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Dying Behind a Closed Door:
Is There a First Amendment Right of Access to
Deportation Hearings in the Wake of 9/11

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1. INTRODUCTION

Shortly after the terrorist attacks of September 11, 2001, Michael Creppy, Chief Immigration Judge, issued a memorandum to all immigration judges and court administrative personnel.¹ The memorandum, dated September 21, 2001, informed the recipients that the Attorney General has implemented additional security procedures for certain cases in the Immigration Court.² The memorandum continued, A[t]hose procedures require us to hold the hearings individually, to close the hearing to the public, and to avoid discussing the case or otherwise disclosing any information about the case to anyone outside the Immigration Court.³

The reasoning behind the decision of the Attorney General was that this is obviously a time of heightened security and concern.⁴ Subsequent instructions for immigration hearings requiring additional security included the condition that A[e]ach of these cases is to be heard separately from all other cases on the docket. The courtroom must be closed for these cases C no visitors, no family, *and no press*.⁵

In the course of the investigation of the terrorist attacks, between 1,100 and 1,200 immigrants were detained.⁶ More than 750 of these detainees turned out to be immigrants who had overstayed their visas, rather than terrorists or criminals.⁷ More than 600 of the hearings relating to those detained

in the wake of September 11, 2001, were classified as Aspecial interest@ and had their cases heard behind closed doors.⁸ Most of those Aspecial interest@ detainees= closed hearings resulted in deportation.⁹ An unknown number of immigrants remain detained.¹⁰ However, hundreds of other immigrants detained after 9/11 have had hearings that were not closed to the press.¹¹

On November 22, 2001, journalist Jim Edwards was denied admission to view the proceedings of the Immigration Court in Newark, New Jersey.¹² On February 13, 2002, Edwards was again denied admission to a hearing scheduled for the following day.¹³ On February 14, 2002, journalist Hillary Burke was denied both docket information and admission to view similar proceedings before the Newark Immigration Court.¹⁴ On February 21, 2002, Edwards and Burke were ordered to leave the courtroom when the removal hearing of Malek Zeidan was called.¹⁵ On each of these occasions, the court indicated that the proceedings were closed pursuant to the Creppy Memorandum.¹⁶

On December 19, 2001, the press was similarly denied the opportunity to observe a hearing before the Immigration Court in Detroit, Michigan.¹⁷ Additional hearings before the Immigration Court on January 2, 2002, and January 10, 2002, were also closed to the press.¹⁸ Again, the court indicated that the hearings were closed to the public on these occasions because of the Creppy Memorandum.¹⁹

Two suits were brought in federal district courts as a result of the exclusion of the press in Detroit and Newark, each challenging the constitutionality of the closed immigration court hearings. The suit filed in the United States District Court for the Eastern District of Michigan as a result of the Detroit immigration hearings was *Detroit Free Press v. Ashcroft*²⁰, and the suit filed in the United States District Court for New Jersey as a result of the Newark hearings was *North Jersey Media Group, Inc.*

v. Ashcroft.²¹ In both cases, each applying the well-established *Richmond Newspapers* two prong >experience and logic= test (described in more detail later in this article) to determine whether there was a right of access under the First Amendment²², the court ruled that the government=s blanket closure of the immigration hearings was unconstitutional.²³ On each appeal, and again with both courts applying the *Richmond Newspapers* test, the Sixth Circuit upheld the Michigan trial court=s decision that the blanket closures were unconstitutional²⁴, while the Third Circuit overturned the New Jersey court=s decision, ruling that the blanket closures were not unconstitutional.²⁵ Both courts of appeal applied the same test, yet produced virtually opposite outcomes under almost identical fact patterns, dramatically splitting the only two circuits to have addressed the issue to date.²⁶

This article will first examine the history of the First Amendment right claimed by the press to have access to judicial proceedings, including a discussion of the *Richmond Newspapers* test. In Part 3, the article will then turn to a brief exploration of the effects of conflict and peace on the decisions handed down by the Supreme Court, and how constitutional rights are affected during such times, particularly the rights of immigrants and aliens. Following this, Part 4 will turn our attention to the facts and reasoning of both cases, comparing and contrasting the approaches used by each court in reaching the opposing outcomes. Finally, the article will discuss the importance of the Supreme Court addressing this particular issue and setting forth a more concrete interpretation of the *Richmond Newspapers* test, hopefully defining a consistent, open, and fair standard for access to deportation hearings.

2. THE FIRST AMENDMENT RIGHT OF ACCESS

a. History of access to courtroom proceedings

Even in the earliest days of the common law system, trials were considered to be open affairs.²⁷ Without delving too deep into the far history of public access to trials, the use of the jury as the arbiter of fact in trials set the stage for open proceedings.²⁸ Jurors were initially members of the community of the accused, and were responsible for bringing the accused before the judge and presenting the facts at the trial, thus being an integral part of the proceedings rather than simply observers.²⁹ The jury has been described as *Athe lamp which shows that freedom lives@ and Athe bulwark of our liberties.@*³⁰ Open courts are *Aan almost inevitable consequence of our system of courts and the use of juries.@*³¹ Although much has changed in the legal system since those early days, one constant is that the general public have almost always been present at criminal trials.³²

The main argument for open courtrooms is that it prevents judicial abuse³³ by allowing the public to *Aserve as a check upon the judicial process B an essential component in our structure of self-government.@*³⁴ Open trials prevent *Aopen attacks . . . from all secret machinations, which may sap and undermine [the judicial process] by introducing new and arbitrary methods of trial, by justices of the peace, commissioners of the review, and courts of the conscience.@*³⁵ In essence, *Ahowever convenient [closed trials] may appear at first (as doubtless all arbitrary powers, well executed, are the most convenient), . . . let it be remembered that delays and little inconveniences in the forms of justice are the price that all free nations must pay for their liberty in more substantial matters.@*³⁶ There are,

however, various reasons why courts may close their proceedings to the public, including closure in the interest of national security.³⁷

Historically, newspaper reporters were given the same rights of access to observe judicial proceedings as the rest of the public.³⁸ Reporters were not barred from reporting the events in court in newspapers.³⁹ Reporting the events at trial served the purpose of increased public awareness of the judicial process the law in general.⁴⁰ This longstanding right of access crossed the Atlantic from England with the common law, and the public's right of access to trials is considered fundamental to our legal system in the United States.⁴¹ Indeed, the First Amendment of the Constitution indicates that Congress shall make no laws abridging the freedom of the press,⁴² and the Sixth Amendment guarantee that A[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.⁴³

b. Development of the *Richmond Newspapers* test

In *Richmond Newspapers Inc., v. Virginia*⁴⁴, the foundation for the modern press rights of access to courts was laid.⁴⁵ In this 1980 case, the Supreme Court decided Athe narrow question@ of whether the public and the press have a constitutional right to attend criminal trials.⁴⁶ Justice Burger, who wrote the plurality opinion,⁴⁷ held that there was an implicit right to attend *criminal* trials under the First Amendment, and without this historical right, vital facets of freedom of speech and freedom of the press would be lost.⁴⁸ Most important to the current closed deportation hearings is Justice Burger's conclusion that if there are alternatives to closing the trial to the public that are not A beyond the realm of

the manageable, the proceedings should not be closed.⁴⁹ In the words of Justice Burger, "Absent an overriding interest articulated in findings, the trial of a criminal case must be open to the public."⁵⁰

The *Richmond Newspapers* decision was refined further by three subsequent cases. The first of the cases was *Globe Newspaper Co. v. Superior Court*, decided two years after *Richmond Newspapers*, in 1982.⁵¹ *Globe Newspaper* held that even though the right of the public and press to gain access to criminal trials had its foundation in the Constitution, it was by no means an absolute right.⁵² The government could bar the public and the press from a trial if "the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest."⁵³

Two years later came the third case in the series that commenced with *Richmond Newspapers*. In 1984, the Supreme Court heard *Press Enterprise v. Superior Court*, also known as *Press Enterprise I*.⁵⁴ In this case, the Supreme Court unanimously held that transcripts of voir dire proceedings in a criminal trial could not be withheld from the press. The Court built upon the holdings in *Richmond Newspapers* and *Globe Newspaper* and held that since voir dire proceedings, which were similar to the criminal trial itself, were also historically open to the public, and that the openness served a valid purpose of allowing the public to see that justice was being done, the voir dire proceedings should be presumptively open to the public.⁵⁵ However, the court also reiterated that "closed proceedings, although not absolutely precluded, must be rare and only for cause shown that outweighs the value of openness,"⁵⁶ and that "the presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest."⁵⁷ Thus the beginnings of the *Richmond Newspapers* test are beginning to develop, with the

extension of the right of access beyond the trial, and the balancing of the right of access with the interests of those seeking to close the proceedings.⁵⁸

The final case that defines the modern *Richmond Newspapers* test, as recently used by both circuits to reach opposing decisions on the same matter, is *Press Enterprise v. Superior Court*, known as *Press Enterprise II*.⁵⁹ In this case, the Supreme Court held that a qualified First Amendment right of access attaches to preliminary hearings in criminal cases⁶⁰ and reiterated that closure is essential to preserve higher values and is narrowly tailored to serve that interest.⁶¹ In determining whether a qualified First Amendment right of access attached to preliminary hearings, the two prong >experience and logic= test was utilized.⁶² The >experience= prong is an examination of a tradition of accessibility to preliminary hearings of the type in question.⁶³ It is notable that the Court explained that the importance of certain types of pretrial hearing can outweigh any lack of historical tradition or counterpart, and that traditional rights of access can be imputed to the pretrial hearing.⁶⁴ The >logic= prong asks whether public access to preliminary hearings . . . plays a particularly significant positive role in the actual functioning of the process.⁶⁵

c. Modern day interpretation of the *Richmond Newspapers* test

Thus the current state of the *Richmond Newspapers* test is as follows: should the public have a tradition of access to a particular type of hearing (or if the hearing is important to the overall trial to which there is a tradition of access), and if the hearing plays a significant and helpful part in the judicial

process (for example, if the hearing helps allay public hostility and outcry), then a qualified First Amendment right of access shall be attached to the hearing.⁶⁶ This qualified right can be overcome by a showing of a compelling governmental interest for closing the proceedings that is narrowly tailored to serving that interest and that no viable alternatives to closure exist.⁶⁷

