North Jersey Media Group, Inc. v. Ashcroft: The Third Circuit Upholds Secret Deportation Hearings for "Special Interest" Immigrants

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I. OVERVIEW

Immediately following the September 11, 2001, attacks, the United States Justice Department instituted a policy of secret deportation hearings for "special interest" cases involving immigrants whom the Attorney General determined might have links to, or knowledge of, the al-Qaeda network or other terrorist organizations.[1] On September 21, 2001, the Chief United States Immigration Judge, Michael Creppy, outlined new security measures required at these "special interest" proceedings (the Creppy Directive).[2] In particular, the Creppy Directive stated the hearings shall be closed to the public and the press, and only the deportee's attorney shall have access to the records of the proceedings.[3] The restriction on information included "confirming or denying whether such a case is on the docket or scheduled for a hearing."[4]

A consortium of media groups brought suit in the United States District Court for the District of New Jersey, claiming that denying the public and the press access to deportation hearings violated the First Amendment.[5] The district court agreed and issued an order enjoining Attorney General Ashcroft from holding closed hearings.[6] The government appealed.[7] The United States Court of Appeals for the Third Circuit, in a two to one decision, *held* that neither the public nor the press possessed a First Amendment right of access to deportation hearings and

1. N. Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198, 199 (3d Cir. 2002).
2. Detroit Free Press v. Ashcroft, 303 F.3d 681, 683-84 (6th Cir. 2002).
3. *Id.*
4. *N. Jersey Media Group*, 308 F.3d at 203.
5. *Id.* at 199, 203-04.
6. *Id.* at 199.
7. *Id.*

national security concerns justified closing hearings for this "special interest" category. *North Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198, 219-21 (3d Cir. 2002).

II. BACKGROUND

The right of access for the public and the press to judicial proceedings predates the birth of the U.S. government and was recognized at common law.[8] Moreover, the United States Supreme Court acknowledged the First Amendment guarantees a right of access to criminal proceedings.[9] Although the Constitution does not explicitly provide this right, the Court has found the right implicit in the long-standing history of access to criminal trials.[10]

Access to Executive Branch proceedings, on the other hand, was debated among the Framers and never resolved.[11] Although the Supreme Court has ruled on access to criminal and civil proceedings, it has never specifically dealt with the right of access to deportation proceedings.[12] This issue has recently resurfaced due to the government's deportation of immigrants suspected of aiding terrorist activities in conjunction with its effort to eradicate terrorism.[13]

In *Richmond Newspapers, Inc. v. Virginia*, the Supreme Court held that criminal trials must be open to the public absent specific findings of some overriding interest.[14] *Richmond Newspapers* involved a murder trial at which the judge, upon a motion by the defense, ordered the courtroom emptied and the trial closed to everyone except witnesses.[15] Two newspaper reporters removed from the courtroom and denied further access, subsequently challenged the constitutionality of the trial judge's order.[16] The Supreme Court created a two-pronged experience and logic test to determine whether the First Amendment granted a right

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8. *See id.* at 209.
9. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 576-77 (1980).
10. *Id.* at 575-77.
11. *See N. Jersey Media Group*, 308 F.3d at 209. At the Virginia ratification convention, Patrick Henry said, "Congress may carry on the most wicked and pernicious of schemes under the dark veil of secrecy. The liberties of a people never were, nor ever will be, secure, when the transactions of their rulers may be concealed from them." *Id.* Although the Framers wanted to guard against government secrecy, they also recognized that in order for the government to function effectively, not every executive proceeding could be open to the public. *Id.*
12. *See id.* at 207.
13. *See id.* at 220-21.
14. 448 U.S. at 581.
15. *Id.* at 559-60.
16. *See id.* at 560, 562-63.

of access to criminal trials.[17] The experience prong examined the particular proceeding to determine if it had a history of openness,[18] whereas the logic prong determined whether openness would benefit the proceeding or whether overriding concerns justified limiting access.[19]

