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Please Take Back Your Huddled Masses: A Look at the First Amendment Right to Access Deportation Hearings After September 11, 2001

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PLEASE TAKE BACK YOUR HUDDLED MASSES: A LOOK AT THE FIRST AMENDMENT RIGHT TO ACCESS DEPORTATION HEARINGS AFTER SEPTEMBER 11, 2001[1]

On September 11, 2001, the American way of life was drastically and dramatically altered by a terrorist attack on New York City and America. Since that infamous day, President Bush has declared a war against terrorism that "has pervaded the sinews of our national life and is reflected in thousands of ways in legislative and national policy, the habits of daily living, and our collective psyches."[2] Following the attack, a worldwide and domestic investigation into the attack and any related terrorist threat to the United States was ordered in the name of national security and defense.[3] In addition to those persons responsible for the terrorist activities, this ongoing investigation revealed numerous illegal aliens, primarily of Arab or Muslim background.[4] A majority of these aliens are "subject to removal from the United States," and have had deportation hearings brought against them.[5] The Department of Justice, which oversees the Immigration and Naturalization Services (INS), was given the authority to identify aliens whose "situation [is] particularly sensitive" and designate their hearings "special interest cases."[6] The Department of Justice has not published or made public any of its guidelines or methods used in making this "special interest" determination. But, it is speculated that the designated aliens "might have connections with, or possess information pertaining to terrorist activities, particularly the September 11th hijacking or al Qaeda and associated groups."[7]

1. The title for this piece was inspired by the poem "The New Colossus" by Emma Lazarus. In her famous poem Emma Lazarus celebrated immigration to the United States. *See* Emma Lazarus, *The New Colossus*, *reprinted in* 100 KEY DOCUMENTS IN AMERICAN DEMOCRACY 214 (Peter B. Levy ed., Greenwood Press 1994). The full text of the passage is as follows:

> Give me your tired, your poor,
> Your huddled masses, yearning to breath free,
> The wretched refuse of your teeming shore.
> Send these, the homeless, the tempest-tost to me.
> I lift my lamp beside the golden door!

2. N. Jersey Media Group v. Ashcroft, 308 F.3d 198, 202 (3rd Cir. 2002).
3. *Id*.
4. *Id.;* Detroit Free Press v. Ashcroft, 195 F.Supp.2d 937, 940 (E.D. Mich. 2002).
5. *N. Jersey Media Group*, 308 F.3d at 202*; Detroit Free Press*, 195 F.Supp.2d at 940.
6. *N. Jersey Media*, 308 F.3d at 202.
7. *Id.*

The decision to increase security and close these special interest cases to the public was articulated on September 21, 2001, in a directive by Chief Immigration Judge Michael Creppy ("Creppy Directive"), under the authority of Attorney General John Ashcroft.[8] This directive, issued to all United States Immigration Judges, also contained the guidelines and procedures all immigration courts must follow when hearing "special interest cases."[9] These guidelines require all proceedings in these "special interest" cases to be assigned to immigration judges who hold at least a "secret clearance,"[10] and be conducted separately from all other cases on the court's docket.[11] Additionally, the Creppy Directive specifies courtrooms be closed to the press and public, including family members and friends.[12] This broad restriction prevents courtroom personnel from discussing the case with anyone, even including, "confirming or denying whether such a case is on the docket or scheduled for a hearing."[13] The Creppy Directive also requires that inquiries about a case to the INS toll-free number, which normally provides information as to the status of a case, will receive only a recorded message informing the caller that "information cannot be released regarding this case."[14]

8. Detroit Free Press v. Aschroft, 303 F.3d 681, 683 (6th Cir. 2002); *N. Jersey Media*, 308 F.3d at 202-03; Memorandum from Michael Creppy, Chief Immigration Judge, to all Immigration Judges 1 (August 21, 2003), *available at* http://news.findlaw.com/hdocs/docs/aclu/creppy092101memo.pdf (last visited May 17, 2003). Hearings containing the "special interest" designations involve aliens who "might have connections with, or possess information pertaining to, terrorist activities against the United States." Of particular concern were aliens who had close associations with the September 11th hijackers or who themselves have associated with al Qaeda or related terrorist groups. *N. Jersey Media Group*, 308 F.3d at 202.

