 379-80 (1979) (holding Sixth Amendment right to public trial belongs to criminal defendant, not public or press).

14. See *Richmond Newspapers*, 448 U.S. at 559 (stating facts). In *Richmond Newspapers*, a criminal defendant, Stevenson, was on trial for fatally stabbing a hotel manager. See *id.* (same). Stevenson was convicted for murder, but the Virginia Supreme Court reversed his conviction after finding that the conviction was based on improperly admitted evidence. See *id.* (same). Subsequently, a newspaper article reported that the key piece of evidence excluded from the Stevenson's trial was a bloodstained shirt obtained from his wife shortly after the killing. See *id.* at 559 n.1 (same). Two mistrials ensued, apparently because some of the jurors were

trial judge to exclude the press from his trial by asserting that the press's presence tainted the jury's impartiality.<sup>15</sup> Upon granting certiorari, a plurality of the Supreme Court held that the press has a fundamental right to attend criminal trials.<sup>16</sup> Having found that the right to attend criminal trials is grounded in the First Amendment, the Court declared that a government actor may close courtroom doors to the press only upon showing that it has a compelling interest and that the particular closure order is narrowly tailored to serve that interest.<sup>17</sup>

Justice Brennan, in his highly precedential concurrence, provided two main justifications for holding that the First Amendment implicitly guarantees the press a right to attend criminal trials.<sup>18</sup> The first justifica-

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biased against the defendant after having read the news article regarding the bloodstained shirt. *See id.* at 559 (same).

15. *See id.* at 561 (stating facts). The trial judge ordered the reporters to leave the courtroom and the reporters sued to vacate the order, asserting a First Amendment right to attend the trial. *See id.* (same). After several appeals, the United States Supreme Court granted certiorari and vacated the trial judge's closure order. *See id.* at 581 (concluding trial judge's failure to articulate findings about interest that could rebut presumptive openness of criminal trial required reversal).

16. *See id.* at 580. ("We hold that the right to attend criminal trials is implicit in the guarantees of the First Amendment; without freedom to attend such trials . . . important aspects of freedom of speech and 'of the press could be eviscerated.'" (quoting *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972))). Although there was no majority opinion in *Richmond Newspapers*, seven Justices signed on to the notion that the express guarantees of the First Amendment embody a fundamental right of access to criminal trials. *See Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 603 (1982) (instructing that despite plurality opinion in *Richmond Newspapers*, that case "firmly established for the first time that the press and general public have a constitutional right of access to criminal trials").

In *Richmond Newspapers*, as in almost any case where the press or individual appeals a trial judge's closure order, the challenger's argument on appeal is moot because the proceeding to which it unsuccessfully sought access will likely have ended by the time the challenger has appealed. *See id.* at 563 (commenting on fact that criminal trial to which reporters sought attendance has long since ended, and state suggests reporters' case is moot). The Supreme Court has recognized, however, that a court does not lack jurisdiction simply because a contest is short-lived. *See S. Pac. Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911) (stating that if underlying dispute is "capable of repetition, yet evading review," it is not moot). The Supreme Court in *Richmond Newspapers* recognized that when a challenger asserts a right of access to a proceeding, a court's jurisdiction over the challenger's case will not be defeated because the case falls within the "capable of repetition, yet evading review" exception to the mootness rule. *Richmond Newspapers*, 448 U.S. at 563.

17. *See Richmond Newspapers*, 448 U.S. at 580-81 (concluding trial judge provided inadequate justification for closing Stevenson's trial to Richmond Newspaper reporters). The Court further stated, "[a]bsent an overriding interest articulated in specific findings, the trial of a criminal case must be open to the public." *Id.*; *see also Globe Newspaper Co.*, 457 U.S. at 606-07 (1982) (cautioning that where State attempts to close courtroom doors to public and press in order to prevent disclosure of sensitive information, State "must show that the denial is necessitated by a compelling governmental interest and is narrowly tailored to serve that interest").

18. *See Richmond Newspapers*, 448 U.S. at 574 n.9. (Brennan, J., concurring) (commenting on fact that presumption of openness was so solidly grounded in

tion was historical: criminal trials in the United States and England have been open to all who care to observe since before the Norman Conquest.<sup>19</sup> The second justification was based on logic.<sup>20</sup> Specifically, the Court recognized that openness is an indispensable characteristic of an Anglo-American trial because the public's presence ensures that the proceedings are conducted fairly for all involved.<sup>21</sup>

To further define its logic justification, the Court articulated three reasons why access to criminal trials enhances the functioning of the justice system.<sup>22</sup> First, public access to criminal proceedings safeguards the defendant's due process rights.<sup>23</sup> Second, it discourages perjury, misconduct of participants and judicial decisions based on prejudice, secret bias or partiality.<sup>24</sup> Third, the history of open trials reflects the acknowledgment that public trials have a prophylactic value for the community in that public trials soothe human reactions of outrage to injustice and prevent self-help by vigilantes.<sup>25</sup>

The Court's right-of-access analysis boils down to two questions: (1) Has the proceeding in question been historically open to the public? (2) Does public access play a positive role in the functioning of a criminal trial?<sup>26</sup> These two questions have been coined as the history and logic

history of United States that Court was unable to find single instance of criminal trial conducted *in camera* in any federal, state or municipal court).

19. *See id.* at 592 (Brennan, J., concurring) (recognizing importance of public access to court proceedings because access is one of numerous checks and balances of our free and democratic system of government).

20. *See id.* at 593-97 (gleaning from history several justifications in support open criminal trials). The Court noted the unimportance of whether it characterized the right to hear, see and communicate observations concerning criminal trials as a "right of access" or a "right to gather information" because "[the Court has] recognized that without some protection for seeking out the news, freedom of the press could be eviscerated." *Id.*

21. *See id.* at 593-94 (concluding that open trials ensure defendants fair determinations of guilt or innocence and that justice is afforded equally).

22. For further discussion of why public scrutiny of trials enhances the functioning of the justice system, see *infra* notes 23-25 and accompanying text.

23. *See* *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606-07 (1982) (instructing that public scrutiny of criminal trials safeguards defendants' rights).

24. *See* *Waller v. Georgia*, 467 U.S. 39, 46 (1984) ("In addition to ensuring that judge and prosecutor carry out their duties responsibly, a public trial encourages witnesses to come forward and discourages perjury.").

25. *See* *Press Enter. Co. v. Superior Court* (Press Enter. I), 464 U.S. 501, 508-09 (1984) (praising openness of trials as having "community therapeutic value" in that community's witnessing of trials pacifies community's urge to retaliate against criminals); *see also* *Richmond Newspapers*, 448 U.S. at 571 (explaining effect of public being aware criminals have been convicted and punished is to restore imbalance created by offenses—imbalances that may have otherwise been restored by committees with their own sense of mob justice). As noted by the Court, the essential therapeutic value of the administration of justice cannot function in the dark; no community catharsis can occur if justice is "done in a corner or in any covert manner." *See id.* (quoting SOURCES OF OUR LIBERTIES 188 (R. Perry ed. 1959)).

26. *See* *Richmond Newspapers*, 448 U.S. at 588-89 (Brennan, J., concurring) (instructing courts to consider whether proceeding in question has been open

prongs of the *Richmond Newspapers* analysis.<sup>27</sup> This two-prong test has become central to any inquiry into whether the press has a right of access to an adjudicatory hearing.<sup>28</sup>

B. *The Supreme Court Expands the Right of Access to Non-Trial Phases of Criminal Proceedings*

Although *Richmond Newspapers* only established a right of access to criminal trials, subsequent Supreme Court decisions have extended the right to pre- and post-trial criminal proceedings.<sup>29</sup> In *Press-Enterprise Co. v. Superior Court* (“*Press-Enterprise I*”),<sup>30</sup> the Court found that the press had a right to attend jury *voir dire* examinations in a criminal trial that involved the rape and murder of a teenage girl.<sup>31</sup> The State opposed opening the proceeding to the media, arguing that its presence would discourage jurors from candidly responding to questions and, consequently, would prevent the defendant from receiving a trial by an impartial jury.<sup>32</sup> Applying

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throughout history and noting that “what is crucial in individual cases is whether access to a particular government process is important in terms of that very process”). In a precedential concurring opinion, Justice Brennan propounded the fundamental reason for conducting trials in the public eye. *See id.* at 597 (“The First Amendment embodies more than a commitment to free expression . . . it has a structural role to play in securing and fostering our republican system of self-government.” (citing *Marbury v. Madison*, 1 Cranch 137, 163 (1803))). He explained that the right of access reflects the special nature of a claim of First Amendment right to gather information. *See id.* at 599-600 (characterizing trial courtrooms as places where press and public “are not only free to be, but where their presence serves to assure the integrity of what goes on”).