The four main cases involved which developed the *Richmond Newspapers* test are specifically geared towards criminal proceedings. However, since the test was crystallized in *Press Enterprise II*, it has been expanded to cover a more diverse array of hearings and information. While *Richmond Newspapers* set the stage for a First Amendment right of access to criminal hearings⁶⁸, *Press Enterprise I & II* extended the scope from the criminal trial to the voir dire⁶⁹ and pretrial hearings.⁷⁰ Since *Press Enterprise II*, the scope of the *Richmond Newspapers* test has been applied to expand the First Amendment right of access to many other areas of criminal proceedings, civil proceedings, and importantly, administrative hearings.⁷¹

Particularly relevant to the subject of this article is the extension of a First Amendment right of access to administrative hearings. Hearings before an Immigration Court are administrative hearings rather than judicial hearings.⁷² *Richmond Newspapers* was extended to cover formal administrative fact-finding hearings by *Society of Professional Journalists v. Secretary of Labor*.⁷³ However, courts have yet to deal with the issue of First Amendment right of access to administrative hearings in sufficient depth to provide a clear picture of the law in this area. Indeed, it can be argued that it is this lack of guidance from prior decisions that is precisely what has caused the current circuit split over access to deportation hearings.

Interestingly, there have been a number of decisions that may indirectly extend the right of access to deportation hearings. *Press Enterprise II* has been extended to cover First Amendment right of access to evidence used in an extradition hearing.⁷⁴ There are obvious similarities between extradition and deportation. Furthermore, *Kaoru Yamataya v. Fisher*⁷⁵ extended due process rights to cover aliens in deportation hearings.⁷⁶ Yet perhaps most compelling in any decision to extend the right of access to deportation hearings is the codification of deportation hearings being presumptively open to the public, except when A[f]or the purpose of protecting witnesses, parties, or the public interest, the Immigration Judge may limit attendance or hold a closed hearing.⁷⁷

3. CONFLICT, PEACE, AND THE JUDICIAL PROCESS

It is no secret that in times of conflict or national stress, the freedoms guaranteed by the Constitution are interpreted more narrowly than they would be in times of peace and prosperity.⁷⁸ The compromising of constitutional freedoms in times of national emergency is a tradition visible throughout American history.⁷⁹ In particular, freedom of the press is an easy target, as illustrated by *Schenck v. United States*⁸⁰, in which Justice Holmes wrote, AWhen a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.⁸¹ It is also no secret that to the Supreme Court, in times of conflict or when national security is at issue, aliens and foreigners are particularly easy targets for public outrage or fear.⁸² The reader will probably be aware,

if not by name, of the facts surrounding *Korematsu v. United States*⁸³, in which the Supreme Court held that in times of war, the exclusion of those of Japanese origin was deemed necessary because of the presence of an unascertained number of disloyal members of the group, most of whom we have no doubt were loyal to this country.⁸⁴ The holding in *Korematsu* seems particularly applicable to the recent rounding up of Arab immigrants, most of whom were also found to be harmless to the United States.⁸⁵

Adopting what is termed the >pathological perspective= presents a useful guide to courts involved in interpreting the First Amendment in times of peace and conflict.⁸⁶ When applying the pathological perspective, the overriding objective at all times should be to equip the first amendment to do maximum service in those historical periods when intolerance of unorthodox ideas is most prevalent and when governments are most able and most likely to stifle dissent systematically. . . . The first amendment, in other words, should be targeted for the worst of times.⁸⁷ One would be hard pressed to argue that since 9/11, the United States has been in anything but the worst of times.

The core of the pathological perspective is that judicial decisions should be geared towards strengthening the core aspects of the First Amendment, so that in times when First Amendment principles are easy to attack, courts do not have the ability to demolish the core aspects.⁸⁸ If the pathological perspective is adopted by courts before times of conflict or stress, then the strengthened core guarantees of the First Amendment will withstand the increased pressure to erode longstanding constitutional rights for the sake of an immediate sense of security.⁸⁹ Essentially, at the pathological perspective=s core is the theory that if courts make decisions relating to the First Amendment by

examining, amongst other things, how the decision will hold up under the worst attacks the future may throw at the First Amendment, then it will help preserve these fundamental constitutional rights at the core of American society when such attacks are made. It is self-defeating to aim to protect constitutionally-derived freedom from terrorism by destroying the very source of that freedom.

4. *DETROIT FREE PRESS AND NORTH JERSEY NEWSPAPERS*

This article now turns to the first of the two recent cases involving access to deportation hearings. Of particular importance to this article is the discussion of the First Amendment right of access, rather than any due process concerns for non-citizens or other matters that are explored in the opinions. Thus the discussions of the cases below shall skim the opinions and focus on the areas in which press access is discussed.

a. *Detroit Free Press v. Ashcroft*

i. Lower court disposition

Briefly, this case arose out of the closure of the deportation hearing of Rabih Haddad to the press and public by Immigration Judge Elizabeth Hacker, who was acting in accordance with the Creppy Memorandum that mandated that >special interest= cases are closed to the press and the public.⁹⁰ The plaintiffs contended, amongst other things, that they have Aa right of access to such

hearings pursuant to the First Amendment of the United States Constitution.⁹¹

The District Court utilized the *Richmond Newspapers* test as laid out in *Press Enterprise II* to decide whether there was a right of access.⁹² Examining the >experience= prong of the test, the court found that since Congress was silent on the issue of whether or not deportation hearings should be closed or open, and because INS regulations indicate that deportation hearings are presumptively open to the public and press, there was a historical tradition of openness.⁹³ The court similarly found that the >logic= prong of the *Richmond Newspapers* test was also satisfied, indicating that:

[i]t 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. Openness is necessary for the public to maintain confidence in the value and soundness of the Government=s actions, as secrecy only breeds suspicion as to why the Government is proceeding against Haddad and aliens like him. And if in fact the Government determines that Haddad is connected to terrorist activity or organizations, a decision made openly concerning his deportation may assure the public that justice has been done.⁹⁴

Acknowledging that the First Amendment right of access is not absolute, but merely qualified, the court proceeded to search for any important or substantial interests the government may have had for excluding the press.⁹⁵ The government=s interests were indicated in an affidavit from James S. Reynolds, Chief of the Terrorism and Violent Crimes Section of the Justice Department=s Criminal Division.⁹⁶ The reasons supplied were as follows: (1) disclosure of the identities of special interest detainees may allow terrorist organizations to trace potential witnesses, who may then be subjected to harm; (2) if terrorist organizations know who is being detained, then the organizations may sever their ties with the detainees and prevent the government from infiltrating the organizations through the

detainees; (3) if terrorist organizations are made aware of who is being detained, the organization may have to find an alternative person to carry out the tasks assigned to the detainee; (4) releasing the names of the detainees may allow interested parties to falsify evidence and interfere with the hearing; and (5) keeping the names of the detainees confidential would prevent their identity being made known to the public, and thus prevent any stigma being attached to the detainees.⁹⁷ However, the court pointed out that this information had already been made public in this case, and there was also no means to stop the information being made public by the detainees themselves, their counsel, or their families.⁹⁸ The court then concluded that the interests of the government were not sufficient to require closure of this particular case.⁹⁹

ii. Sixth Circuit Court of Appeals findings and analysis

On appeal, the Sixth Circuit affirmed the decision of the trial court.¹⁰⁰ Early in the opinion,

Judge Keith wrote:

Today, the Executive Branch seeks to take [the safeguards within public trials] away from the public by placing its actions beyond public scrutiny. Against non-citizens, it seeks the power to secretly deport a class if it unilaterally calls them Aspecial interest@ cases. The Executive Branch seeks to uproot people=s lives, outside the public eye, and behind a closed door. Democracies die behind closed doors.¹⁰¹

After recognizing that non-citizens, whether legally or illegally within the United States, are entitled to the same protection under the Constitution as citizens,¹⁰² the Sixth Circuit indicated that the

Ordinary process of determining whether closure is warranted on a case-by-case basis sufficiently addresses [the government's] concerns about the release of potentially harmful information.¹⁰³ This finding is important in the analysis under the *Richmond Newspapers* test, as it shows that there is already an existing mechanism to close hearings as and when required, and thus a viable alternative to a blanket closure already exists, negating the need for the large scale closures as instructed by the Creppy Memo. Additionally, even if there was no existing mechanism for closing hearings when required, the opinion holds that a blanket closure of deportation hearings is not specific enough to be considered narrowly tailored to the government's specific interest.¹⁰⁴

A. *Richmond Newspapers* is the correct test to apply

The Sixth Circuit then turned its attention to the *Richmond Newspapers* test. The opinion first includes a discussion of how the *Richmond Newspapers* test has been extended to cover a wide variety of criminal proceedings¹⁰⁵, civil proceedings¹⁰⁶, and administrative hearings¹⁰⁷, including a university disciplinary board's proceedings¹⁰⁸, civil actions against an administrative agency¹⁰⁹, and municipal planning meetings.¹¹⁰ The court brushed aside the government's contention that there is a dividing line between judicial and administrative proceedings, and that the First Amendment right of access applies solely to judicial hearings.¹¹¹

The Sixth Circuit found that deportation hearings are quasi-judicial proceedings¹¹², and a [a] deportation hearing, although administrative, is an adversarial, adjudicative process, designed to expel

non-citizens from this country.¹¹³ Important to the idea that it is the nature of the proceeding rather than the name given to the proceeding that matters, the opinion quoted *Press Enterprise II*: A[T]he First Amendment question cannot be resolved solely on the label we give the event, i.e., >trial= or otherwise.¹¹⁴

The opinion proceeds to enlighten the reader about what a deportation hearing involves from the standpoint of the alien, quoting various sources: A[T]he ultimate individual stake in [deportation] hearings is the same or greater than in criminal or civil actions¹¹⁵; A[D]eportation can be the equivalent of banishment or exile¹¹⁶; A[t]hough 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.¹¹⁷ Yet despite showing a clear understanding of the stakes from the alien=s point of view, the Sixth Circuit failed to make the logical step of likening a deportation hearing directly to a criminal hearing, particularly in light of the presumption of involvement in terrorist (criminal) activity that was the driving force behind the rounding up of hundreds of Arab immigrants. Such a step would have served the purpose of placing a deportation hearing directly in the scope of the *Richmond Newspapers* test, which is at its most firmly rooted when applied to criminal proceedings.