The Court acknowledged the long history behind the presumption of open criminal trials, beginning even before the birth of the Constitution.[20] Despite the lack of explicit recognition by the Constitution, the Court held the First Amendment guarantees this right.[21] The Court observed "it would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted; as we have shown, recognition of this pervades the centuries-old history of open trials and the opinions of this Court."[22]

The Court also determined the logic prong was met because the trial court did not make any findings as to the need for a closed trial that would overcome the benefits guaranteed by openness.[23] Nor did the trial court consider any other alternatives to closure.[24] While *Richmond Newspapers* dealt solely with criminal trials, the Supreme Court has since applied this test to judge the merits of First Amendment claims regarding access to other government proceedings.[25] These subsequent decisions have formalized and expanded the application of the *Richmond Newspapers* test.[26]

In *Press-Enterprise Co. v. Superior Court*, the Court, using the experience and logic test, held the First Amendment provides a right of access to the transcript of a preliminary hearing.[27] *Press-Enterprise* involved a nurse who was being charged with murder for allegedly giving heart patients an overdose of drugs.[28] Because the case had attracted national publicity, the magistrate granted the defendant's unopposed

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17. *See id.* at 564-78.
18. *Id.* at 564-75.
19. *Id.* at 580-81.
20. *Id.* at 569.
21. *Id.* at 576.
22. *Id.* at 575.
23. *Id.* at 580-81.
24. *Id.*
25. *See, e.g.*, Press-Enter. Co. v. Superior Court, 478 U.S. 1, 8-10 (1986) (holding qualified First Amendment right of access applied to criminal preliminary hearings in California); Fed. Mar. Comm'n v. S.C. Ports Auth., 122 S. Ct. 1864, 1872-78 (2002).
26. *See Press-Enter. Co.*, 478 U.S. at 1; *S.C. Ports Auth.*, 122 S. Ct. at 1864.
27. 478 U.S. at 10.
28. *Id.* at 3.

motion for a closed preliminary hearing.[29] After the hearing, the magistrate refused to release the transcripts and sealed the record.[30]

In its review, the Supreme Court first noted that pretrial proceedings, like criminal trials, had historically been conducted before neutral and detached magistrates and had a presumption of openness.[31] Even states that had allowed closed preliminary hearings did so only upon a showing of just cause that overrode the openness presumption.[32] The Court observed, "Open preliminary hearings, therefore, have been accorded 'the favorable judgment of experience.'"[33]

The Court next examined the logic prong and determined that public access had a significant positive effect on pretrial hearings.[34] The Court concluded, because a First Amendment right of access attaches to preliminary hearings, "the proceedings cannot be closed unless specific, on the record findings are made demonstrating that 'closure is essential to preserve higher values and is narrowly tailored to serve that interest.'"[35] When the interest at stake is the defendant's right to a fair trial, closure may be deemed necessary only upon specific findings demonstrating a substantial probability that the rights of the accused will be prejudiced by an open proceeding and that no reasonable alternatives to closure exist.[36] Thus the Supreme Court held that the California Supreme Court's "reasonable likelihood of substantial prejudice" standard for deciding when to close preliminary hearings did not sufficiently guard the First Amendment right to access.[37]

The most recent Supreme Court case in this area is *Federal Maritime Commission (FMC) v. South Carolina Ports Authority*.[38] In that case, the Court held that state sovereign immunity barred the FMC from adjudicating a private party's complaint against the state.[39] The Court recognized that history could only provide limited guidance regarding the Constitution's applicability to administrative proceedings.[40] Specifically, the Court observed that "[t]he Framers, who envisioned a limited Federal Government, could not have anticipated the vast growth

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29. *Id.* at 3-4.
30. *Id.* at 4-5.
31. *Id.* at 10.
32. *Id.* at 11.
33. *Id.* (internal quotations and citation omitted).
34. *Id.* at 11-13.
35. *Id.* at 13-14 (internal quotations and citation omitted).
36. *Id.* at 14.
37. *Id.* at 14-15.
38. 122 S. Ct. 1864 (2002).
39. *Id.* at 1867-68.
40. *See id.* at 1872.