27. *See Globe Newspaper*, 457 U.S. at 606 (“[T]he institutional value of the open criminal trial is recognized in both experience [history] and logic.” (citing *Richmond Newspapers*, 448 U.S. at 570-71)). In *Globe Newspaper*, the Court voided a Massachusetts law requiring that the press and public be excluded from a courtroom during the testimony of a minor who was allegedly the victim of a sex crime. *See id.* at 610-11 (concluding that Massachusetts law violated First Amendment right of access). The *Globe Newspaper* Court confirmed the reasoning in *Richmond Newspapers* stating, “public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the fact-finding process, with benefits to both the defendant and to society as a whole.” *Id.* at 606.

28. For further discussion of how *Richmond Newspaper’s* history and logic analysis has become an integral part of right of access determinations, see *infra* notes 29-136 and accompanying text.

29. For further discussion of Supreme Court cases expanding the scope of the right of access, see *infra* notes 30-43 and accompanying text.

30. 464 U.S. 501 (1984).

31. *See id.* at 511 (concluding guarantees of public proceedings in criminal trials cover proceedings in *voir dire* examinations of potential jurors). The defendant in *Press-Enterprise I* was tried and convicted and sentenced to death for raping and murdering a teenage girl. *See id.* at 503 (stating facts). Before the *voir dire* examination of prospective jurors commenced, reporters from *Press-Enterprise Co.* argued that the *voir dire* be open to the public and press, asserting a right to attend trial under *Richmond Newspapers* and that the trial commenced with the *voir dire* proceedings. *See id.* (same).

32. *See id.* (stating facts). The trial judge closed all but three days of the six-week *voir dire* proceeding to the public. *See id.* at 503 (same). After the trial oc-

the history and logic analysis of *Richmond Newspapers*, the Court explained that *voir dire* proceedings had been open to the public for centuries before the Colonies separated from England.<sup>33</sup> Additionally, the Court stated that public access enhances the functioning of *voir dire* examinations by protecting individuals against arbitrary government action and safeguarding defendants' rights.<sup>34</sup>

The Supreme Court similarly used the *Richmond Newspapers* analysis to extend the press's right of access to preliminary hearings of a criminal trial.<sup>35</sup> In *Press-Enterprise Co. v. Superior Court ("Press-Enterprise II")*,<sup>36</sup> the Court declared that the press has a right to attend a preliminary proceeding.<sup>37</sup> The *Press-Enterprise II* decision contributed to right-of-access doctrine by instructing that the question of whether the press has a First Amendment right of access "cannot be resolved solely on the label we give the event, i.e., 'trial' or otherwise, particularly where the preliminary hearing functions much like a full-scale trial."<sup>38</sup>

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curred, the press unsuccessfully sought access to the transcripts of the *voir dire* proceedings. *See id.* (same). The Supreme Court ultimately granted certiorari and reversed and remanded, ordering the non-sensitive information in the transcripts to be disclosed to the press. *See id.* at 513 (emphasizing that transcript of proceeding did not contain much privacy-sensitive information).

33. *See id.* at 508 (explaining history of public jury selection, which, as Court noted, was common practice in America at time Constitution was adopted).

34. *See id.* at 508 (illustrating how public access to trials enhances fairness and appearance of fairness, which maintains public confidence in justice system). Therefore, the Court found that the press had a right of access to the *voir dire* proceedings for two reasons: (1) the trial judge provided no findings showing that an open proceeding would threaten either the accused's interest in a trial by an impartial jury or jurors' privacy interests; and (2) even with findings adequate to support closure, the judge failed to consider whether alternatives were available to protect the interests of the prospective jurors, such as limiting closure to information that was sufficiently sensitive to deserve privacy protection. *See id.* at 510-11 (suggesting that trial judge's closure of proceeding failed strict scrutiny).

35. *See Press-Enter. Co. v. Superior Court (Press-Enter. II)*, 478 U.S. 1, 13 (1986) (extending right of access to transcripts of preliminary hearing in criminal case, over objections of judge, prosecutor and defendant, all of whom thought public access to transcripts would endanger fair trial).

36. 478 U.S. 1 (1986).

37. *See id.* at 12 (finding public access to preliminary hearing no less essential to proper functioning of preliminary proceeding than of trial itself). In *Press-Enterprise II*, a magistrate closed the defendant's preliminary hearing because the case had attracted national attention and "only one side may get reported in the media." *Id.* at 4. The defendant's case attracted national attention because defendant was a nurse charged with murdering twelve patients by administering to them massive doses of the heart drug lidocaine. *See id.* at 3 (stating facts).

38. *Id.* at 7 If, as the Court stated, a right of access is not solely determined by whether the event is an actual trial, one can reasonably infer that a right of access is largely determined by whether the proceeding in question has a history of openness and whether public access plays a positive role in the functioning of the proceeding. *See generally* *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 701 (6th Cir. 2002) (applying history and logic prongs of right-of-access analysis to special interest INS deportation hearing).



Several elements of the reasoning in *Press-Enterprise II* are particularly noteworthy.<sup>39</sup> First, the Court substantiated the history prong of *Richmond Newspapers*, determining that a two-hundred-year period of presumptive openness advises that a particular proceeding should be conducted in the public eye.<sup>40</sup> Second, the Court suggested that the importance of public access to a proceeding could counterbalance a brief history of openness, hinting that the analysis should be applied as a sliding scale test.<sup>41</sup> Third, the Court emphasized that a preliminary hearing occurs before a judicial officer without a jury, which has long been recognized as a safeguard against overzealous prosecutors and biased judges.<sup>42</sup> Moreover, the Court proclaimed, in the absence of a jury, public access plays a vital role in promoting fairness of non-jury proceedings in that only the press and public can perform the jury's function of safeguarding the defendant's rights.<sup>43</sup>

### III. THE DEVELOPMENT OF THE FIRST AMENDMENT RIGHT OF ACCESS IN THE THIRD CIRCUIT

After *Richmond Newspapers* and its Supreme Court progeny, the open question was whether the right of access was confined to the criminal context or whether the justifications for access applied equally to non-criminal contexts.<sup>44</sup> The Third Circuit followed the Court's lead in recognizing a right of access to the phases of a criminal trial.<sup>45</sup> Shortly thereafter, the

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39. See *Press-Enter. II*, 478 U.S. at 8 (coining two-prong *Richmond Newspapers* analysis by stating, if proceeding in question passes test of experience and logic, then press possesses qualified First Amendment right to attend proceeding).

40. See *id.* at 10 (citing *United States v. Burr*, 25 F.Cas. 1, No. 14,692 (C.C.D.Ky. 1806) as example of 196-year-old case in which preliminary hearing was conducted before public and press). That roughly 200 years satisfies the history prong has significant implications for later cases in determining what amount of time is adequate to satisfy the history prong. Compare *Detroit Free Press*, 303 F.3d at 701 (finding deportation hearings to have 120-year tradition of presumptive openness sufficient to satisfy history prong), with *N. Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198, 199 (3d Cir. 2002) (suggesting that deportation hearings do not have tradition of openness tantamount to "unbroken and uncontradicted" tradition of openness present in civil and criminal trial contexts).

41. See *Press-Enter. II*, 478 U.S. at 10-11 n.3 (suggesting agreement with cases that noted, "some pretrial proceedings have no historical counterpart, but, given the importance of the pretrial proceeding to the criminal trial, the traditional right of access should still apply").

42. See *id.* at 13 (emphasizing importance of public access to preliminary hearing because it is conducted without presence of jury).

43. See *id.* ("People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.") (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1981)).

44. For a discussion of whether and how the right of access applies outside the criminal context, see *infra* notes 47-128 and accompanying text.