Instead, the Sixth Circuit used three recent cases to illustrate that the substance of the administrative hearing is important, rather than the fact that it is an administrative hearing. The first case is *Sims v. Apfel*¹¹⁸, in which the court found it key to their decision that the substance of the Social Security hearing was not adversarial like a trial, but inquisitive.¹¹⁹ The second case is *Federal Maritime Commission v. South Carolina State Ports Authority*¹²⁰, in which the court=s decision

turned on the fact that the Federal Maritime Commission's proceedings "walks, talks, and squawks very much like a lawsuit", despite it being an administrative hearing.¹²¹ The final case, *United States v. Miami University*,¹²² indicated that the substance of the hearing plays a role in how the court views what the hearing actually is. In *United States v. Miami University*, the court declined to classify a university disciplinary hearing as a criminal trial for First Amendment right of access purposes because "student disciplinary proceedings do not afford the student the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call his own witnesses to verify his version of the incident".¹²³ Thus the details of any particular hearing should be examined in detail in order for a court to classify a hearing, rather than simply classifying the hearing on superficial factors such as the name of the hearing.

The Sixth Circuit's opinion proceeded to compare, in more detail, the similarities between a deportation hearing and a judicial hearing. Deportation hearings are related to judicial hearings in that both have similar procedural rules, evidentiary burdens, the right of the defendant to seek habeas corpus relief, and the right of the defendant to be represented by counsel of his own choosing.¹²⁴ Additionally, deportation hearings are conducted by an immigration judge, and the immigration judge plays no investigative or other role aside from presiding over the hearing.¹²⁵ Thus, the court concluded, "this system of administrative adjudication closely parallels the judicial model of decision making", and the *Richmond Newspapers* test is applicable.¹²⁶

B. Logic prong analysis

Having reached the conclusion that the *Richmond Newspapers* test is the correct test to apply in determining whether a qualified First Amendment right of access to deportation hearings exists, the court examined the first prong of the test - whether deportation proceedings have traditionally been open to the public and press. The court found that deportation hearings have historically been open to the public.¹²⁷ In reaching this decision, the court indicates that INS regulations, since 1965, have ensured the presumptive openness of deportation hearings.¹²⁸ The court also noted that exclusion hearings have been explicitly closed to the public, and Congress could have easily specified that deportation hearings were to be conducted away from the public if it had intended deportation hearings to be closed.¹²⁹ The court also came close to declaring deportation hearings the functional equivalent of criminal trials, by drawing attention to the historical fact that >beginning with the Transportation Act of 1718, the English criminal courts could enter an order of transportation or banishment as a sentence in a criminal trial.¹³⁰

C. Experience prong analysis

Turning to the second prong of the *Richmond Newspapers* test - whether public access plays an important and positive role in deportation proceedings - the court immediately concluded that A[p]ublic access undoubtedly enhances the quality of deportation proceedings.¹³¹ The Sixth Circuit recounted the standard reasons why public access is important: it acts as a check on the actions of the

government by making sure that the hearings are fair and conducted properly;¹³² it guarantees that mistakes can be corrected rapidly;¹³³ allowing public access has a therapeutic effect, and serves as outlets for community concern, hostility, and emotions;¹³⁴ access enhances the trust that the proceedings are conducted fairly, simply by the fact that anyone can attend, even if nobody actually does attend;¹³⁵ and access bridges the gap between government affairs and the individual citizen.¹³⁶

Having satisfied both the experience and the logic prongs of the *Richmond Newspapers* test, the court declared that a qualified First Amendment right of access to deportation hearings exists.¹³⁷ The court's attention then turned to whether the government has made a showing sufficient to overcome the qualified right.

D. Compelling interests, narrowly tailored

Interestingly, the Sixth Circuit's opinion held that the government has in fact shown that there are compelling interests sufficient to justify closing the proceedings to the public.¹³⁸ Indicating the reasons listed in James S. Reynolds's affidavit, recited above in the description of the decision at the District Court, the Sixth Circuit concluded that prevention of terrorism is a compelling interest.¹³⁹ Although the District Court dismissed the government's interests listed in the affidavit as irrelevant as the information the government sought to protect was available from other sources¹⁴⁰, the Court of Appeals viewed the government's interests more generally.

Quoting from *J. Roderick MacArthur Foundation v. Federal Bureau of Investigation*¹⁴¹, the

Sixth Circuit used the analogy of constructing a mosaic - individual and small pieces of information revealed at a deportation hearing may have no obvious importance until they are placed in the context of a larger mosaic of information that a terrorist group may be collecting. The court deferred judgment on the importance of the information sought to be kept confidential by closing deportation hearings to the government, and indicated that Agents are certainly in a better position to understand the contours of the investigation and the intelligence capabilities of terrorist organizations than the court.¹⁴² However, the Sixth Circuit did agree with District Court's conclusion that because the information was available to the public through other channels in this particular case, the government had not made a case to warrant closure of the hearings in this particular individual situation.¹⁴³

Although the government was found to have a compelling interest in closing deportation hearings, the government's methods of protecting those interests were not found to be narrowly tailored.¹⁴⁴ The *Richmond Newspapers* test provides that even if a qualified right of access is found, the government can overcome this right by showing a compelling interest, and means of protecting that interest that are narrowly tailored. The Sixth Circuit found that the Creppy Memo was over-inclusive, being too broad and indiscriminate.¹⁴⁵ Additionally, the court found that there were other methods that could be used to prevent the release of the specific information the government sought to withhold from the public, such as the use of in camera reviews or protective orders.¹⁴⁶ In particular, the court found that the speculative nature of the government's use of the mosaic theory - the fact that the government made no showing that confidential information was in fact part of the deportation hearings in this case - aided the court in reaching the conclusion that the Creppy Memo was overly broad.¹⁴⁷

In concluding its discussion of the *Richmond Newspapers* test, Judge Keith wrote the following on behalf of the court:

In sum, we find that the Government=s attempt to establish a narrowly tailored restriction has failed. The Creppy directive is under-inclusive by permitting the disclosure of sensitive information while at the same time drastically restricting First Amendment rights. The directive is over-inclusive by categorically and completely closing all special interest hearings without demonstrating, beyond speculation, that such a closure is necessary.¹⁴⁸

Adopting an outlook that is similar to the pathological perspective, the court=s final words are as follows:

Without question, the 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.¹⁴⁹

b. *North Jersey Media Group, Inc. v. Ashcroft*

i. Lower court disposition

This case is similar to *Detroit Free Press* in factual background. Essentially, reporters were excluded from deportation hearings because of the Creppy Memo, and the initial complaint alleged that the government Adenied plaintiffs= right of access to certain deportation hearings as protected by the First Amendment of the United States Constitution.¹⁵⁰ It is notable that this complaint is virtually identical in substance to that claimed by the plaintiffs in *Detroit Free Press*.

Skipping to the trial court's discussion of whether a qualified First Amendment right of access exists for deportation hearings, the District Court immediately turned its attention to the *Richmond Newspapers* test.¹⁵¹ The court, similar to the *Detroit Free Press* case, first writes about the formation of the *Richmond Newspapers* test, followed by a concise listing of the interests that benefit from open proceedings.¹⁵² Following this, the court utilized the fact that the First Amendment right of access has been extended continuously by the *Richmond Newspapers* test to rebut the government's contention that courts had not explicitly recognized such a right as applicable to deportation hearings, and as such no right existed.¹⁵³ The court wrote, A[w]hile [the government's assertion] may be so, this observation neither negates such a right nor provides a basis for departing from the *Richmond Newspapers* experience and logic test.¹⁵⁴ After reciting how the *Richmond Newspapers* test has been used to expand the First Amendment right of access to proceedings far beyond the basic criminal trial, the District Court indicated that it saw no reason why it would not be applicable to determine whether to expand the right of access to deportation hearings.¹⁵⁵

After finding that the *Richmond Newspapers* test was appropriate, the District Court then addressed the history of openness prong - the experience prong.¹⁵⁶ Almost identical to the reasoning applied in *Detroit Free Press*, the court first indicated that due process rights have been applied to deportation hearings for almost a century, and that federal regulations explicitly state that deportation proceedings are presumptively open.¹⁵⁷ However, the court's opinion delves deeper into the experience prong, utilizing the Third Circuit's decision in *United States v. Simone*, and noted that even if there is not a history of openness, it does not necessarily mean that there is a tradition of closure:

the court must still examine the logic prong in situations where there is no tradition of openness or closure.¹⁵⁸

Moving on to the logic prong, the District Court immediately found that there is no doubt that deportation proceedings inherently involve a governmental process that affects a person's liberty interest, and, as the Supreme Court has held, must comport with constitutional guarantees of due process.¹⁵⁹ Again, remarkably similar to *Detroit Free Press*, the opinion likened deportation hearings to judicial proceedings by virtue of the procedural similarities between the two, and because the ultimate individual stake in these proceedings is the same as or greater than in criminal or civil actions.¹⁶⁰ With no further ado, the court concluded that there is a qualified right of public access to deportation hearings protected by the First Amendment.¹⁶¹