of the administrative state."[41] Thus, the Court's analysis focused on a comparison of the FMC administrative proceedings to civil litigation.[42] The Court noted that an FMC adjudication "walks, talks, and squawks very much like a lawsuit."[43] As a result, because the two proceedings were substantially similar, the Court found ample reason to warrant applying the same standards.[44]

The Third Circuit and the United States Court of Appeals for the Sixth Circuit are the only two courts that have squarely addressed the issue of a First Amendment right of access to deportation hearings.[45] Both cases also examined the issue against the backdrop of America's war on terrorism and the Attorney General's decision to close deportation hearings for "special interest" cases.[46]

In *Detroit Free Press v. Ashcroft*, the defendant, Rabih Haddad, overstayed his visa and as a result faced deportation.[47] He was labeled a "special interest" case because the government suspected that the Islamic charity managed by Haddad provided funds to terrorist organizations.[48] The Immigration Judge held Haddad's bond hearing on December 19, 2002, and "[w]ithout prior notice to the public, Haddad, or his attorney, courtroom security officers announced that the hearing was closed to the public and the press."[49] The judge denied Haddad bail, and the government detained him.[50] Several newspapers subsequently brought suit, alleging a violation of their First Amendment right of access to the proceedings.[51] The trial court held that the First Amendment provided a right of access to the proceedings based on the *Richmond Newspapers* test.[52]

The Sixth Circuit agreed.[53] The appellate court specifically noted the government's tremendous power to deport aliens.[54] Moreover, the court emphasized the potential abuse of this power: "Since the end of the 19th Century, our government has enacted immigration laws banishing,

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41. *Id.* (citation omitted).
42. *Id.* at 1872-74.
43. *Id.* 1873 (citation omitted).
44. *Id.* at 1874.
45. *See* N. Jersey Media Group v. Ashcroft, 308 F.3d 198, 220-21 (3d Cir. 2002); Detroit Free Press v. Ashcroft, 303 F.3d 681 (6th Cir. 2002).
46. *See N. Jersey Media Group*, 308 F.3d at 199; *Detroit Free Press*, 303 F.3d at 682-83.
47. 303 F.3d at 684.
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.* at 684-85.
53. *See id.* at 711.
54. *Id.* at 682-83.

or deporting, non-citizens because of their race and their beliefs."[55] The court also recognized that the judiciary does not have the authority to review the government's deportation decisions.[56] Therefore, the court observed, "[t]he only safeguard on this extraordinary governmental power is the public, deputizing the press as the guardians of their liberty."[57]

The Sixth Circuit analyzed the right to access question under the two-part test articulated in *Richmond Newspapers*.[58] The court acknowledged *Richmond Newspapers* dealt with criminal trials, but held the test's applicability extended to administrative proceedings and thus to deportation hearings.[59] The court rejected the government's assertion that "a line has been drawn between judicial and administrative proceedings, with the First Amendment guaranteeing access to the former but not the latter."[60]

Beginning with the *Richmond Newspapers* experience prong, the Sixth Circuit determined deportation hearings traditionally had been open to the public.[61] The government argued that these hearings did not have sufficient history to invoke the First Amendment right, but the court found a general policy of openness in these hearings since the enactment of the Immigration and Nationality Act in 1882.[62] Although Congress repeatedly enacted statutes closing exclusion hearings, it had never done so for deportation hearings.[63]

The Sixth Circuit then turned to the logic prong of the *Richmond Newspapers* test and determined that openness of deportation hearings served several beneficial purposes.[64] Public access acted as a check on the Executive Branch to ensure fairness of proceedings.[65] It also ensured the government did not make mistakes in deciding whom to deport.[66] The court emphasized these "two concerns are magnified by the fact that deportees have no right to an attorney at the government's expense" and as a result the press and the public are the deportees' sole guardian.[67] The