45. See, e.g., *United States v. Simone*, 14 F.3d 833, 835 (3d Cir. 1994) (holding First Amendment right of access attaches to post-trial hearings to investigate jury misconduct). *Simone* illustrates how the Third Circuit traditionally applied the his-

Third Circuit created a right of access in the civil and administrative contexts.<sup>46</sup>

#### A. *Third Circuit Creates a Right of Access to Civil Proceedings*

The Third Circuit first decided that the *Richmond Newspapers* analysis applied to a civil trial in *Publicker Industries, Inc. v. Cohen*.<sup>47</sup> In *Publicker*, a trial judge excluded a *Philadelphia Inquirer* reporter from a civil hearing because of the sensitive nature of the corporate information being considered and because the very issue before the court was whether the corporate information should be disclosed to stockholders.<sup>48</sup> Upon request of Publicker's counsel, the trial judge excluded the press from the hearing,

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tory and logic analysis to determine whether a right of access attaches to a particular proceeding. *See id.* at 837-40 (applying *Richmond Newspapers* test as sliding scale test). The *Simone* court explained, "[t]hough experience provides little guidance, logic counsels that access to these proceedings will in general have a positive effect." *Id.* at 840. The Third Circuit recognized that the majority of post-trial inquiries into jury misconduct were conducted *in camera*; therefore, having found no history of openness, the court stated, "in making our determination we will rely primarily on the logic prong of the test." *Id.* at 838.

The Third Circuit similarly applied the *Richmond Newspapers* test as a sliding scale in *United States v. Criden*, 675 F.2d 550, 555 (3d Cir. 1982) (positing that history prong was not relevant to determination of whether First Amendment right of access applied to pretrial criminal proceedings and therefore focusing on "the current role of the first amendment and the societal interests in open pretrial criminal proceedings"). The court in *Criden* found a right of access to pretrial criminal proceedings because the societal interests identified by the Supreme Court as mandating a strong presumption of access to criminal trials were "also present in the context of pretrial criminal proceedings." *Id.* at 556 (defining and applying six societal interests previously articulated in *Richmond Newspapers*).

46. For further discussion of the Third Circuit's consideration of whether the right of access applies to civil and administrative contexts, see *infra* notes 47-66 and accompanying text.

47. 733 F.2d 1059, 1071 (3d Cir. 1984) (applying *Richmond Newspapers* and holding First Amendment implicitly incorporates right of access to civil trials); *accord* *Rushford v. The New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988) (concluding *Richmond Newspapers* applies and that First Amendment right exists in civil context); *Westmoreland v. CBS*, 752 F.2d 16, 23 (2d Cir. 1984) (same); *Matter of Cont'l Ill. Sec. Litig.*, 732 F.2d 1302, 1308 (7th Cir. 1984) (same); *Brown & Williamson Tobacco Co. v. FTC*, 710 F.2d 1165, 1179 (6th Cir. 1983) (same); *Newman v. Graddick*, 696 F.2d 796, 801 (11th Cir. 1983) (same). In *Publicker Industries*, a prospective stockholder of Publicker Industries, Inc. sought an injunction ordering Publicker's board of directors to disclose certain corporate information to its stockholders at its annual meeting the next day. *See Publicker*, 733 F.3d at 1062-63 (stating facts). The information requested concerned one of Publicker's foreign subsidiary's processes of producing scotch. *See id.* at 1064 (same). The subsidiary failed to get approval for its process from Customs and Excise as required by the English Company Finance Act. *See id.* at 1065 (same). The subsidiary's lack of requisite approval raised the danger that the scotch was produced illegally, causing Publicker to lose millions of dollars. *See id.* (same).

48. *See Publicker*, 733 F.3d at 1063 (stating facts). During the hearing in which the judge was to decide whether the board had to disclose the disputed information to Publicker's stockholders, a reporter for the *Philadelphia Inquirer* entered the courtroom. *See id.* (same).

stating that by permitting the press to attend the hearing, “the press would be usurping the very function that is reposed in me; namely, deciding whether this information should be revealed or not.”<sup>49</sup>

The Third Circuit applied the two-prong *Richmond Newspapers* analysis in this civil trial context.<sup>50</sup> Applying the history prong, the court stated that civil trials, like criminal trials, have been historically open to the press and public.<sup>51</sup> The court then applied the logic prong and concluded that public access to the civil trial, like the criminal trial, plays an important positive role in the functioning of the judicial proceeding.<sup>52</sup> As the Third Circuit aptly stated,

Public access to civil trials, no less than criminal trials, plays an important role in the participation and the free discussion of governmental affairs. Therefore, we hold that the “First Amendment embraces a right of access to [civil] trials . . . to ensure that this constitutionally protected ‘discussion of governmental affairs’ is an informed one.”<sup>53</sup>

#### B. Access to Administrative Proceedings in the Third Circuit

The Third Circuit has stated that the history and logic analysis from *Richmond Newspapers* is broadly applicable to issues involving access to administrative proceedings.<sup>54</sup> Indeed, the Third Circuit has observed that

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49. *Id.* (explaining that judge holds authority to decide what information is provided to the public and that allowing press in courtroom would stifle judge’s authority).

50. *See id.* at 1068 (applying history and logic prongs of *Richmond Newspapers* to determine whether right of access attaches to civil trials).

51. *See id.* at 1069 (reviewing various legal authorities that confirmed the presumptive openness of civil trials).

52. *See id.* at 1070 (reasoning that public access to civil trials, no less than criminal trials, safeguards fact-finding process, fosters appearance of fairness, heightens public respect for judicial process and permits public to participate in and serve as check on judicial process).

53. *Id.* The Third Circuit then found that the trial court’s closure of the entire hearing, as opposed to only parts of it, was not a narrowly tailored means of serving the judge’s interest in closing the hearing. *See id.* at 1074 (concluding judge’s closure order failed strict scrutiny).

54. *See, e.g.,* N. Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198, 208-09 (3d Cir. 2002) (explaining that *Richmond Newspapers* right-of-access analysis applies broadly to issues of access to governmental proceedings, including deportation hearings, which occur in administrative context); *Whiteland Woods, L.P. v. Township of W. Whiteland*, 193 F.3d 177, 180- 81 (3d Cir. 1999) (concluding right of access to administrative proceedings exists if *Richmond Newspapers* test is satisfied); *Capital Cities Media, Inc. v. Chester*, 797 F.2d 1164, 1174 (3d Cir. 1986) (explaining that government may not exclude press or public from proceedings, criminal or otherwise, if proceedings have historically been open to public and public access plays significant positive role in function of proceeding); *First Amendment Coalition v. Judicial Inquiry & Review Bd.*, 784 F.2d 467, 472 (3d Cir. 1986) (suggesting that if administrative proceedings to which press sought access had been historically open to public, Third Circuit may have found right of access).

certain administrative hearings “walk, talk, and squawk” very much like a lawsuit.<sup>55</sup> Although the Third Circuit has conceived of a right of access to administrative proceedings, it denied the press access in both cases in which reporters asserted a right of access to administrative proceedings.<sup>56</sup> Despite these denials, one court pointed out that in both cases in which the Third Circuit denied the press access, the issue was whether the press had a right to *view investigatory documents* related to administrative proceedings, as distinguished from a right to *attend adjudicatory hearings*, the issue involved in *Richmond Newspapers* and its progeny.<sup>57</sup>

The first case in which the Third Circuit considered a right of access in the administrative context was *Capital Cities Media, Inc. v. Chester*.<sup>58</sup> In *Capital Cities Media*, a newspaper company called *Times Leader* sought access to documents of the Pennsylvania Department of Environmental Resources (“D.E.R.”) relating to the D.E.R.’s investigation of contaminated drinking water in several areas of Pennsylvania.<sup>59</sup> The Third Circuit denied the press access to the documents.<sup>60</sup> In doing so, the court distinguished between access to adjudicatory hearings and investigatory documents and emphasized that the First Amendment bars the government from excluding the press from hearings, provided that the history and logic prongs of the right-of-access analysis are met.<sup>61</sup>

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55. See *N. Jersey Media*, 308 F.3d at 214 (citing *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743, 751 (2002), for proposition that administrative proceedings’ occurrence in Executive Branch context “cannot blind us to the fact that the proceeding is truly an adjudication”).

56. See *Whiteland Woods*, 193 F.3d at 181 (holding that plaintiff has right of access to planning commission meetings, which are administrative, but finding individual’s right of access not violated when township prevented individual from videotaping meeting).

57. See *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 699-700 (6th Cir. 2002) (distinguishing investigatory nature of information sought in *Capital Cities Media* and *First Amendment Coalition* from adjudicatory nature of INS hearing to which court granted access).