Addressing the possibility that the Creppy Memo would be considered a narrowly tailored means serving a compelling government interest, the opinion divided the government's interests as stated in the Creppy Memo into two categories. The first category is the government's desire to prevent setbacks to its investigations into terrorism that may be caused by open hearings, and the second category is the government's desire to prevent the stigma or harm to detainees that might result if hearings were open.¹⁶² The District Court concisely addressed the first of these interests, stating A[t]he problem with the Creppy Memo is that there is nothing in it to prevent disclosure of this very information by the special interest detainee or that individual's lawyer, both of whom are permitted to be present in the special interest proceedings. . . . Therefore, by definition, the Creppy closure dictates are not narrowly tailored to serve the government's interests because they do not

advance those interests.¹⁶³ It is notable that the court looked to *Detroit Free Press* as a basis for this conclusion.¹⁶⁴ With regard to the second category, the District Court found that the Creppy Memo is once again too broad, as it does not allow the detainee to make the decision about what is best for the detainee=s reputation and safety, noting that Aclosure may be seen by some detainees as having a negative impact upon them and their interests.¹⁶⁵

In reaching the final conclusion that the Creppy Memo is not narrowly tailored enough to serve the government=s interests, the opinion indicated that it did not see why in camera reviews of information considered sensitive would not be a suitable alternative means of achieving the government=s desired ends.¹⁶⁶

It is highly notable that the trial court decision in *North Jersey Media Group* follows virtually the same logic as that applied by the *Detroit Free Press* opinions in reaching the same conclusion. However, it is on appeal to the Third Circuit that *North Jersey Media Group* is overturned, and the split between the Third and Sixth Circuits arises.

ii. Third Circuit Court of Appeal=s findings and analysis

Judge Becker of the Third Circuit delivered the opinion of the appeals court in *North Jersey Media Group*. In the introduction of the opinion, the Third Circuit indicated a clear concern for national security, writing:

[t]his case arises in the wake of September 11, 2001, a day on which American life changed drastically and dramatically. The era that dawned on Spetember 11th, and the

war against terrorism that has pervaded the sinews of our national life since that day, are reflected in thousands of ways in legislative and national policy, the habits of daily living, and our collective psyches. *Since the primary national policy must be self-preservation*, it seems elementary that, to the extent open deportation hearings might impair national security, that security is implicated in the logic test.¹⁶⁷

This is immediately distinguishable from the Sixth Circuit's contrary outlook in *Detroit Free*

Press:

Without question, the 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*.¹⁶⁸

A. *Richmond Newspapers* is the correct test to apply

The Third Circuit begins its discussion of the *Richmond Newspapers* test by recounting the history of the *Richmond Newspapers* test, acknowledging that the *Richmond Newspapers* test has been extended to cover many facets of criminal proceedings and civil trials.¹⁶⁹ The court then turned to a dedicated analysis of the applicability of the *Richmond Newspapers* test to administrative hearings, and the court stated that *Richmond Newspapers* is a test broadly applicable to issues of access to government proceedings, including removal, and noted its agreement with the Sixth Circuit in *Detroit Free Press* on the same issue.¹⁷⁰ Having ascertained that *Richmond Newspapers* was the applicable test, the court proceeded to examine whether there was a First Amendment right of access to deportation hearings when the *Richmond Newspapers* test is applied.

B. Experience prong analysis

The Third Circuit jumped right into a discussion of the history of access to hearings that stem from the political branch rather than the judicial branch. Delving far back to the past, the court informed us that Patrick Henry once indicated that transactions as relate to military operations or affairs of great consequence could arguably be kept secret.¹⁷¹ Additionally, the Third Circuit pointed to the limited access the public has to Congressional practice today.¹⁷² The opinion then proceeded to list numerous administrative hearings that can be closed for various reasons, generally for a good cause or to protect the public interest.¹⁷³ Regardless, the Third Circuit still examined whether deportation hearings have been historically open to the degree needed to satisfy the experience prong of the *Richmond Newspapers* test.

The court concluded that based on both Supreme Court and Third Circuit precedents, the tradition of open deportation hearings is too recent and inconsistent to support a First Amendment right of access.¹⁷⁴ In reaching this conclusion, the court acknowledged that since the late 19th century, Congress has repeatedly failed to explicitly state that deportation hearings are to be closed, even though Congress has explicitly stated that exclusion hearings are closed to the public.¹⁷⁵ But the court also stated that deportation hearings have been closed to the public on occasion by virtue of some deportation hearings being held in hospitals, prisons, or private homes, and that there is no public right of access to such locations.¹⁷⁶ Additionally, the court indicated that deportation hearings that involve abused children and spouses are closed to the public.¹⁷⁷ The court relied on this history of occasional

closed deportation hearings amidst a mass of open deportation hearings to hold that A[t]he tradition of open deportation hearings is simply not comparable@ to the unequivocal historical complete openness of criminal trials for many centuries, stating that Aa recent - and rebuttable - regulatory presumption is hardly the stuff of which Constitutional rights are forged@.¹⁷⁸

Importantly, where the District Court indicated that *United States v. Simone* made it possible for a court to find the experience prong satisfied where there was no clear or lengthy history of openness,¹⁷⁹ the Third Circuit read *Simone* differently. *Simone*, according to the Third Circuit, only placed a greatly reduced emphasis on the experience prong of the *Richmond Newspapers* test because the matter in question - access to jury misconduct proceedings in a criminal trial - was surrounded by Aoverwhelming historical support for access in other phases of the criminal process, [and that the court was] reluctant to presume that the opposite rule applies in this case in the absence of a distinct tradition to the contrary.@¹⁸⁰ Since the history of access to administrative hearings is hardly comparable to the history of access to criminal proceedings, the leap of applying *Simone* to proceedings that do not lie close to a historical tradition of openness was too great for the court to make.

Although the court, at this point, indicated its confidence that the experience prong of the *Richmond Newspapers* test was not satisfied with regards to deportation hearings, the court addressed the Supreme Court=s holding in *Federal Maritime Commission v. South Carolina Ports Authority*.¹⁸¹ It was in this opinion that the Supreme Court held that sovereign immunity applied to administrative hearings because they Awalk, talk, and squawk like a civil lawsuit@,¹⁸² and Aformal administrative adjudications were all but unheard of in the late 18th century and early 19th century, [so]

the dearth of specific evidence indicating whether the Framers believed the States= sovereign immunity would apply in such proceedings is unsurprising@.¹⁸³ As such, the Supreme Court used the current similarities between judicial proceedings and the administrative adjudication conducted by the Federal Maritime Commission to draw the conclusion that the two were virtually the same, and states would have sovereign immunity from both.¹⁸⁴

However, the Third Circuit felt it unnecessary to interpret *Federal Maritime Commission* widely, and indicated that since access to deportation hearings was not a matter that could impinge on state sovereignty, deportation hearings should not be considered similar to judicial hearings, despite the obvious similarities between the two.¹⁸⁵ It is notable that the Sixth Circuit utilized *Federal Maritime Commission* as illustrative of how the substance of the hearings was more important than the superficial details of the hearing when determining whether to treat the hearing as judicial, inquisitive, or otherwise.¹⁸⁶

C. Logic prong analysis

Turning to the Third Circuit=s examination of the logic prong of the *Richmond Newspapers* test, the Third Circuit held that Athe logic inquiry has drifted from its intended role and that, properly conceived, it does not support openness in this case.@¹⁸⁷ Interestingly, the Third Circuit approached the logic inquiry from a different angle. After acknowledging the standard functions served by openness¹⁸⁸, the court introduced an additional factor: Athe calculus must perforce take account of the flip side - the

extent to which openness impairs the public good.¹⁸⁹ In *Detroit Free Press* and other cases relying on the *Richmond Newspapers* test, the >flip side= was examined *after* a qualified First Amendment right of access was found, rather than as part of the logic prong. That is, in *Detroit Free Press*, the impairment of the public good was considered to be related solely to a compelling government interest, rather than as a general consequence of openness, as if national security was the government=s interest and not the interest of the public at large.

The Third Circuit=s opinion then weighed the benefits of openness with the security concerns of the government in reaching its conclusion that the logic prong is not satisfied. The opinion listed six >governmental interests= that the court considered part of the logic prong analysis. The interests are that openness will reveal Asources and methods of investigation@, and information that Awould allow the terrorist organization to see patterns of entry, what works and what doesn=t@, Awill inform the terrorist organization as to what cells to use and which not to use for further plots and attacks@, information that may cause the A[acceleration of] the timing of a planned attack@, Aallow terrorist organizations to interfere with pending proceedings by creating false evidence@, and information that will protect the INS detainee=s Asubstantial interest in having their possible connection to the ongoing investigation kept undisclosed.@¹⁹⁰ These interests are comparable to those listed in *Detroit Free Press*, which were considered to be compelling governmental interests by the Sixth Circuit.