9. *See* Memorandum from Michael Creppy, *supra* note 8.

10. *Id.* at 2 (Instruction number one states,"Because some of these cases may ultimately involve classified evidence, the cases are to be assigned only to judges who currently hold at least a secret clearance.").

11. *Id.* (Instruction number three states, "Each of these cases is to be heard separately from all other cases on the docket.").

12. *Id.* (Instruction number three states, "The courtroom must be closed for these cases—no visitors, no family, and no press").

13. *Id.* (Instruction numbers four and five. Instruction four states, "The Record of Proceeding is not to be released to anyone except an attorney or representative who has an EOIR-28 on file for the case (assuming the file does not contain classified information.)" Instruction five states, "This restriction on information includes confirming or denying whether such a case is on the docket or scheduled for a hearing."). *See also N. Jersey Media Group*, 308 F.3d at 203 (refers to this as a "complete information blackout along both substantive and procedural dimensions."); NATIONAL IMMIGRATION LAW CENTER, CHIEF IMMIGRATION JUDGE ISSUES GUIDELINES FOR SECRET REMOVAL HEARINGS (2001), *at* http://www.nilc.org/immlawpolicy/removpsds/removpsds072.htm (last visited on March 29, 2003).

14. Memorandum from Michael Creppy, *supra* note 8, at 2-3 (Instruction six states, "The ANSIR record for the case is to coded to ensure that information about the case is not provided on the 1-800 number and the case is not listed on the court calendars posted outside the courtrooms.

After the Creppy Directive was released, two federal appellate cases, both attacking the constitutionality of the Creppy Directive under the First Amendment, were decided.[15] In the first case, *Detroit Free Press v. Aschcroft*, the Sixth Circuit held the Creppy Directive was unconstitutional. In the second case, *North Jersey Media Group v. Aschcroft*, the Third Circuit created a circuit split by holding the Creppy Directive was constitutional. This note will first examine the federal government's power to regulate immigration and the judicial history of the First Amendment access rights that limits this power. Secondly, both appellate court cases will be discussed in length.

I. BACKGROUND

Federal Government's Power to Regulate Immigration

To fully understand the Creppy memo and its impact on American immigration procedure and law, it is important to have some background information regarding the federal government's powers in controlling immigration. When addressing the constitutional limitations on actions taken by the federal government, it is first necessary to determine the constitutional source of the power.[16] Both historically and recently there has been much debate over the federal government's power to regulate immigration.[17] But, due to the limits of this note, this issue will be only briefly discussed.[18]

See also the Procedures for ANSIR Coding and Marking ROP, the 1-800 number."). *See also* National Immigration Law Center, *Chief Immigration Judge Issues Guidelines for Secret Removal Hearings*, 15(8) IMMIGRANTS' RTS. UPDATE 1 (2001), *at* http://www.nilc.org/immlawpolicy/removpsds/removpsds072.htm (last visited on March 29, 2003).

15. Both *North Jersey Media* and *Detroit Free Press* were filed in part by media organizations who want to publicize the names and information revealed in the hearing.

16. Professor Joel Goldstein instilled this approach to constitutional issues in me during Constitutional Law my first year of law school. Since the federal government is one of enumerated powers, the first analysis is to determine under what provision of the constitution the government is acting, and whether their actions have gone beyond the power vested in the constitution. Only after determining this issue is it okay to continue analyzing violations of specific constitutional rights.