58. See *Capital Cities Media, Inc. v. Chester*, 797 F.2d 1164, 1166-69 (3d Cir. 1986) (applying *Richmond Newspapers* analysis to administrative proceeding and characterizing issue as whether press had right of access to records of state environmental agency).

59. See *id.* at 1165-66 (stating facts). In December 1983, Pennsylvania Gas & Water Company placed 250,000 customers on water use restrictions because of an outbreak of an intestinal illness called giardiasis, which is caused by the contamination of drinking water. See *id.* (stating facts). Pennsylvania Department of Environmental Resources (“D.E.R.”) is responsible for enforcing environmental laws designed to protect the integrity of the public water supplies. See *id.* (same). The *Times Leader*, a newspaper company, had investigated the causes of the giardiasis outbreak, including D.E.R.’s possible responsibility. See *id.* (same). *Times Leader* sought documents from D.E.R. regarding the results of D.E.R.’s investigation of the giardiasis or sewer problems, but the D.E.R. officials denied the press access to these documents. See *id.* (same).

60. See *id.* at 1175 (denying *Times Leader* access to proceeding).

61. See *id.* at 1174 (“[W]e do not yet know whether the Supreme Court will apply its analysis of access in the context of judicial proceedings to the context of executive branch files.”). The court acknowledged that the Free Speech and Press

Additional evidence that the Third Circuit recognizes a right of access to administrative hearings can be found in *First Amendment Coalition v. Judicial Inquiry & Review Board*.<sup>62</sup> In *First Amendment Coalition*, members of the media unsuccessfully sought access to the record of private board hearings involving judicial misconduct charges against Associate Justice Larsen of the Pennsylvania Supreme Court.<sup>63</sup> The Third Circuit assumed that the press had a right of access to the record of private board hearings, which were administrative hearings.<sup>64</sup> The court nevertheless ruled that the state's competing interest in protecting its judiciary from frivolous claims of misconduct trumped the right of access in that instance.<sup>65</sup> As the court emphasized, "[t]here could hardly be a higher governmental interest than a State's interest in the [integrity] of its judiciary."<sup>66</sup>

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Clauses bar the government from closing governmental hearings, provided the history and logic prongs are met. *See id.* at 1168 (explaining that Free Speech Clause prohibits government from closing governmental proceedings, whether judicial or otherwise, if proceedings satisfy history and logic prongs of *Richmond Newspapers* test). With respect to papers, however, the court held that it would strain the text of the First Amendment to interpret it as conferring on each citizen a presumptive right of access to any government-held documents that may be of interest to a particular citizen. *See id.* at 1168 (explaining such interpretation would be unreasonable). The court ultimately upheld the district court's dismissal of the *Times Leader's* claim on grounds that *Time Leader* failed to allege a tradition of access. *See id.* at 1175 (requiring plaintiffs seeking access to particular proceedings to allege history of access, pursuant to first prong of *Richmond Newspapers* analysis).

62. 784 F.2d 467 (3d Cir. 1986). Pennsylvania's Constitution created a Judicial Inquiry and Review Board to oversee the conduct of the state's judiciary. *See id.* at 468-69 (stating facts). The Board receives complaints of improper judicial conduct, conducts investigations and, after examining the complaint, the Board may order a hearing and direct the attendance and testimony of witnesses. *See id.* (same). If the Board finds good cause after its hearing, it recommends to the Pennsylvania Supreme Court suspension, removal, discipline or compulsory retirement of the justice or judge. *See id.* at 471 (same). All documents filed with the Board and the records of the Board's hearings are to be kept confidential, except in one instance: if the Board recommends that the Pennsylvania Supreme Court discipline a judge, the Board must file a transcript of its formal proceedings with the Pennsylvania Supreme Court, in which case the press and public may view the transcript. *See id.* (same).

63. *See id.* at 469-70 (stating facts). The plaintiffs were reporters from the *Pittsburgh Post-Gazette* and *Philadelphia Inquirer* and the First Amendment Coalition, a nonprofit corporation made up of various media organizations. *See id.* (same).

64. *See id.* at 472 (assuming right of access to judicial disciplinary proceedings and stating issue determining what stage in proceedings right of access attaches).

65. *See id.* at 476 (emphasizing unique nature of Judicial Review Board's function of examining judicial misconduct and warning that eliminating confidentiality requirement of hearings on judicial misconduct would expose state judges to harassment and disrupt judicial system). Applying the *Richmond Newspapers* test, the Third Circuit denied the press access to the record of the Board's hearing because the press failed to establish a history of openness and that public access played a positive role in the Board's proceeding. *See id.* at 469-70 (explaining Board did not recommend that Larsen be disciplined for alleged misconduct and, consequently, record of hearings must remain sealed pursuant Pennsylvania Constitution).

66. *Id.* at 475 n.4 (quoting *Landmark Communications v. Virginia*, 435 U.S. 829, 848 (1978) (Stewart, J., concurring)). The Third Circuit similarly assumed a

#### IV. A QUESTION OF FIRST IMPRESSION: DOES THE PRESS HAVE A RIGHT OF ACCESS TO INS DEPORTATION HEARINGS?

Against this backdrop of cases defining and applying the right of access to adjudicatory hearings, courts have recently been called upon to examine the right of access in the context of an INS deportation hearing involving resident aliens who might be connected to al Qaeda or have information regarding the September 11, 2001 attacks.<sup>67</sup> Only two circuits, the Third and the Sixth, have decided the issue, and they reached different conclusions after ruling on virtually identical facts.<sup>68</sup> To better illustrate the reasoning underlying the Third Circuit's approach, it will be contrasted with the Sixth Circuit's approach.<sup>69</sup>

##### A. Access to Deportation Hearings Generally

The first immigration act dealing with deportation proceedings was enacted in 1882.<sup>70</sup> Since then, the governing statutes have always expressly provided for closed *exclusion* hearings, but they have never called for closed *deportation* hearings.<sup>71</sup> Congress made this distinction because due process rights attach to proceedings to deport an alien but not to

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right of access in the administrative context in *Whiteland Woods, L.P. v. Township of West Whiteland*, 193 F.3d 177 (3d Cir. 1999). *Whiteland Woods* applied the *Richmond Newspapers* analysis to determine whether a real estate developer had a right to videotape a township planning commission meeting. *See id.* at 180-81 (stating "[w]e have no hesitation in holding *Whiteland Woods* had a constitutional right of access to the . . . meeting" because public access to commission's meetings passes both prongs of *Richmond Newspapers* test). Although the *Whiteland Woods* court assumed the developer had right of access to attend the meetings, the court found this was not significantly curtailed by the ban on videotaping. *See id.* at 183 (explaining right of access was not meaningfully restricted by Township's prohibition on videotaping).

67. For further discussion of a right of access to special interest deportation proceedings, see *infra* notes 68-128 and accompanying text.

68. Compare *N. Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198, 221 (3d Cir. 2002) (denying press access to special interest hearings), with *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002) (granting press access to special interest hearings). For further discussion of the Sixth and Third Circuits' contrasting approaches to the right of access to special interest deportation hearings, see *infra* notes 83-128 and accompanying text.

69. For a critical analysis of the Third Circuit's approach to the right of access in special interest deportation hearings, see *infra* notes 98-128 and accompanying text.

70. *See* Act of Aug. 3, 1882, ch. 376, 22 Stat. 214 (giving Congress duty to regulate immigration); *Kleindienst v. Mandel*, 408 U.S. 753, 761 (1972) (noting Congress passed first general immigration statute in 1882).