The Third Circuit continued to combine the logic prong with the examination of compelling government interests that are narrowly tailored by subscribing to a theory put forth by Dale Watson, Executive Assistant Director for Counterterrorism and Counterintelligence for the Federal Bureau of

Investigation. Mr. Watson is quoted as saying, "The 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."¹⁹¹ This weak excuse for the blanket closure of special interest deportation hearings, whether containing any fragments of a mosaic of security related information or not, is validated by the Third Circuit, which was unwilling to "lightly second-guess" any of the reasoning behind the government's desire for blanket closings, despite admitting that "[t]he newspapers are undoubtedly correct that the representations of [Mr. Watson] are to some degree speculative, at least insofar as there is no concrete evidence that closed deportation hearings have prevented, or will prevent, terrorist attacks."¹⁹²

In finally concluding that the *Richmond Newspapers* test has not been satisfied by the plaintiffs, Judge Becker notably summed up by pointing out that all the people responsible for the September 11th attacks "were aliens", that "[a]s always, these aliens are given a heavy measure of due process", and the closure of the deportation hearings will not affect "the aliens who may be deported."¹⁹³

D. Dissent by Judge Scirica

The opinion by Judge Becker was not joined by Judge Scirica, who filed a dissenting opinion. Judge Scirica agreed with the majority and the Sixth Circuit that the *Richmond Newspapers* test applies to the determination of whether there is a First Amendment right of access to deportation hearings, but

disagreed with the majority by finding that a qualified right of access does exist when the test is properly applied.¹⁹⁴

The dissent first examined the experience prong. In its analysis, it found the fact that Congress has never closed deportation hearings, despite having multiple opportunities to do so, of some importance.¹⁹⁵ The dissent also noted that Congress left deportation hearings presumptively open to the public and the press for at least a century.¹⁹⁶ Relying on *Federal Maritime Commission v. South Carolina Ports Authority*, it concluded that the history of a particular proceeding or hearing should be considered within the history of the modern administrative state, rather than against legal history commencing with the drafting of the Constitution, as to do otherwise would be essentially limiting the *Richmond Newspapers* test to proceedings and hearings that were recognized at the turn of the 19th century, and ignoring the vast growth of the administrative state.¹⁹⁷

Also key to the dissent's conclusion that the experience prong is satisfied is the observation that there are obvious similarities between deportation hearings and judicial proceedings, and the similarities are such that it is a small leap to liken a deportation hearing to a judicial hearing for the purposes of reaching a fair result under the *Richmond Newspapers* test.¹⁹⁸ Importantly, the dissent asserted that simply because he considered deportation hearings to have a historical tradition of access, this does not mean that all administrative hearings will vicariously obtain the same historical tradition.¹⁹⁹

The logic test analysis by the dissent is dissimilar to that adopted by the Sixth Circuit and by the majority opinion. In Judge Scirica's own words, we must consider the value of openness in deportation hearings generally, not its benefits and detriments in special interest deportation hearings

in particular. If a qualified right of access is found . . . the analysis turns to whether particular issues raised in individual cases override the general limited right of access.²⁰⁰ Noting that national security is not implicated in many deportation hearings (for instance, those for marriage fraud and conviction of felonies), the demands of national security under the logic prong . . . do not provide sufficient justification for rejecting a qualified right of access to deportation hearings in general.²⁰¹ The dissent indicated that the national security interests are more applicable in the analysis of the existence of any compelling government interests, and declared that there is a qualified right of access to deportation hearings under the *Richmond Newspapers* test.²⁰²

In examining whether such interests are compelling enough to warrant a blanket closure, the dissent found that although issues of national security warrant particular deference to the government's expertise, the demands of the government can be met by the closure of deportation hearings on a case-by-case basis.²⁰³

5. THE NEED FOR GUIDANCE IN THE APPLICATION OF THE *RICHMOND NEWSPAPERS* TEST

It is clear from the opinions above that there is a significant lack of Supreme Court guidance in how the *Richmond Newspapers* test is to be applied. If the examination of the cases shown above is confusing, then the point is made. The two trial courts eloquently utilized the *Richmond Newspapers* test to reach a solid decision. However, three different appellate judges managed to interpret the *Richmond Newspapers* test in three different ways. Having a First Amendment right determined by a test that can't be consistently applied flies in the face of the principles of consistency and predictability.

The two circuits differ in their reading of the same case law and how previous decisions shape the experience and logic prongs of the test. The Sixth Circuit adopts a more open outlook towards the experience test, preferring to look at the nature of deportation hearings compared to proceedings which do have a qualified First Amendment right of access, and the tradition of openness of deportation hearings within the lifetime of the existence of such hearings. Adopting a different approach, the Third Circuit looks to the openness of deportation hearings in comparison to the proceedings that have the most well-established and firm right of access - criminal proceedings. In choosing this track, deportation hearings appear to have a checkered and short history of openness, and certainly one which can be distinguished from the unbroken, uncontradicted history of openness that bound the Supreme Court to conclude that a presumption of openness inheres the very nature of a criminal trial under our system of justice.²⁰⁴ Likewise, the Sixth Circuit's finding that the logic prong of the *Richmond*

Newspapers test was satisfied by an examination of whether public access plays a significant positive role in the functioning of the particular process in question,²⁰⁵ but the Third Circuit finds the logic prong unsatisfied and irrelevant in its current form.²⁰⁶

Such different outcomes - contrary in almost every respect with regard to the application of the same test to the same facts, and based upon the same case law - indicates a clear weakness in the *Richmond Newspapers* test. This weakness is not a result of the *Richmond Newspapers* test being ineffective when applied, as it has a long history of service without calls for a different test. The weakness is a result of the test being applied to a confusing area - administrative hearings that masquerade as quasi-judicial proceedings.²⁰⁷ Administrative hearings range from those that are clearly inquisitorial²⁰⁸ to those that walk, talk, and squawk like judicial hearings.²⁰⁹ While the *Richmond Newspapers* test has proven successful in extending the First Amendment right of access throughout judicial proceedings, courts are now treading softly when it comes to extending the right to administrative hearings, fearing that they may open the floodgates to a First Amendment right of access to all administrative proceedings, not just those that mimic judicial hearings.²¹⁰

The ambiguity apparent in the *Richmond Newspapers* test as applied to administrative hearings is perhaps providing a loophole for the furtherance of political aims.²¹¹ It is often the case that when contentions are made that restrictions on journalism are necessary for security, . . . the constraints typically have had little to do with self-preservation and much to do with politics and public relations.²¹² The First Amendment right of access is largely for the benefit of the public via the press, and the person who is the subject of the proceeding should not alter whether the press has access or

not. Indeed, the immigration status of the person who is the subject of the proceeding should be virtually irrelevant under the *Richmond Newspapers* test. However, Judge Becker's concluding comments in his majority opinion for the Third Circuit include the use of the word "alien" in a manner reminiscent of the word "negro" in cases such as *Scott v. Sandford*.²¹³ The Third Circuit's interpretation of the *Richmond Newspapers* test, contrary to the interpretation of the test by other federal courts, and resulting in an utterly contrary outcome to other federal courts, could be seen as an attempt to create a subclass of people within the United States - aliens. The Third Circuit's concluding remarks in particular - that the reality of the Creppy Memo is that the media will be the losers, not those who are having their lives decided behind closed doors and in hostile conditions²¹⁴, and who cares if the aliens (or, more accurate to the language in the opinion, the perpetrators) get a fair hearing, because they have already been given a heavy measure of due process, for which they should be grateful - would be consistent with such an attempt to push a political or personal agenda at the expense of the public's right of access, even if this is not the intended meaning of the statements.²¹⁵ It is unclear where the relevance of the proceedings involving aliens rather than any other person comes into the *Richmond Newspapers* test. The rights at stake are not belonging to the alien, but the press, yet the rights of aliens in today's climate depend heavily on public scrutiny of the government's activities.

6. USEFULNESS OF THE PATHOLOGICAL PERSPECTIVE

The ideas presented by the pathological perspective are particularly applicable to the solution to

the current split in the courts. The pathological perspective advocates the strengthening and refining of First Amendment standards and principles in times of peace and low stress, so that in times of war and other high stress, the resilient mechanisms for preserving First Amendment rights are already in place, and can be used to ensure that the core of the First Amendment will not be eroded on a whim.²¹⁶ Courts adopting the pathological perspective should seek to produce limit the range of discretion left to future decisionmakers who will be called upon to make judgments when pathological pressures are most intense.²¹⁷ This would, in turn, limit the ability of judges to make decisions that are damaging to the fundamental core principles of the Constitution. The pathological perspective is eloquently and succinctly backed up by Justice Frankfurter, who wrote that courts should not allow the impregnating atmosphere of the times to take precedence over foresighted judicial decisionmaking, and that constitutional issues must be determined by principles established in more tranquil periods.²¹⁸ It is notable that the pathological perspective suggests that the process should begin in times of peace, in preparation for times of war or stress, to prevent the situation encountered by the courts in *Detroit Free Press* and *North Jersey Media Group*.²¹⁹ However, there is no reason to doubt that the pathological perspective could be applied retroactively to correct a situation in which constitutional rights have already been threatened, but not yet decisively eroded.

It is clear that the courts are lacking the guidance of a simple, robust, and clear test to decide the First Amendment right of access. The *Richmond Newspapers* test is a prime example that A[c]ompllicated, subtle, imaginative legal arguments are not calculated to convince resistant officials and their constituencies that tolerance of threatening dissenters is a constitutional imperative.²²⁰ Equally

important is the need for a test targeted for the worst of times [that speaks] to persons who are neither first amendment specialists nor devotees.²²¹ Without simplicity and clarity, not only will the standards devised by the courts be unconvincing to those charged with making such decisions, but also by those who have to live with the consequences of those decisions (i.e. the public.)

Adoption of the pathological perspective does not mean that the core constitutional principles that have already been established have to change in any way.²²² The role of the pathological principle is structural, rather than substantive, in relation to constitutional principles; that is, it seeks to define and strengthen the constitutional principles and tests, rather than to affect any rights already established. Thus where precedent is unavailable, courts can look to the simplicity of the constitutional principles, rather than become confused in a mass of complicated and unclear decisions in an attempt to reach a decision.²²³

Interestingly, both District Courts in *Detroit Free Press* and *North Jersey Media Group* came close to decisions which adopted a pathological perspective. Both courts identified the First Amendment right of access to deportation hearings by using a simple, well defined test. Both courts applied the *Richmond Newspapers* test and reached the same decision. Both courts considered the current needs of the nation in their decisions. Each opinion was concise, well-founded in law, and reached a conclusion that nestled neatly within the already-established First Amendment right of access. Once the decisions reached the appellate level, the pathological perspective was lost primarily because the *Richmond Newspapers* test was open to excessive judicial interpretation that resulted in a vastly different determination of what the First Amendment rights of access were in relation to deportation

hearings. Both Courts of Appeal were unable to find clarity in the *Richmond Newspapers* test. Judge Becker of the Third Circuit produced an opinion that turned the *Richmond Newspapers* test inside out, and reached a conclusion that screamed that the *Richmond Newspapers* test is unclear, overly-complex, and open to abuse. It is obvious how the pathological perspective could have prevented this from occurring by limiting the scope of interpretation given to judges through the use of a more rigid, easy-to-understand, and clear version of the *Richmond Newspapers* test.