55. *Id.* (citations omitted).
56. *Id.* at 683.
57. *Id.* (citation omitted).
58. *Id.* at 694-96.
59. *Id.* at 695-96.
60. *Id.* at 695.
61. *Id.* at 700.
62. *Id.* at 701.
63. *Id.* at 701-02.
64. *Id.* at 703-05.
65. *Id.* at 703-04.
66. *Id.* at 704.
67. *Id.*

court also noted open deportation hearings served a therapeutic purpose as outlets for community concerns or emotions, especially after the September 11, 2001, attacks.[68] Additionally, openness enhanced the "perception of integrity and fairness" and ensured the involvement of citizens in their government.[69]

After determining deportation hearings met the *Richmond Newspapers* test and were governed by the First Amendment right of access, the Sixth Circuit examined whether the government's actions curtailing that right satisfied strict scrutiny analysis.[70] The court acknowledged the government had a substantial interest in preventing terrorism and deferred to the Justice Department's rationale for prohibiting public access to these hearings.[71] However, the court held the blanket closure rule mandated by the Creppy Directive was not narrowly tailored and the government did not provide a persuasive argument as to why its concerns could not be addressed on a case-by-case basis.[72] The court determined "certain types of information that the Government seeks to keep confidential could be kept from the public on a case-by-case basis through protective orders or *in camera* review—for example, the identification of investigative sources and witnesses."[73] While *Detroit Free Press* has a similar fact pattern to the noted case and both courts used the *Richmond Newspapers* test in their analyses, the courts reached opposite conclusions.[74]

III. THE COURT'S DECISION

In the noted case, the United States Court of Appeals for the Third Circuit applied the two-part *Richmond Newspapers* test to determine the applicability of the First Amendment to deportation hearings and held that the First Amendment right of access *did not* apply.[75] First, the court held that deportation hearings did not have a sufficient history of openness as required by the "experience" prong of the *Richmond Newspapers* test.[76] The court also found that the "logic" prong of the test

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68. *Id.*
69. *Id.* at 704-05.
70. *Id.* at 705-10.
71. *Id.* at 706-07.
72. *Id.* at 707.
73. *Id.* at 708.
74. *See id.* at 710-11; N. Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198, 220-21 (3d Cir. 2002).
75. *N. Jersey Media Group*, 308 F.3d at 204-21.
76. *Id.* at 211-12.

was not satisfied in light of the reasons declared by the Justice Department for closing deportation hearings.[77]

While conceding that a presumption of openness existed for these hearings, the Third Circuit determined that "this presumption has neither the pedigree nor uniformity necessary to satisfy *Richmond Newspapers*'s first prong."[78] The court distinguished the noted case from *Richmond Newspapers* by comparing the long-standing history of openness for criminal proceedings to the more recent presumption of openness for deportation hearings.[79] In particular, the court emphasized the First Amendment right of access to criminal trials recognized in *Richmond Newspapers* "stemmed from an 'uncontradicted history, supported by reasons as valid today as in centuries past.'"[80]

The court reviewed historical practices and reasoned congressional practice confirmed the court's decision against a right of access.[81] The members of the First Congress did not open their proceedings to the public, nor did the Senate until 1794, or the House until 1812.[82] While both Houses are open now, the court noted some rules still restrict public access to these proceedings.[83] The court acknowledged this tradition of closing sensitive proceedings extended to various hearings before administrative agencies.[84] For example, "hearings on charges of wrongdoing may often be closed at the administrator's discretion for 'good cause,' to protect the 'public interest,' or under similar standards."[85] The court listed numerous other examples of administrative proceedings that may be closed.[86]

Thus, finding administrative hearings in general do not enjoy a presumption of openness, the court next examined the claim that deportation proceedings in particular have a history of openness.[87] The court recognized the strongest historical evidence in favor of open deportation proceedings is that, since Congress first codified deportation procedures in the 1890s, exclusion hearings have always been expressly

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77. *Id.* at 216-19.
78. *Id.* at 209.
79. *See id.* at 205, 211-12.
80. *Id.* at 205 (quoting Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 573 (1980)).
81. *Id.* at 209-10.
82. *Id.*
83. *Id.* at 210.
84. *Id.*
85. *Id.* (citing 5 C.F.R. § 185.132(d) (2002)).
86. *Id.*
87. *Id.* at 211-13.