71. *See N. Jersey Media*, 308 F.3d at 211 (recognizing that Congress has repeatedly reenacted statutes that close exclusion hearings, but has repeatedly reenacted statutes governing deportation hearings without requiring that they be closed to public). Exclusion proceedings take place when a foreigner seeks entry into the United States, and a deportation proceeding occurs when the United States seeks to deport a person who has already entered the United States. *See id.* at 212 n.8 (distinguishing exclusion and deportation proceedings). Despite their substantive and procedural differences, exclusion and deportation hearings are currently

proceedings considering whether to grant an alien entry into the United States.<sup>72</sup> Since 1965, INS regulations have expressly stated that deportation proceedings are to be presumptively open to the press and public.<sup>73</sup> Under the statute, however, an immigration judge may limit or prohibit attendance to deportation proceedings in four circumstances: (1) if the physical facility in which the hearing will be conducted cannot accommodate the number in attendance, in which case priority is given to the press or the public; (2) if the purpose of closure is to protect witnesses, parties or the public interest; (3) if the hearing involves an abused alien spouse or child; or (4) if the hearing considers information subject to a protective order due to a substantial likelihood that the information, if disclosed, would harm national security interests of the United States.<sup>74</sup>

### B. “Special Interest” Deportation Hearings and the Creppy Directive

Shortly after the September 11, 2001 attacks, President George Bush ordered an investigation of the attacks and related terrorist threats to the United States.<sup>75</sup> This investigation made the government aware of aliens who had violated immigration laws and were therefore subject to removal from the United States.<sup>76</sup> Attorney General John Ashcroft authorized the Office of the Chief Immigration Judge to outline additional security procedures to apply in deportation cases designated as special interest cases.<sup>77</sup> Special interest cases are those involving aliens who “might have connec-

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called “removal” hearings. *See id.* (citing *Chi Thon Ngo v. INS*, 192 F.3d 390, 394 n.4 (3d Cir. 1999)).

72. *See* *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) (“[Although] it is true that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law, . . . [a]n alien on the threshold of initial entry stands on different footing.”).

73. *See* 8 C.F.R. § 3.27 (2003) (providing for open deportation hearings since 1965 except in limited circumstances).

74. *See id.* (noting four exceptions to openness of deportation hearings).

75. *See* Homeland Security Presidential Directive 2 (Oct. 30, 2001), at 2001 WL 1329414 (outlining initiatives to combat terrorism through immigration policies); *see also* *The Terrorist Threat Confronting the United States, Before the Senate Comm. on Intelligence*, 107th Cong. (Sept. 26, 2002) (statement for the record of Dale L. Watson, Executive Assistant Director, Counterterrorism and Counterintelligence, Federal Bureau of Investigation), available at [http://www.fas.org/irp/congress/2002\\_hr/020602watson.html](http://www.fas.org/irp/congress/2002_hr/020602watson.html) (stressing that after September 11, 2001, terrorism matters are number one priority of FBI).

76. *See* Matthew Brzezinski, *Hady Hassan Omar’s Detention*, N.Y. TIMES, Oct. 27, 2002, § 6 (Magazine), at 50 (indicating that government’s massive anti-terrorism efforts following September 11, 2001 attacks led to the U.S. government deporting more than 400 people after conducting their deportation hearings in secret).

77. *See* Protective Orders in Immigration Administrative Proceedings, 67 Fed. Reg. 36799 (May 28, 2002) (to be codified at 8 C.F.R. pt.3), available at 2002 WL 1048864 (F.R.) (authorizing immigration judges to close proceedings to public if information to be considered would, if disclosed, present substantial likelihood of harm to national security). Attorney General Ashcroft has authority over all laws relating to the administration and enforcement of all laws relating to the immigra-

tions with, or possess information pertaining to” the September 11, 2001 attacks, al Qaeda or related terrorist groups.<sup>78</sup> Pursuant to a memorandum issued by Chief Immigration Judge Creppy (the “Creppy Directive”), all special interest cases are conducted in secret, sealed from all visitors, press and even the detainee’s family members.<sup>79</sup>

Several media companies challenged the Creppy Directive’s policy of closing these hearings as violating their First Amendment right to attend and sought injunctions to enjoin closing of the hearings.<sup>80</sup> In each case, the government countered these challenges with assertions that any right to attend is defeated by the government’s national security interest in conducting special interest hearings in secret.<sup>81</sup> More precisely, the government sought to avoid disclosing potentially harmful information to terrorists who might pose an ongoing security threat to the United States.<sup>82</sup>

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tion and naturalization of aliens. *See* 8 U.S.C.A. § 1103 (West 2003) (summarizing powers of Attorney General).

78. Memorandum from Michael Creppy, Chief Immigration Judge (Nov. 20, 2001, 12:58AM) [hereinafter Creppy Directive] (on file with author), *available at* <http://abcnews.go.com/sections/pdf/immigctpro.pdf>.

79. *See id.* (“The courtroom must be closed for [special interest] cases—no visitors, no family, and no press.”). The Creppy Directive ordered other heightened security measures, including a requirement that special interest cases be assigned only to judges who hold at least secret clearance and a requirement that the judges instruct all courtroom personnel not to discuss the cases with anyone because many of the cases involve classified evidence. *See id.* (enumerating heightened security procedures for special interest cases).

80. *See* N. Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198, 221 (3d Cir. 2002) (presenting newspaper company’s First Amendment challenges to closing of deportation hearings); *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002) (same).

81. *See* Brief for Appellant at 7-8, 20-21, 37, N. Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198 (3d Cir. 2002) (No. 02-2524) (contending that considerations leading *Richmond Newspapers* Court to create right of access to criminal trials do not apply to administrative proceedings, including deportation proceedings, and emphasizing that closure of special interest cases is necessary to protect national security by safeguarding government’s investigation of September 11th terrorist attacks and other terrorist conspiracies); *Detroit Free Press*, 303 F.3d at 705-06 (same).

82. *See* Appellant’s Brief at 7-8, *N. Jersey Media* (No. 02-2524) (urging court to seal special interest cases from public). The Government supported its national security conclusion with an affidavit by James S. Reynolds, Chief of the Terrorism and Violent Crimes Section of the Justice Department’s Criminal Division, which provided several reasons for closure:

1. “[D]isclosing the names of ‘special interest’ detainees . . . could lead to public identification of individuals associated with them, other investigative sources, and potential witnesses . . . [and t]errorist organizations . . . could subject them to intimidation or harm. . . .”

2. “[D]ivulging the detainees’ identities may deter them from cooperating . . . [and] terrorist organizations with whom they have connection may refuse to deal further with them . . .” thereby eliminating valuable sources of information for the Government and impairing its ability to infiltrate terrorist organizations.



1. *Sixth Circuit's Approach*

In *Detroit Free Press v. Ashcroft*,<sup>83</sup> the Sixth Circuit upheld an injunction, prohibiting the INS from closing the deportation hearing of Rabih Haddad, a special interest detainee.<sup>84</sup> The court applied the two-prong *Richmond Newspapers* analysis and concluded the Creppy Directive's mandated closure policy violated the press's First Amendment right to attend the hearings.<sup>85</sup> The Sixth Circuit applied the *Richmond Newspapers* analysis as a sliding scale test in the sense that a lack of long history of openness is not fatal to the press's right of access.<sup>86</sup> Rather, a brief tradition of openness suffices to establish a right of access where access plays a significant positive role in the functioning of the proceeding.<sup>87</sup>

Despite finding that a strong justification for openness can make up for a lack of openness throughout history, the court concluded that deportation hearings had been open to the public for sufficiently long to satisfy the *Richmond Newspaper's* history prong.<sup>88</sup> The court examined the statutes governing deportation hearings and determined that Congress's explicit closure of exclusion hearings, while not providing for closure of deportation hearings, constituted roughly a 120-year history of presump-

3. "[R]eleasing the names of the detainees . . . would reveal the direction and progress of the investigation . . ." and "[o]fficial verification that a member [of a terrorist organization] has been detained and therefore can no longer carry out the plans of his terrorist organization may enable the organization to find a substitute who can achieve its goals . . . ."

4. "[P]ublic release of names, and place and date of arrest . . . could allow terrorist organizations and others to interfere with the pending proceedings by creating false or misleading evidence."

5. "[T]he closure directive is justified by the need to avoid stigmatizing 'special interest' detainees, who may ultimately be found to have no connection to terrorism. . . ."

*Id.*; see also *Detroit Free Press*, 303 F.3d 681, 705-06 (quoting *Detroit Free Press v. Ashcroft*, 195 F. Supp. 2d 937, 947 (E.D. Mich. 2002)).

83. 303 F.3d 681 (6th Cir. 2002).

84. See *id.* at 683 (affirming district court's order enjoining blanket closure of deportation hearings in special interest cases).

85. See *id.* at 694, 710 (applying history and logic test to claim of access to deportation hearings and concluding Creppy Directive is not narrowly tailored to achieve its compelling interest). The Sixth Circuit referred to the Supreme Court's opinion in *Federal Maritime Commission v. South Carolina Ports Authority*, 122 S. Ct. 1864 (2002), to justify applying the *Richmond Newspapers* analysis to administrative proceedings. See *id.* at 697 (citing *Federal Maritime*, 122 S. Ct. at 1873 for proposition that administrative proceedings "walk, talk, and squawk" very much like lawsuits).