7. THE SUPREME COURT'S ROLE

This matter should be, and in all likelihood will be, addressed by the Supreme Court in the very near future. *Detroit Free Press* and *North Jersey Media Group* define a deep crack in the courts' interpretation of a key First Amendment right. The First Amendment right of access is important - Publicity is the sole of justice. Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account.²²⁴ Particularly in light of the sheer numbers of people who may be affected by these decisions, and the recent surge in proceedings that the government wishes to keep out of the public eye²²⁵, the First Amendment right of access is in dire need clarification.

However, the Supreme Court has a difficult task ahead. The recent terrorist attacks have placed the Constitution in a difficult place. Terrorists used some of the freedoms the Constitution guarantees to physically attack the United States in 2001. If the courts close the hatches and restrict the freedom the Constitution guarantees in an attempt to secure physical safety, then the terrorists win by

destroying the source of what they despise. If the courts determine that the Constitution should be protected, the terrorists win by utilizing those freedoms to launch further physical attacks. Doubtless, the pathological perspective was written in 1985 without the thought of events similar to 9/11 in mind. Its applicability is obvious, yet its application may need further consideration in this situation.

The Supreme Court could follow one of two paths. First, it could find that when the Constitution and national security conflict, that the Constitution should come first. This would entail following the *Richmond Newspapers* test and applying it to deportation hearings, finding that a special interest@ deportation hearings should be closed on a case-by-case basis. Second, the court could find that in such an unprecedented time of national stress, the Constitution comes a close second to the immediate >survival= of the United States, and the court would find that a special interest@ deportation hearings are to be closed with no questions asked.

More important than reaching the decision above, the Supreme Court needs to go one step further, even though it would not be obliged to do so. The Supreme Court should recognize the deficiencies of the *Richmond Newspapers* test, and make an effort to establish a clear and simple standard that can be followed. In doing so, the court could adopt a pathological perspective, and help preserve the core First Amendment right of access by limiting how much leeway the lower courts have in determining what does and does not have a First Amendment right of access. Since *Press Enterprise II*, the Supreme Court has been largely silent on the issue, and has allowed the lower courts to slowly expand the right of access to various innocuous proceedings. It is time for the court to return to the issue and define the test in a manner such that it can be applied by the lower courts to any manner

of proceedings, administrative or otherwise, and produce consistent and logical results each and every time. It is not necessary that the Supreme Court decide whether deportation proceedings are indeed covered by a redefined *Richmond Newspapers* test. Merely defining the test using the pathological perspective would suffice, as it would allow the lower courts to reach consistent decisions.

Regardless of what the Supreme Court decides, it must be particularly clear on one important issue. In upholding the blanket closing of Aspecial interest@ deportation hearings to the press, it must be careful to not venture closer to forming a modern two-tier United States similar to that which existed a century ago. Whereas in the late nineteenth century, African-Americans and whites formed two separate classes within the United States, a knee-jerk decision by the Supreme Court could set the stage for aliens to be a clearly defined lesser class than United States citizens if some of the rights that are currently afforded to aliens are visibly snatched back. It would be most prudent for the Supreme Court to distance itself from the analysis of the Third Circuit, and determine the issue solely by analyzing the *Richmond Newspapers* test. The fact that aliens are involved should be a sidenote, rather than a deciding issue.

8. CONCLUDING REMARKS

The Supreme Court faces a difficult decision - a gamble between national security and the Constitution. However, by producing a more robust First Amendment right of access test, it could do a good job of protecting both. The *Richmond Newspapers* test is not an irrelevant test. With

clarification and simplification, it could remain a useful and effective test even in times of national stress. By allowing access to all Aspecial interest@ proceedings, except those in which the government can demonstrate to the judge that there is a specific security threat, both the government and deportees= rights and needs can be preserved, and importantly, the United States would not be thought of a nation that throws out its highly-prized Constitution as soon as times get tough. The mechanisms for protecting the confidentiality of sensitive information are already well-established (e.g. in camera reviews of sensitive information, closing individual hearings as and when necessary rather than blanket closings), and there is no need for the court to uphold blanket closings as the only appropriate step to take.

But the *Richmond Newspapers* test needs to be redefined more tightly and carefully, with far better guidance in how it is to be applied. The split between *Detroit Free Press* and *North Jersey Media Group* shows how the *Richmond Newspapers* test, although well-established and useful, is open to excessive judicial interpretation and can produce inconsistent results because of this. In times of national stress, courts need to be able to uphold the core First Amendment principles against increased pressure from the government and the public. Focusing the *Richmond Newspapers* test would remove the abilities of judges to damage the First Amendment under such pressure, and remove the ability of judges to use the *Richmond Newspapers* test to further anti-alien agendas. When aiding in the success of attacks on the First Amendment, the courts are short-sightedly bowing under misguided public pressure, as A[p]athological periods tend to be short lived, but their consequences linger on.@²²⁶

1.78 Interpreter Releases 1836 (Dec. 3 2001).

2.*Id.* The text of the memorandum in full is as follows:

As some of you already know, the Attorney General has implemented additional security procedures for certain cases in the Immigration Court. Those procedures require us to hold the hearings individually, to close the hearing to the public, and to avoid discussing the case or otherwise disclosing any information about the case to anyone outside the Immigration Court.

If any of these cases are filed in your court, you will be notified by OCIJ that special procedures are to be implemented. A more detailed set of instructions will be forwarded at that time to the judge handling the case and the court administrator. If you have questions about the handling of security arrangements for a particular case, you should contact your Assistant Chief Immigration Judge.

Although this is obviously a time of heightened security and concern, I am confident that each of us will remember our obligation to be fair and impartial in our dealings with everyone who comes to our courts. Thank you for your understanding and your cooperation.

Id.

3.*Id.*

4.*Id.*

5.78 Interpreter Releases 1837 (Dec. 3 2001) (emphasis added).

6.Roger Parloff, *Closed Doors*, THE AMERICAN LAWYER, Vol. XXIV, No. 11, pg. 130, Nov. 2002; Jim Edwards, *Letter From Newark*, THE NATION, Vol.275, No. 19, pg. 7, Dec. 2, 2002.

7.*Letter From Newark*, *supra* note 6.

8.Steve Fainaru, *Court Backs Closing of Detainees= Hearings*, WASH. POST, Oct. 9, 2002, at A1.

9.*Id.* See also Dan Eggen, *Judge Orders Release or Open Hearing for Detainee*, WASH. POST, Sept. 18, 2002, at A14 (indicating that the number of immigrants secretly detained and subsequently deported is closer to 750).

10.*Courts Back Closing of Detainees= Hearings*, *supra* note 8.

11.*Id.*

12.*North Jersey Media Group, Inc. v. Ashcroft*, 205 F. Supp. 2d 288, 291 (D. N.J. 2002).

13.*Id.*

14.*Id.*

15.*Id.*

16.*Id.*

17.*Detroit Free Press v. Ashcroft*, 195 F. Supp. 2d 937, 941 (E.D. Mich. 2002).

18.*Id.*

19.*Id.*

20.*Detroit Free Press v. Ashcroft*, 195 F. Supp. 2d at 937.

21.*North Jersey Media Group*, 205 F. Supp. 2d at 288 (D.N.J. 2002).

22.This test was set forth in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980). The two part >experience and logic= test suggested that in determining whether a criminal trial should be open to the public, the court must examine both the history of openness and the utility of openness. The *Richmond Newspapers* test is explained in more detail later in the article.

23.*See Detroit Free Press*, 195 F. Supp. 2d, at 937; *North Jersey Media Group*, 205 F. Supp. 2d at 288.

24.*Detroit Free Press v. Ashcroft*, 303 F.3d 681 (3d Cir. 2002).

25.*North Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198 (6th Cir. 2002).

26.*See Detroit Free Press*, 303 F.3d at 681; *North Jersey Media Group*, 308 F.3d at 198.

27.*See Richmond Newspapers*, 448 U.S. at 565. Justice Burger=s opinion includes an excellent discussion on the relationship between the history of open trials and the current state of open trials in the United States.