closed, but deportation hearings have never been closed.[88] The plaintiffs argued that by expressly closing exclusion hearings while remaining silent regarding deportation hearings, Congress created a presumption that deportation hearings should be open.[89] They further argued the Justice Department explicitly supported this historical presumption in its regulations: "'[a]ll hearings, other than exclusion hearings, shall be open to the public except that . . . [f]or the purpose of protecting . . . the public interest, the Immigration Judge may limit attendance or hold a closed hearing.'"[90] The court rejected this argument, refusing to craft a constitutional right from mere congressional silence, and stated the recent presumption of openness created by the Justice Department's regulations was "hardly the stuff of which Constitutional rights are forged."[91] The court held, while a showing of openness at common law was not required in order to establish a constitutional right, deportation proceedings still did not meet the historical requirements of the *Richmond Newspapers* test.[92]

In arriving at this conclusion the Third Circuit also considered the Supreme Court's recent decision in *FMC v. South Carolina Ports Authority*.[93] The plaintiffs asserted this decision forced the court to distinguish a deportation hearing from a civil trial in order to apply different standards to the two proceedings.[94] The court acknowledged the significant similarities between the proceedings and admitted that it would be "hard pressed to find meaningful differences between the two types of proceedings."[95] However, the Third Circuit did not interpret *Ports Authority* to mean the full panoply of constitutional rights apply to any administrative proceeding resembling a civil trial.[96] The court explained the *Ports Authority* decision started with the premise that state sovereign immunity shields nonconsenting states from complaints brought by private parties and because FMC proceedings so strongly resembled civil trials to which immunity applies, the Framers would have

88. *Id.* at 211.
89. *Id.* at 212.
90. *Id.* (quoting 8 C.F.R. § 3.27 (2002)).
91. *Id.* at 213.
92. *Id.* at 213, 215.
93. *Id.* at 214.
94. *Id.*
95. *Id.* at 214-15. A deportation hearing is commenced with a "Notice to Appear" which strongly resembles a civil complaint. *Id.* at 214; 8 C.F.R. § 239.1. Moreover, as in a civil trial, a respondent also has the right to representation by counsel of his choosing and the right to be present during his hearing. *N. Jersey Media Group*, 308 F.3d at 215; *see* 8 U.S.C. § 1229a(b)(4) (2000). The respondent also has the right to cross-examine witnesses and present evidence on his behalf. *N. Jersey Media Group*, 308 F.3d at 215.
96. *N. Jersey Media Group*, 308 F.3d at 215.

intended it to apply in both cases.[97] The Third Circuit, however, held there was no fundamental right of access to administrative proceedings in general so the *Ports Authority* analogy did not apply to the noted case.[98]

The court next examined the "logic" prong of the *Richmond Newspapers* test, and determined that the district court failed to adequately consider the extent to which access to these "special interest" proceedings would harm the public.[99] The court agreed that openness serves certain positive interests, but held, in order for the logic inquiry to be meaningful, it needed to go further and take into account the "flip side—the extent to which openness impairs the public good."[100] In fact, the court found no "case in which a proceeding passed the experience test through its history of openness yet failed the logic test by not serving community values."[101]

In the noted case, the government presented evidence that open deportation hearings could leak potentially harmful information and would threaten national security.[102] Although the court recognized these national security threats were somewhat speculative, it also recognized some deference needed to be given to the political branch concerning this

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97. *Id.*
98. *Id.*
99. *See id.* at 216-17.
100. *Id.* at 217. The Third Circuit has noted six functions typically served by openness:

> [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. (citation omitted).
101. *Id.*
102. *Id.* at 217-19. The FBI's Executive Assistant Director for Counterterrorism and Counterintelligence, Dale Watson, issued a declaration used by the Government as evidence that openness would threaten national security. *Id.* at 218-19. The Court summarized the most pressing dangers: (1) sources and methods of the investigation would be revealed to the public and, when pieced together with other information, may allow a terrorist to gain insight into, or thwart, the government's attempt to prevent terrorism; (2) allowing public access to information regarding how certain individuals gained access to the country may help terrorists to discover what works and what does not; (3) information about what evidence the government has against particular terrorist groups will allow each group to tailor its activities accordingly; (4) if terrorists discover that a particular member is detained, they may accelerate the timing of planned activities; (5) making public the evidence provided by a detainee about his terrorist link would allow that terrorist group time to destroy the evidence or interfere with the proceeding by creating false evidence; (6) connecting detainees to the September 11, 2001, attacks raises stigma concerns if no connection is found, and this concern is enhanced because deportation hearings are regulatory, not punitive. *Id.* at 218.

area.[103] The court held, in light of the possible harms caused by open deportation hearings, openness would not promote the public good and thus failed the logic test.[104] Having decided the First Amendment right of access did not apply to deportation hearings, the court did not determine whether the Creppy Directive's blanket closures would pass a strict scrutiny analysis.[105]

Judge Scirica, in his dissent, agreed with the district court that history does show a First Amendment right of access to deportation hearings.[106] The dissent claimed the correct analysis should determine whether a right of access applies to deportation hearings in general.[107] Since the majority of these proceedings do not implicate national security issues, the dissent contended a blanket decision on the inapplicability of the First Amendment is too broad.[108] The dissent further explained the concerns related to the "special interest" group of detainees could be addressed on a case-by-case analysis.[109] In specific cases, security concerns may trump the right to access, but the dissent argued the Creppy Directive, which removes the decision from the Immigration Judge, is not necessary for the protection of national security.[110] In response to the government's argument that the process of a case-by-case determination may in itself release harmful information, the dissent explained that even this process can be kept secret.[111] Judge Scirica explained "[e]ven the initial determination to close a proceeding—and to seal the entire record—can be accomplished *in camera* and under seal."[112]

IV. ANALYSIS

The court's decision in the noted case gives the Executive Branch immense powers to regulate all aspects of deportation proceedings.[113]

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103. *Id.* at 219.
104. *Id.* at 217.
105. *Id.* at 221. The Watson declaration also claimed that "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." *Id.* at 219 (citation omitted).
106. *Id.* at 221-24 (Scirica, J., dissenting).
107. *Id.* at 224-25 (Scirica, J., dissenting).
108. *Id.* at 225 (Scirica, J., dissenting).
109. *Id.* at 227-28 (Scirica, J., dissenting).
110. *Id.* (Scirica, J., dissenting).
111. *Id.* at 227 (Scirica, J., dissenting).
112. *Id.* (Scirica, J., dissenting).
113. *See id.* at 219-20 (holding that the judiciary should defer to the Executive Branch under the circumstances).

The Executive Branch already has the power to regulate such proceedings, and its decisions are not reviewable by the judiciary.[114] In many instances, the press is the only guardian of the individual rights of detainees.[115] Public access to judicial proceedings has long been recognized as a check on the government to ensure fairness for the individual.[116] By holding deportation hearings do not have a presumption of openness, the Third Circuit makes a decision that has broad constitutional implications for all deportation hearings rather than narrowing its decision to the issue at hand.[117] The court seems primarily driven by the pressures of protecting the national security and the fearful mood of the nation with regard to terrorism.[118]

The court held the First Amendment claim in the noted case does not meet the standards of the *Richmond Newspapers* "experience and logic" test.[119] However, in reviewing the experience prong of the *Richmond Newspapers* test, the Third Circuit strayed from Supreme Court precedent.[120] Initially, in *Richmond Newspapers*, the Supreme Court held the First Amendment right of access applied to criminal trials.[121] Then, in *Press-Enterprise*, after recognizing the numerous similarities between preliminary hearings and criminal trials, the Court expanded the right of access to preliminary hearings.[122] Most recently, the Court, in *Ports Authority*, compared administrative proceedings to civil litigation and found them so similar that the same regulations applied.[123] Despite these holdings, the Third Circuit in the noted case departed from this evolving line of case law by denying a right of access to deportation hearings.[124]