86. See *id.* at 701 (explaining that "a brief historical tradition [of openness] might be sufficient to establish a First Amendment right of access where the beneficial effects of access to that process are overwhelming and uncontradicted").

87. See *id.* (emphasizing consistency of Sixth Circuit's sliding scale test with Supreme Court's view that First Amendment should be construed broadly so as to apply to contexts that did not exist in Framers' time).

88. See *id.* at 701 (explaining general policy of deportation hearings as one of historical openness).

tively open deportation hearings.<sup>89</sup> The court also found that public access plays a significant positive role in deportation proceedings and, thus, the logic prong of the test was satisfied.<sup>90</sup>

Having concluded that access to deportation hearings satisfied the history and logic analysis and is therefore a right, the Sixth Circuit strictly scrutinized the Creppy Directive's blanket closure order.<sup>91</sup> In applying strict scrutiny, the court recognized that the government's interest in national security is clearly compelling.<sup>92</sup> The court concluded, however, that, for three reasons, the Creppy Directive's blanket closure policy was not narrowly tailored to serve the national security interest.<sup>93</sup> First, the Creppy Directive ignored Supreme Court precedent by ordering per se closure for all special interest hearings without requiring the immigration judge to make particularized findings as to why access to each particular case would threaten national security.<sup>94</sup> Second, the government had a less restrictive alternative to blanket closure—closure on a case-by-case ba-

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89. *See id.* at 701-02 (endorsing rule of *expressio unius est exclusio alterius*, which suggests that Congress's practice of closing exclusion hearings while failing to close deportation hearings leads one to infer Congress intended deportation hearings to be open).

90. *See id.* at 703-04 (noting that all justifications for openness expressed in *Richmond Newspapers* and its progeny applied to open deportation hearings). The Sixth Circuit emphasized that open deportation hearings would serve to pacify community outrage over September 11th devastations. *See id.* at 704 ("[T]he cathartic effect of open deportations [after September 11] cannot be overstated.").

91. *See id.* at 705 (citing *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606-07 (1982), for proposition that government must support action that infringes right of access with showing that closure of proceeding "is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest").

92. *See id.* at 705 (accepting government's terrorist investigation as compelling interest in closing special interest hearings).

93. For a further discussion of why the Sixth Circuit determined the Creppy Directive was not narrowly tailored to serve a government interest in national security, see *infra* notes 94-96 and accompanying text.

94. *See* Creppy Directive, *supra* note 78 (requiring blanket closure of special interest deportation hearings); *cf.* *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 609 n.20 (1982) ("Indeed, the plurality opinion in *Richmond Newspapers* suggested that individualized determinations are *always* required before the right of access may be denied: 'Absent an overriding interest articulated in findings, the trial of a criminal case must be open to the public.'" (emphasis added)); *see also* *Detroit Free Press*, 303 F.3d at 707 (discussing government's failure to heed Supreme Court's requirement that if judge is to close hearing, judge must make specific findings on record to allow reviewing court to determine whether closure was proper and whether judge had less restrictive alternatives). The government asserted that it was unable to determine on a case-by-case basis which deportation cases should be closed to the public. *See id.* at 692-93 (asserting fear that terrorists could acquire dangerous information if hearings are open to public). For an analogous situation in which the government argued it was incapable of individualized determinations, see *Korematsu v. United States*, 323 U.S. 214, 219 (1944) (accepting government's finding that it was impossible to separate disloyal Japanese from loyal and therefore exclusion of entire group from California coast was necessary).

sis.<sup>95</sup> Third, the Creppy Directive did not prevent terrorists from obtaining sensitive information because the deportees themselves (and their lawyers) could discuss the proceedings with the press after the hearings.<sup>96</sup> The Sixth Circuit buttressed its decision to grant the press access with an eloquent statement about preserving rights in both good and bad times:

[T]he events of September 11, 2001, left an indelible mark on our nation, but we as a people are united in the wake of the destruction to demonstrate to the world that we are a country deeply committed to preserving the rights and freedoms guaranteed by our democracy. Today, we reflect our commitment to those democratic values by ensuring that our government is held accountable to the people and that First Amendment rights are not impermissibly compromised. Open proceedings, with a vigorous and scrutinizing press, serve to ensure the durability of our democracy.<sup>97</sup>

## 2. *Third Circuit's Approach*

In *North Jersey Media Group, Inc. v. Ashcroft*,<sup>98</sup> the Third Circuit reversed a district court's nationwide injunction that enjoined the Creppy Directive's blanket closure of all special interest deportation hearings.<sup>99</sup> The Third Circuit agreed that the *Richmond Newspapers* analysis applied to deportation hearings, but it applied the analysis differently than did the Sixth Circuit.<sup>100</sup> In applying the history and logic prongs of the test, the Third Circuit ruled that the press does not have a right of access to depor-

95. See *Detroit Free Press*, 303 F.3d at 707 (asserting case-by-case closure of hearings is as effective as blanket closure in preserving national security).

96. See *id.* (noting that blanket closure of hearings does not necessarily protect national security because deportees themselves can discuss proceedings and disclose documents to friends, family and press).

97. *Id.* at 711.

98. 308 F.3d 198 (3d Cir. 2002).

99. See *id.* at 202 (reversing district court's holding that *Richmond Newspapers* history and logic test renders Creppy Directive unconstitutional). Perhaps the only important difference between *Detroit Free Press* and *North Jersey Media* is that in the former case the press sought an injunction enjoining closure of one individual's hearing, whereas in the latter case the press sought a *nationwide* injunction on enforcement of the Creppy Directive's closure order. For further discussion of the significance of difference in remedies sought in *North Jersey Media* and *Detroit Free Press*, see *infra* notes 125-28 and accompanying text.

100. See *N. Jersey Media*, 308 F.3d at 208-09 (instructing that *Richmond Newspapers* analysis applies to administrative proceedings); see also *United States v. Simone*, 14 F.3d 833, 839 (3d Cir. 1994) (citing *Press-Enter. Co. v. Superior Court (Press-Enter. II)*, 478 U.S. 1, 7 (1986), for proposition that "the First Amendment question cannot be resolved solely on the label we give the event, i.e., 'trial' or otherwise"); *Press-Enter. Co. v. Superior Court (Press-Enter. I)*, 464 U.S. 501, 516 (1984) (Stevens, J., concurring) ("[T]he distinction between trials and other official proceedings is not necessarily dispositive, or even important, in evaluating the First Amendment issues.").

tation proceedings.<sup>101</sup> The Third Circuit's analysis did not function as a sliding scale.<sup>102</sup> Rather, the history prong itself determined whether a right of access existed, and a lack of historical access to the proceeding was fatal to the asserted right of access, regardless of whether the logic prong was met.<sup>103</sup>

Under the Third Circuit's analysis, the relatively short history of access to deportation proceedings does not satisfy the history prong for several reasons.<sup>104</sup> First, according to the Third Circuit, Congress's failure to close deportation proceedings to the press or public, while never guaranteeing their openness, is not the kind of uncontradicted history required by *Richmond Newspapers*.<sup>105</sup> Second, whatever tradition of openness deportation hearings have, it has only existed since the 1890s, as opposed to the history of public access to criminal trials involved in *Richmond Newspapers*, dating back to a time before the Norman Conquest.<sup>106</sup> Third, despite the 1964 INS regulations stating that deportation hearings shall be open except in limited circumstances, the exceptions to presumptive openness are

101. See *N. Jersey Media*, 308 F.3d at 220 (concluding press has no right of access to special interest deportation proceedings).

102. See *id.* at 216 (explaining that even if public access to proceedings plays substantial positive role in function of proceeding, lack of history of openness is fatal to claims of access).

103. See *id.* at 214 (declaring that Third Circuit will not find right of access without strong historical evidence that proceeding in question has historically been open to press and public). In regard to the logic prong, the Third Circuit stated, "we are troubled by our sense that the logic inquiry, as currently conducted, does not do much work in the *Richmond Newspapers* test." See *id.* at 217 (revealing there is no case in which proceeding passed experience prong through its history of openness yet failed logic prong by not serving community values). Therefore, it is of little consequence to the Third Circuit that public access to special interest deportation hearings furthers each of the following six values, which the Third Circuit previously stated are typically served by openness of proceedings: (1) promoting informed discussion of governmental affairs by helping the public understand the judicial system; (2) enriching the public's perception of fairness which can be achieved only by allowing the public to view the proceedings; (3) providing the community with an outlet for community outrage, hostility and emotion; (4) serving as a check on arbitrary and impartial judicial practices; (5) ensuring fairness to all involved in the proceeding; and (6) discouraging perjury. See *id.* (citing *United States v. Simone*, 14 F.3d 833, 839 (3d Cir. 1999), for proposition that Third Circuit has gleaned six justifications for public access to adjudicatory proceedings).