28.KEITH EDDY, THE ENGLISH LEGAL SYSTEM 33 (4th ed., Sweet & Maxwell 1987)

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- 29.*Id.* at 37.
- 30.*Id.* at 33.
- 31.JACKSON=S MACHINERY OF JUSTICE 21 (J.R. Spencer, ed., Cambridge University Press 1989).
- 32.*Richmond Newspapers*, 448 U.S. at 566.
- 33.JACKSON=S MACHINERY OF JUSTICE, *supra* note 31, at 23.
- 34.Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606 (1982).
- 35.HERMAN COHEN, THE SPIRIT OF OUR LAWS 63-64 (Sweet & Maxwell 1907).
- 36.*Id.* at 64.
- 37.*See* G. Michael Fenner & James L. Koley, *Access to Judicial Proceedings: To Richmond Newspapers and Beyond*, 16 HARV. C.R.-C.L. L. REV. 415, 441,(1981).
- 38.JACKSON=S MACHINERY OF JUSTICE, *supra* note 31, at 23.
- 39.*Id.*
- 40.Nebraska Press Ass=n v. Stuart, 427 U.S. 539, 587 (1976) (Brennan, J., concurring). A wider quotation of the case indicates the broader reasoning for public trials.
- Secrecy of judicial action can only breed ignorance and distrust of courts and suspicion concerning the competence and impartiality of judges; free and robust reporting, criticism, and debate can contribute to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system, as well as improve the quality of that system by subjecting it to the cleansing effects of exposure and public accountability.
- Id.* Justice Brennan makes the interesting comparison with open trials and the famous words of Justice Brandeis, ASunlight is said to be the best of disinfectants; electric light the most efficient policeman.@ L. BRANDEIS, OTHER PEOPLE=S MONEY 62 (1933).
- 41.*See, e.g.*, Kathleen K. Olson, *Courtroom Access After 9/11: A Pathological Perspective*, 7 COMM. L. & POL=Y 461, 461 (2002).
- 42.U.S. CONST. amend. I (ACongress 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.@)
- 43.U.S. CONST. amend. VI.
- 44.*Richmond Newspapers Inc. v. Virginia*, 448 U.S. 555 (1980).
- 45.For a good discussion on press access to courtrooms prior to the *Richmond Newspapers* case, see generally JEROME A. BARRON AND C. THOMAS DIENES, HANDBOOK OF FREE SPEECH AND FREE PRESS 505-606 (Little Brown and Co., 1979), which was published a year before *Richmond Newspapers* was decided. A more detailed analysis of *Richmond Newspapers* is beyond the scope of this article. However, G. Michael Fenner & James L. Koley, *Access to Judicial Proceedings: To Richmond Newspapers and Beyond*, 16 HARV. C.R.-C.L. L. REV. 415, 441,(1981), will provide the interested reader with a more in-depth examination of the case.
- 46.HANDBOOK OF FREE SPEECH AND FREE PRESS, *supra* note 45, at 558.
- 47.Justices White and Stevens joined Justice Burger in his opinion.
- 48.HANDBOOK OF FREE SPEECH AND FREE PRESS, *supra* note 45, at 580.
- 49.*Id.* at 581.
- 50.*Id.*
- 51.Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982).
- 52.*Id.* at 606.
- 53.*Id.* at 606-07.
- 54.Press Enterprise v. Superior Court, 464 U.S. 501 (1984).
- 55.*Id.* at 504-10.
- 56.*Id.* at 509.
- 57.*Id.* at 510.

58.The historical aspect of access to proceedings relates to the >experience= prong of the test, and the usefulness of public access to proceedings relates to the >logic= prong.

59.Press Enterprise v. Superior Court, 478 U.S. 1 (1986). Throughout the remainder of the article, the two identically-named *Press Enterprise* cases shall be referred to as *Press Enterprise I* and *Press Enterprise II* for the sake of clarity.

60.*Id.* at 13.

61.*Id.* at 13-14, quoting *Press Enterprise I*, 464 U.S. at 510.

62.*Id.* at 9.

63.*Id.* at 10.

64.*Id.* at 11, n.4.

65.*Id.* at 11.

66.This is distilled from the four cases mentioned in the preceding text.

67.Again, this is a distillation of the four cases mentioned earlier.

68.*See* *Richmond Newspapers Inc. v. Virginia*, 448 U.S. 555, 581 (1980).

69.*See* *Press Enterprise v. Superior Court*, 464 U.S. 501, 504-10 (1984).

70.*See* *Press Enterprise II*, 478 U.S. at 13.

71.For a complete picture of how the press right of access has been extended and defined over the years, see Dan Paul, Richard J. Ovelman, and Enrique D Arana, *Access, Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series*, Practising Law Institute, Nov. 14-15, 2002.

72.*See* 8 C.F.R. ' 3.9-3.44 for the details of immigration court procedures.

73.*Society of Professional Journalists v. Society of Labor*, 616 F. Supp. 569, 573-74 (D. Utah 1985) (appeal dismissed by *Society of Professional Journalists v. Society of Labor*, 832 F.2d 1180 (10th Cir. 1987)).

74.*See In re Romeo*, 1987 U.S. Dist. LEXIS 12595 (D. Mass. May 1, 1987).

75.*Kaoru Yamataya v. Fisher*, 189 U.S. 86 (1903) (also known as the *Japanese Immigrant Case*).

76.*Id.* at 101. Justice Harlan wrote that:

it is not competent for the Secretary of the Treasury or any executive officer, at any time within the year limited by the statute, arbitrarily to cause an alien who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here, to be taken into custody and deported *without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States*. No such arbitrary power can exist where the principles involved in due process of law are recognized.

Id. at 101 (emphasis added).

77.8 C.F.R. ' 3.27.

78.*See* Marin R. Scordato & Paula A. Monopoli, *Free Speech Rationales After September 11th: The First Amendment in Post-World Trade Center America*, 13 STAN. L. & POL=Y REV. 185, 203 (2002); Rodney A. Smolla, *Terrorism and the Bill of Rights*, 10 WM. & MARY BILL RTS. J. 551 (2002); Kathleen K. Olson, *Courtroom Access After 9/11: A Pathological Perspective*, 7 COMM. L. & POL=Y 461 (2002). *See generally* PETER STOLER, *THE WAR AGAINST THE PRESS: POLITICS, PRESSURE, AND INTIMIDATION IN THE 80'S* 16-36 (Dodd, Mead & Co. 1986) (recounting the history of free speech and free press); JEFFERY A. SMITH, *WAR AND PRESS FREEDOM: THE PROBLEM OF PREROGATIVE POWER* (Oxford University Press 1999) (broadly discussing the topic of war and the press); RODNEY A. SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY* 291-320 (Alfred A. Knopf 1992) (detailing free speech in relation to the Persian Gulf War and national security issues.)

79.*See* *FREE SPEECH IN AN OPEN SOCIETY*, *supra* note 78, at 555.

80.*Schenck V. United States*, 249 U.S. 47 (1919).

81.*Id.* at 52.

82.One merely has to glance at the unfortunately named >USA PATRIOT Act= to see the recent heavy restrictions on immigrants and people of certain nationalities in the wake of 9/11. The naming of the act seems to add to the frenzy of anti-immigrant behavior post 9/11 by insinuating that a patriotic US citizen - and who would want to be labeled non-patriotic today? - agrees with the large scale erosion of rights and the placement of much of the blame squarely on the shoulders of immigrants.

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83. *Toyosaburo Korematsu v. United States*, 323 U.S. 214 (1944).
84. *Id.* at 218-19.
85. *Edwards*, *supra* note 6. Even as this article is being written, there are reports circulating in the press that the INS is continuing to detain hundreds of immigrants:
- Hundreds of men and boys from Middle Eastern countries were arrested by federal immigration officials in Southern California this week when they complied with orders to appear at INS offices for a special registration program. . . . Immigration and Naturalization Service spokesmen refused Wednesday to say how many people the agency had detained, what the specific charges were or how many were still being held . . . the number across Southern California was 500 to 700. In Los Angeles, up to one-fourth of those who showed up to register were jailed, lawyers said. . . . Many of those arrested, according to their lawyers, had already applied for green cards and, in some instances, had interviews scheduled in the near future. Although they had overstayed their visas, attorneys argue, their clients had already taken steps to remedy the situation and were following the regulations closely. "These are the people who've voluntarily gone" to the INS, said Mike S. Manesh of the Iranian American Lawyers Assn. "If they had anything to do with terrorism, they wouldn't have gone."
- Megan Garvey, Martha Groves, and Henry Weinstein, *Hundreds are Detained After Visits to INS*, L.A. TIMES, Dec. 19, 2002, at A1.
86. Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449 (1985).
87. *Id.* at 450.
88. *Id.* at 452-55.
89. *Id.* at 467-68.
90. *Id.* at 941-42.
91. *Id.*
92. *Id.* at 942.
93. *Id.* at 943, *citing* 8 C.F.R. ' 3.27.
94. *Id.* at 944.
95. *Id.* at 944-45.
96. *Id.* at 946.
97. *Id.* at 947.
98. *Id.*
99. *Id.*
100. *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 683 (6th Cir. 2002).
101. *Id.*
102. *Id.* at 688.
103. *Id.* at 692-93.
104. *Id.* at 692.
105. *Id.* at 695.
106. *Id.*
107. *Id.*
108. *United States v. Miami University*, 294 F.3d 797 (6th Cir. 2002).
109. *Brown & Williamson Tobacco Corp. v. Federal Trade Comm=n*, 710 F.2d 1165 (6th Cir. 1983).
110. *Whiteland Woods, L.P. v. West Whiteland*, 193 F.3d 177 (3d Cir. 1999).
111. *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 695 (6th Cir. 2002).
112. *Id.* at 696.
113. *Id.*
114. *Id.* at 695, *quoting* *Press Enterprise v. Superior Court*, 478 U.S. 1, 7 (1986).
115. *Id.* at 696, *quoting* *North Jersey Media Group, Inc. v. Ashcroft*, 205 F. Supp. 2d 288, 301 (D. N.J. 2002).
116. *Id.*, *quoting* *Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947).
117. *Id.*, *quoting* *Bridges v. Wixon*, 326 U.S. 135, 154 (1945).
118. *Sims v. Apfel*, 530 U.S. 103 (2000).

119.*Id.* at 110-11.
120.Fed. Maritime Comm=n v. South Carolina State Ports Auth., 122 S. Ct. 1864, 1873 (2002).
121.*Id.* at 1874.
122.United States v. Miami University, 294 F.3d 797 (6th Cir. 2002).
123.*Id.* at 822, *quoting* Goss v. Lopez, 419 U.S. 565, 583 (1975).
124.Detroit Free Press v. Ashcroft, 303 F.3d 681, 698 (6th Cir. 2002).
125.*Id.* at 699.
126.*Id.* at 699-700.
127.*Id.* at 701.
128.*Id.*, citing 8 C.F.R. ' 3.27.
129.*Id.* Exclusion hearings are hearings to determine the initial admissibility of an alien, while deportation hearings determine whether or not an alien already lawfully admitted should be removed from within United States borders.