In its analysis of the "logic" prong of the test, the Third Circuit deferred to the judgment of the Attorney General and the Justice Department and found potentially negative effects of open deportation hearings for "special interest" cases.[125] By deferring so completely to the Executive Branch, the court ignored the significant positive effects openness has on these proceedings, particularly in cases that focus on

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114. *See* Detroit Free Press v. Ashcroft, 303 F.3d 681, 683 (6th Cir. 2002).
115. *Id.*
116. *Id.*
117. *See N. Jersey Media Group*, 308 F.3d at 221.
118. *See id.* at 217-19.
119. *See id.* at 221.
120. *See id.* at 209-15.
121. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 581 (1980).
122. *See* Press-Enter. Co. v. Superior Court, 478 U.S. 10 (1986).
123. Fed. Mar. Comm'n v. S.C. Ports Auth., 122 S. Ct. 1864, 1873-75 (2002).
124. *See N. Jersey Media Group*, 308 F.3d at 220-21.
125. *Id.* at 219-20.

specific classes of people.[126] The court could have balanced these competing values by focusing on the constitutionality of the Creppy Directive's blanket closures, and determining if there were other, less drastic, alternatives available. By holding no First Amendment right of access to deportation hearings exists, however, the court did not examine the constitutionality of the Creppy Directive's closures.[127] Instead the court issued a broad holding that *no* deportation hearings (most of which do not involve national security issues) invoke a constitutional right of access.[128]

The Third Circuit's decision "means that two federal appellate courts have now issued conflicting rulings on the secret hearings, an issue the government has said touches upon 'the nation's very ability to defend itself.'"[129] Regarding the Sixth Circuit's decision, a senior staff attorney at the American Civil Liberties Union has said, "The court's opinion reaffirms that civil liberties must be protected during all times, including times like this, and that public scrutiny of executive branch activity is particularly important where you have a vulnerable group of people who are facing a loss of liberty and may be without counsel."[130] On the other side of the spectrum, Assistant Attorney General Robert D. McCallum, Jr., applauded the Third Circuit's holding: "Today's decision in the Third Circuit is not just a victory for the Justice Department, but for every American relying on the government to take every legal step possible to protect our nation from acts of terror while preserving constitutional liberties."[131] With no end in sight to the fight against terrorism, this issue is likely to arise again and, without a clear standard, conflicts are unavoidable. It seems likely that this very sensitive and controversial issue will be brought before the Supreme Court for a definitive answer.

V. CONCLUSION

The Sixth and Third Circuits, the only two courts to specifically address the issue of a First Amendment right of access to deportation proceedings, have produced conflicting decisions. The right of access to these proceedings is just one of the issues arising out of the aftermath of

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126. *See id.* at 217.
127. *See id.* at 221.
128. *See id.*
129. Steve Fainaru, *Court Backs Closing of Detainees' Hearings*, WASH. POST, Oct. 9, 2002, at A01.
130. Charles Lane, *Court Calls for Open Detainee Hearings; U.S. Chastised on Immigration Case Secrecy Policy*, WASH. POST, Aug. 27, 2002, at A01.
131. Fainaru, *supra* note 129, at A01.

the terrorist attacks on the United States. The war on terrorism has initiated a tug-of-war between the guarantee of civil liberties and the desire to eradicate terrorism. This debate has promulgated new issues not contemplated before September 11, 2001. Often the judicial system becomes the balancing mechanism of these competing interests, and it is a struggle to determine whether the individual right gives way to the overall good or the overall good gives way to the individual right. In the noted case, the Third Circuit allowed national security interests to override individual rights.

While in some cases this is warranted, the blanket standard of closing all "special interest" deportation hearings, endorsed by the Third Circuit, goes beyond protecting the public to denying constitutional freedoms. A case-by-case determination of whether closure is warranted would protect individual constitutional rights while also protecting the public from threats of terrorism. The court seemed to be driven by current events rather than the law in reaching its conclusion that the First Amendment right of access does not apply to deportation hearings.

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