104. For a discussion of why the Third Circuit does not find a history of open deportation proceedings sufficient to satisfy *Richmond Newspapers* analysis, see *infra* notes 105-07 and accompanying text.

105. See *N. Jersey Media*, 308 F.3d at 213 (acknowledging strength of *expressio unius* argument, but refusing to find right of access to deportation proceedings simply because Congress has failed to close deportation hearings despite numerous opportunities to do so).

106. See *id.* (suggesting that deportation hearings do not have tradition of openness tantamount to centuries-long tradition of openness present in civil and criminal trial contexts).

not evidence of “unbroken, uncontradicted history” of public access required by *Richmond Newspapers*.<sup>107</sup>

In its application of the logic prong, the Third Circuit departed from Supreme Court and Third Circuit precedent, which asks only whether public access to the proceeding in question plays a significant positive role in the functioning of the proceeding.<sup>108</sup> The Third Circuit considered the positive role of access to the proceeding. Afterward, however, the court created an entirely new inquiry, asking whether a competing public interest weighs against openness.<sup>109</sup> As the court stated in *North Jersey Media*, an inquiry into the positive role public access plays “must perforce take account of the flip side—the extent to which openness impairs the public good.”<sup>110</sup>

In applying its refined logic prong, the Third Circuit concluded that each of the justifications pronounced in *Richmond Newspapers* was present, but “we are [nevertheless] troubled by our sense that the logic inquiry . . . does not do much work in the *Richmond Newspapers* test.”<sup>111</sup> Therefore,

107. See *id.* (indicating that although in 1964 Department of Justice (“DOJ”) regulations created presumptive right of access to deportation proceedings, “recent—and rebuttable—regulatory presumption is hardly the stuff of which Constitutional rights are forged.”). *Richmond Newspapers* and its progeny provide little guidance for determining how much of a history of access satisfies the history prong. The shortest history of access to satisfy the history prong is 196 years. See *Press-Enter. Co. v. Superior Court* (Press-Enter. II), 478 U.S. 1, 10 (1986) (citing *United States v. Burr*, 25 F.Cas. 1 (No. 14,692) (CC Va. 1807), as example of 196 year-old case in which preliminary hearing was conducted before public and press). One commentator suggests the Court has not provided that a specific quantity of history satisfies the history prong because the historical analysis is not critically important. See Recent Case, *First Amendment—Public Access to Deportation Hearings—Third Circuit Holds That the Government Can Close “Special Interest” Deportation Hearings*, 116 HARV. L. REV. 1193, 1198 (2003) (positing that Justice Brennan’s precedential concurrence in *Richmond Newspapers* suggests historical analysis is subsidiary to logic prong of two-part analysis and that analysis of proceedings’ history of openness must be mindful of justifications for that history).

108. See *Press-Enter. Co. v. Superior Court* (Press-Enter. II), 478 U.S. 1, 8 (1986) (instructing that logic prong requires courts to consider “whether public access plays a significant positive role in the functioning of the particular process in question”); *Press Enter. Co. v. Superior Court* (Press-Enter. I), 464 U.S. 501, 508 (1984) (same); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982) (same); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 589 (1980) (Brennan, J., concurring) (same).

109. See *N. Jersey Media*, 308 F.3d at 217 n.13 (blurring distinction between application of logic prong and application of strict scrutiny, which comes only after right of access is found). The Third Circuit recognized that “under our approach, there is an evidentiary overlap between the *Richmond Newspapers* logic prong and the subsequent ‘compelling government interest’ strict scrutiny investigation necessary upon a finding of a First Amendment access right.” *Id.* The Court instructed, however, that the two inquiries are “not redundant because it is possible for openness to serve a positive role under a balanced logic prong even though the government has a compelling interest in closure.” *Id.*

110. *Id.* at 217.

111. *Id.* The Third Circuit’s conclusion that the logic prong carries little weight in the *Richmond Newspaper* analysis contradicts the Third Circuit’s previous

the court concluded the press had no right of access to special interest deportation hearings.<sup>112</sup> Having found no First Amendment right of access to the deportation proceedings, the Third Circuit did not apply strict scrutiny to the Creppy Directive.<sup>113</sup>

### 3. *Contrasting the Sixth and Third Circuit Approaches*

The Sixth and Third Circuit approaches to determining whether the press has a right of access to special interest deportation hearings differ in

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judgments regarding the importance of the logic prong. *See* *Capital Cities Media, Inc. v. Chester*, 797 F.2d 1164, 1177 (3d Cir. 2002) (Adams, J., concurring) (emphasizing critical role of logic prong in *Richmond Newspapers* analysis). As Justice Adams noted in *Capital Cities Media*,

Whether access to a particular proceeding would encourage the dissemination of information and discussion beneficial to our society is a critical issue in determining whether the Constitution requires public access. . . . One could envision a special case, perhaps, where access to governmental proceedings might be deemed so significant to a democratic government that the First Amendment would mandate access even without a showing of a tradition of openness.

*Id.*; *see also* *United States v. Simone*, 14 F.3d 833, 838 (3d Cir. 1994) (concluding that where historical analysis provides little guidance to whether right of access should attach to proceedings, the Court “will rely primarily on the ‘logic’ prong of the test”); *United States v. Criden*, 675 F.2d 550, 555 (3d Cir. 1982) (relying exclusively on logic prong and expressly ignoring history prong in determining that press has right of access to pretrial criminal proceedings).

112. *See N. Jersey Media*, 308 F.3d at 204-05 (holding “there is no First Amendment right to attend [special interest] deportation proceedings”).

113. *See id.* at 221 (finding no need to strictly scrutinize Creppy Directive’s blanket closure policy after concluding media has no First Amendment right of access to special interest deportation proceedings). The court’s subsequent dicta nevertheless sought to refute any arguments that excluding the media from hearings does not effectuate the government’s interest in national security. *See id.* at 204 (addressing media’s argument that Creppy Directive’s “veil of secrecy is ineffective at best” in protecting national security because it permits detainees themselves to disclose information about their proceedings). A recently promulgated regulation buttresses the Third Circuit’s position that the Creppy Directive effectively preserves dangerous information from leaking to terrorists. *See* *Protective Orders in Immigration Administrative Proceedings*, 67 Fed. Reg. 36799 (May 28, 2002) (to be codified at 8 C.F.R. pt. 3) (authorizing immigration judges to issue protective orders and seal records as necessary to prevent detainees and their attorneys from disclosing information, which, if disclosed, may be harmful to national security).

Additionally, the Third Circuit rejected the feasibility of a case-by-case closure because the disclosure of even the detainees’ identities could reveal the government’s investigatory patterns. *See N. Jersey Media*, 308 F.3d at 219 (accepting statement of Dale Watson that “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”). The Third Circuit doubted immigration judges’ ability to reliably protect information that is seemingly innocuous, but potentially dangerous if combined with other information regarding details of the government’s terrorism investigations. *See id.* at 200 (declining to expect immigration judges to be able to accurately assess harm that might result from disclosing “seemingly trivial facts”).

several respects.<sup>114</sup> On a broad level, the press is more likely to have right-of-access under the Sixth Circuit's application of the *Richmond Newspapers* test.<sup>115</sup> The Sixth Circuit's approach is more lenient to the press because it uses a sliding scale test.<sup>116</sup> In contrast, the Third Circuit rigidly applies each prong of the *Richmond Newspapers* test.<sup>117</sup> Additionally, the critical question under the Sixth Circuit's approach is whether public access to the hearing will enhance its functioning.<sup>118</sup> If access enhances the hearing's functioning, the Sixth Circuit will be heavily inclined to grant the press access, even if the public and press have not historically been granted access to the hearing in question.<sup>119</sup> In contrast, the Third Circuit will not grant the press access to a hearing unless that type of hearing has a long history of being open to the press and public, regardless of whether public access enhances the functioning of the hearing.<sup>120</sup>

114. For further discussion of the differences in Sixth and Third Circuit approaches, see *infra* notes 115-28 and accompanying text.