130.*Id.* at 702.
131.*Id.* at 703.
132.*Id.* at 703-04.
133.*Id.* at 704. The court makes good use of two cases. The first is *Kwock Jan Fat v. White*, 253 U.S. 454 (1920), of which it quotes A[i]t is better that many Chinese immigrants should be improperly admitted than one natural born citizen of the United States be permanently excluded from his country@. *Id.* at 464. This indicates that it is clearly preferable for the court to err on the side of caution when dealing with the right of certain people to live in the United States. The second case is *Soc=y of Prof=l Journalists v. Sec=y of Labor*, 616 F. Supp. 569 (1985), which indicates that ACongressional oversight hearings can prevent future mistakes, but they can do little to correct past ones. In contrast, openness at the hearings can allow mistakes to be cured at once.@ *Id.* at 576. Should the public be allowed access to deportation hearings, any mistakes could be immediately corrected, rather than allowed to stand uncorrected simply because nobody who was aware of the mistake was present at the hearing.
134.*Detroit Free Press*, 303 F.3d at 704.
135.*Id.*
136.*Id.* Judge Keith writes that A[w]hen government selectively chooses what information it allows the public to see, it can become a powerful tool for deception.@ *Id.*
137.*Id.*
138.*Id.* at 705.
139.*Id.* at 705-06.
140.Detroit Free Press v. Ashcroft, 195 F. Supp. 2d 937, 947 (E.D. Mich. 2002).
141.J. Roderick MacArthur Found. v. Federal Bureau of Investigation, 102 F.3d 600 (D.C. Cir. 1996).
142.*Detroit Free Press*, 303 F.3d at 707.
143.*Id.*
144.*Id.*
145.*Id.* at 708.
146.*Id.*
147.*Id.* at 709.
148.*Id.* at 710.
149.*Id.* at 711.
150.North Jersey Media Group, Inc. v. Ashcroft, 205 F. Supp. 2d 288, 290 (N.J. 2002).
151.*Id.* at 298.
152.Judge Bissell writes that A[I]n the wake of *Richmond Newspapers*, courts have repeatedly referred to the decision as authority for the numerous interests that are served by open judicial proceedings, such as: promotion of informed discussion of governmental affairs by providing the public with the more complete understanding of the judicial system; promotion of the public perception of fairness which can be achieved only by permitting full public view of the proceedings; providing a significant therapeutic value as an outlet for community concern, hostility and emotion; serving as a check on corrupt practices by exposing

the judicial process to public scrutiny; enhancement of the performance of all involved; and discouragement of perjury.@ *Id.* at 298-99 (citations omitted).

153.*Id.* at 299.

154.*Id.*

155.*Id.* at 300.

156.*Id.*

157.*Id.*, citing *Kaoru Yamataya v. Fisher*, 189 U.S. 86 (1903) (the *Japanese Immigrant Case*), and 8 C.F.R. ' 3.27.

158.*Id.*, citing *United States v. Simone*, 14 F.3d 833 (3d Cir. 1994), in which the court of appeals found that there was no clear history of closure or openness in juror misconduct proceedings, and thus the experience prong was not particularly useful. The court of appeals then stated that in making our determination we will rely primarily on the "logic" prong of the test.@ *Simone*, 14 F.3d at 838.

159.*North Jersey Media Group v. Ashcroft*, 205 F. Supp. 2d 288, 301 (D. N.J. 2002).

160.*Id.*

161.*Id.*

162.*Id.*

163.*Id.*

164.*Id.* The quote in the previous footnote is followed by *Accord Detroit Free Press v. Ashcroft*, 195 F. Supp. 2d 937 (E.D. Mich. 2002).@ *Id.*

165.*Id.* at 302.

166.*Id.*

167.*North Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198, 202 (2002) (emphasis added).

168.*Detroit Free Press v. Ashcroft*, 303 F.3d 681, 711 (6th Cir. 2002).

169.*North Jersey Media Group*, 308 F.3d at 204-07.

170.*Id.* at 208-09.

171.*Id.* at 209, quoting 3 ELLIOT=S DEBATES at 170. However, the author feels the use of Patrick Henry=s words is taken out of context. The full quotation would be as follows:

Such transactions as relate to military operations or affairs of great consequence, the immediate promulgation of which might defeat the interests of the community, I would not wish to be published, till the end which required their secrecy should have been effected. *But to cover with the veil of secrecy the common routine of business, is an abomination in the eyes of every intelligent man, and every friend to his country.*

[Mr. Henry then, in a very animated manner, expatiated on the evil and pernicious tendency of keeping secret the common proceedings of government, and said that it was contrary to the practice of other free nations. The people of England, he asserted, had gained *immortal honor by the manly boldness wherewith they divulged to all the world their political disquisitions and operations, and that such a conduct inspired other nations with respect.* He illustrated his arguments by several quotations.]

He then continued: I appeal to this Convention if it would not be better for America to take off the veil of secrecy. Look at us--hear our transactions! If this had been the language of the federal Convention, what would have been the result? Such a constitution would not have come out to your utter astonishment, conceding such dangerous powers, and recommending secrecy in the future transactions of government. I believe it would have given more general satisfaction, if the proceedings of that Convention had not been concealed from the public eye. This Constitution authorizes the same conduct. There is not an English feature in it. The transactions of Congress may be concealed a century from the public, consistently with the Constitution. This, sir, is a laudable imitation of the transactions of the Spanish treaty. We have not forgotten with what a thick veil of secrecy those transactions were covered.

3 ELLIOT=S DEBATES at 170-71 (emphasis added).

172.*North Jersey Media Group*, 308 F.3d at 209-10.

173.*Id.*

174.*Id.* at 211.

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- 175.*Id.* at 212, n.9-10.
- 176.*Id.*
- 177.*Id.*
- 178.*Id.* at 212-13.
- 179.*See* United States v. Simone, 14 F.3d 833, 838 (3d Cir. 1994).
- 180.*North Jersey Media Group*, 308 F.3d at 214.
- 181.Fed. Maritime Comm=n v. South Carolina Ports Auth., 122 S. Ct. 1864 (2002).
- 182.*Id.* at 1873.
- 183.*Id.* at 1872.
- 184.*Id.* at 1874.
- 185.*North Jersey Media Group*, 308 F.3d at 215.
- 186.Fed. Maritime Comm=n v. South Carolina State Ports Auth., 122 S. Ct. 1864, 1873 (2002).
- 187.*North Jersey Media Group*, 308 F.3d at 216.
- 188.These functions include A[1] promotion of informed discussion of governmental affairs by providing the public with the more complete understanding of the judicial system; [2] promotion of the public perception of fairness which can be achieved only by permitting full public view of the proceedings; [3] providing a significant community therapeutic value as an outlet for community concern, hostility and emotion; [4] serving as a check on corrupt practices by exposing the judicial process to public scrutiny; [5] enhancement of the performance of all involved; and [6] discouragement of perjury." *Id.* at 217.
- 189.*Id.*
- 190.*Id.* at 218-19.
- 191.*Id.* at 219.
- 192.*Id.*
- 193.*Id.* at 221.
- 194.*Id.*
- 195.*Id.* at 222.
- 196.*Id.*
- 197.*Id.*, quoting in part Fed. Maritime Comm=n v. South Carolina Ports Auth., 122 S. Ct. 1864, 1872 (2002).
- 198.*Id.* at 223.
- 199.*Id.*
- 200.*Id.* at 225.
- 201.*Id.*
- 202.*Id.*
- 203.*Id.* at 225-28.
- 204.Richmond Newspapers Inc. v. Virginia, 448 U.S. 555, 573 (1980).
- 205.Press Enterprise v. Superior Court, 478 U.S. 1, 8 (1986).
- 206.*North Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198, 217 (2002).
- 207.*Detroit Free Press v. Ashcroft*, 303 F.3d 681, 696 (6th Cir. 2002).
- 208.*North Jersey Media Group*, 308 F.3d at 223-24.
- 209.Fed. Maritime Comm=n v. South Carolina Ports Auth., 122 S. Ct. 1873 (2002).
- 210.*North Jersey Media Group*, 308 F.3d at 215.
- 211.Professor Blasi writes that:
- A third common feature of a pathological period is a comparatively high level of politicization regarding the question of toleration of dissent. Often because of a felt need for scapegoats, a substantial segment of the political community focuses on the activities of dissenters and on the response of government, including the courts, to those activities.
- Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 468 (1985).
- 212.JEFFERY A. SMITH, *WAR AND PRESS FREEDOM* 91 (Oxford University Press 1999)
- 213.Scott v. Sandford, 60 U.S. 393 (1856).
- 214.In *Haddad v. Ashcroft*, 221 F. Supp. 2d 799 (2002), the plaintiff claims that by classifying his deportation hearing as

Aspecial interest@, the proceedings would have been >tainted= (i.e. the possibility of terrorist involvement, whether valid or not, would have been introduced to the hearing, perhaps making the immigration judge far more likely to deport him. *Id.* at 802.

215.*North Jersey Media Group*, 308 F.3d at 221. The author does not wish to accuse Judge Becker of wishing to remove aliens from the United States, but merely wants to indicate that the potential for abusing the *Richmond Newspapers* test to achieve such ends is currently possible.

216.Biasi, *supra* note 211, at 449.

217.*Id.* at 474.

218.Dennis v. United States, 341 U.S. 494, 528 (1951) (Frankfurter, J., concurring).

219.*See generally*, Biasi, *supra* note 216.

220.*Id.* at 470-71.

221.*Id.* at 471.

222.Kathleen K. Olson, *Courtroom Access After 9/11: A Pathological Perspective*, 7 COMM. L. & POL=Y 461, 470 (2002).

223.*Id.*

224.JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE Vol.1 524 (1827).

225.The government is not merely limiting the closure of proceedings to deportation hearings, but is proposing closed military tribunals for many people detained as a result of 9/11 and subsequent US operations.

226.Vincent Biasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 458 (1985).