115. Compare *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 701 (6th Cir. 2002) (construing logic prong of *Richmond Newspapers* analysis as more important consideration than history prong), with *N. Jersey Media*, 308 F.3d at 212-14, 217 (requiring unbroken and uncontradicted history of openness, regardless of whether access to hearing in question plays positive role in functioning of hearing).

116. See *Detroit Free Press*, 303 F.3d at 701 (“[A]lthough 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.”).

117. See *N. Jersey Media*, 308 F.3d at 213-14 (refusing to grant press access to proceeding in question where history of access to proceeding is ambiguous or lacking and inquiring into negative as well as positive role access plays in proceeding).

118. See *Detroit Free Press*, 303 F.3d at 703 (recognizing function of public access in deportation context is to enhance quality of proceedings). The Sixth Circuit emphasizes the importance of public access to hearings in immigration context in which government has “nearly unlimited authority” because press and public are the only check on the government. See *id.* at 704 (quoting *Richmond Newspapers v. Virginia*, 448 U.S. 555, 569 (1980) for aphorism that states, “without publicity, all other checks [on government] are insufficient”). Public access to deportation hearings may act as a substantially important check on the government in light of the Supreme Court’s decision in *Wong Yang Sung v. McGrath*, 339 U.S. 33, 46, 50 (1950) (requiring government to afford due process before deporting aliens and depicting context of deportation hearing as involving “voteless class of litigants” who are “strangers to the laws and customs [of the United States] . . . and often do not even understand the tongue in which they are accused”).

119. See *Detroit Free Press*, 303 F.3d at 703-05 (enumerating justifications weighing heavily in favor of public access to hearing, such as public access ensuring fairness of deportation hearings; having therapeutic effect for community after September 11, 2001 attacks; enhancing society’s respect for government; and ensuring that citizens can participate in our republican system of self-government).

120. See *N. Jersey Media*, 308 F.3d at 216 (explaining Third Circuit’s approach as rejecting right of access to hearing in question if hearing does not have unbroken and uncontradicted tradition of openness, irrespective of whether public access has beneficial effect on function of hearing).

The Sixth Circuit's approach is more in line with Supreme Court precedent than is the Third Circuit's.<sup>121</sup> Specifically, *Richmond Newspapers* and its progeny applied the two-prong analysis as a sliding scale, giving particular weight to the logic prong.<sup>122</sup> Indeed, this was the Third Circuit's approach prior to deciding the issue of media access to special interest deportation hearings.<sup>123</sup> The Third Circuit altered the way it applied the *Richmond Newspapers* analysis in *North Jersey Media*.<sup>124</sup> Why the Third Circuit departed from the Supreme Court's and the Third Circuit's traditional right-of-access approach is unclear.

One possible justification for the change in approach is the broad scope of the remedy sought by the press in *North Jersey Media*.<sup>125</sup> Unlike in *Detroit Free Press*, where the press sought an injunction enjoining the closure of *one individual's* deportation hearing, the press in *North Jersey Media* sought a *nationwide* injunction on enforcement of the Creppy Directive's closure order.<sup>126</sup> The Third and Sixth Circuits neither articulated the significance of this difference nor the extent to which the remedy sought impacted their respective approaches.<sup>127</sup> Nevertheless, the following statement by the Third Circuit reflects its concerns about a nationwide injunction on closure of all deportation hearings:

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121. For a discussion of why the Sixth Circuit's right-of-access approach is particularly in line with Supreme Court precedent on the issue, see *infra* note 122 and accompanying text.

122. See *Press-Enter. v. Superior Court (Press-Enter. II)*, 478 U.S. 1, 11 n.3 (applying *Richmond Newspapers* as sliding scale test in that importance of public access to proceeding could counterbalance brief history of openness); Recent Case, *supra* note 107, at 1198 (indicating that under Justice Brennan's concurrence in *Richmond Newspapers*, which has become prevailing approach to right-of-access inquiries, most important question is whether access plays positive role in functioning of hearing because analysis of hearing's tradition of openness must be mindful of justifications for that history).

123. See cases cited *supra* note 111 (identifying Third Circuit's traditional right-of-access approach, under which Third Circuit accorded logic prong substantial weight in determining whether press has right to attend hearing in question).

124. See *supra* note 111 (indicating Third Circuit's departure from previous applications of its right-of-access analysis).

125. See *N. Jersey Media*, 308 F.3d at 204 (noting media sought nationwide injunction ordering all special interest deportation hearings to be open to press and public).

126. Compare *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 684 (6th Cir. 2002) (observing that press sought to enjoin closures of hearings in Haddad's case), with *N. Jersey Media*, 308 F.3d at 204 (observing that lower court's injunction was nationwide in scope).

127. See *N. Jersey Media*, 308 F.3d at 204 (failing to articulate significance or implications of media's requested remedy); *Detroit Free Press*, 303 F.3d at 684 (same). Judge Scirica, who dissented from the Third Circuit's decision to deny the media a right to attend special interest deportation hearings, briefly commented on the broad scope of a nationwide injunction. See *N. Jersey Media*, 308 F.3d at 228 (Scirica, J., dissenting) (suggesting benefits of remedy narrower than nationwide injunction would be to provide relief to parties before court while allowing other courts to examine difficult constitutional question of whether press has right to attend special interest deportation hearings).



We are keenly aware of the dangers presented by deference to the executive branch when constitutional liberties are at stake, especially in times of national crisis, when those liberties are likely in greatest jeopardy. On balance, however, we are unable to conclude that openness plays a positive role in special interest deportation hearings at a time when our nation is faced with threats of such profound and unknown dimension.<sup>128</sup>

## V. CONCLUSION

The right of access is a fundamental right that the Supreme Court has determined is implicit in the First Amendment's guarantees of free speech and press.<sup>129</sup> The Supreme Court has acknowledged the press's right to attend criminal trials and their various phases.<sup>130</sup> The Third Circuit extended that right to civil trials and has conceived of a right of access to administrative hearings, indicating that such hearings "walk, talk, and squawk like a civil lawsuit."<sup>131</sup>

Litigators practicing in the Third Circuit need to be aware of the context in which a claim of access arises in order to effectively argue to the Third Circuit that access to the proceeding in question does or does not pass muster under the *Richmond Newspapers* analysis.<sup>132</sup> Regardless of the context of the proceeding, practitioners need to make strong arguments from history and precedent, given that the historical analysis is a critical element of Third Circuit's approach to any right-of-access inquiry.<sup>133</sup> Furthermore, in disputing whether public access plays a positive role in the proceeding in question (the logic prong), practitioners should consider the countervailing interests that weigh against public access.<sup>134</sup> If arguing for access to special interest deportation hearings, litigators should liken the hearing to a civil lawsuit, a context in which the Third Circuit has

128. *N. Jersey Media*, 308 F.3d at 220.

129. For an introduction to the First Amendment right of access, see *supra* notes 13-28 and accompanying text.

130. For a discussion of Supreme Court promulgations regarding the press's right of access in the criminal context, see *supra* notes 13-43 and accompanying text.

131. See *N. Jersey Media*, 308 F.3d at 214 (quoting *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 751 (2002)). For a discussion of the Third Circuit's recognition of a right of access to criminal, civil and administrative proceedings, see *supra* notes 44-66 and accompanying text.

132. For an examination of the Third Circuit's application of the *Richmond Newspapers* analysis in the criminal, civil and administrative contexts, see *supra* notes 44-128 and accompanying text.

133. For a discussion of why the Third Circuit affords substantial weight to the history prong of the *Richmond Newspapers* test, see *supra* notes 104-07 and accompanying text.

134. For a discussion of the Third Circuit's unique application of the *Richmond Newspapers* logic prong, see *supra* notes 108-12 and accompanying text.

previously recognized a right of access.<sup>135</sup> Moreover, litigators should be keenly aware of the Third Circuit's need to balance the constitutional liberties with national security as the nation endures the ongoing threat of terrorism.<sup>136</sup>

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135. For a discussion of Third Circuit's recognition of the media's right to attend civil trials, see *supra* notes 47-53 and accompanying text.

136. For a discussion of the Third Circuit's approach to the press's right of access to special interest deportation hearings, see *supra* notes 98-113 and accompanying text.