17. Most of the debates and articles concern discrimination and not allowing aliens to enter the United States. The discrimination tactics have been employed by both the federal government and the states - particularly Miami with Cuban refugees and southern states like California and Texas trying to limit the number of Mexican immigrants allowed into the states.

18. *See generally* Marisa Ann Tostado, Comment, *Alienation: Congressional Authorization of State Discrimination Against Immigrants*, 31 LOY. L.A. L. REV. 1033 (1998); Philip Brashier, Comment, *The United States Struggles with Past Judicial Interpretations in Defining the Modern Law of Immigration*, 37 S. TEX. L. REV. 1357 (1996); Gerald L. Neuman, *The Lost Century Of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833 (1993)

Congress's Power to Pass Immigration Legislation

There have been several critics who claim the federal government does not have the power to regulate immigration because the Constitution does not explicitly grant this power to the federal government.[19] The logic behind this argument is that the federal government was founded on the theory of enumerated powers, the Constitution clearly articulates Congress was given only the legislative powers "herein granted,"[20] and any "power not delegated to the federal government is reserved for the states."[21] Therefore, the argument concludes, Congress does not have the power to pass legislation regulating immigration. However, the Constitution also textually grants the federal government the authority to create "uniform rules of naturalization."[22] In addition to this constitutional clause, courts have used the Commerce Clause, and the theory of sovereign immunity as a basis for the federal power to regulate immigration.[23]

Jurisprudentially, "the government's authority over immigration was first announced more than one hundred years ago in 'The Chinese Exclusion Case.'" [24] The court determined the authority to regulate immigration came not from an "express provision of the Constitution but from powers incident to sovereignty."[25] Since that decision, the United States Supreme Court has time and again concluded that the federal government has a near unrestrained ability to control immigration.[26] In its holdings the Court has relied heavily on policy issues; particularly the importance of the government controlling immigration

19. *See* Margaret Warner, *Liberty v. Security*, PBS ONLINE NEWSHOUR, August 27, 2002, at 1.

20. U.S. CONST. art. I; Brashier, *supra* note 18, at 1389 n.17.

21. U.S. CONST. amend. X; Brashier, *supra* note 18, at n.17.

22. U.S. CONST. art I, §8, cl. 4; Tostado, *supra*, note 18.

23. Chy Lung v. Freeman, 92 U.S. 275, 280 (1875); Tostado, *supra* note 18, at 1040.

24. "The court recounted the strife following Chinese immigration to California after the gold rush of the mid 1800's. A convention of lawmakers in California petitioned Congress to alleviate this 'problem'. The petition charged among other things that the presence of Chinese laborers had a baneful effect upon the material interests of the state, and upon public morals; that there immigration was in numbers approaching the character of an oriental invasion, and was a menace to our civilization." The court held that "if the government . . . considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security," this "determination is conclusive upon the judiciary." *Detroit Free Press*, 303 F.3d at 685-86 (quoting Chae Chan Ping v. United States, 130 U.S. 581 (1889)).

25. *Id.* at 686.

26. *Id.* at 682-83. The Court has, historically, given great deference to the federal government in deciding who, and for what substantive reason someone should be deported. *See, e.g.*, Galvan v. Press, 347 U.S. 522, 528, 531 (1954) (holding Congress can deport former member of communist party even if they personally did not advocate the violent overthrow of the Government); Wong Wing v. United States, 163 U.S. 228, 237 (1896) (courts cannot limit Congress from expelling "aliens whose race or habits render them undesirable as citizens").

policy, because it affects the foreign treaties the government enters into and thereby affecting international relations.[27] Therefore, as a result of the Constitution and judicial principle of stare decisis, the federal government clearly has the power to regulate immigration.

The Executive Branch's Power to Control Immigration

With the codification of the Immigration Reform, Accountability and Security Enhancement Act of 2002, it appears that the Secretary of Homeland Security has taken over some immigration enforcement duties from the Attorney General.[28] Even after the enactment of this statute, the executive branch and probably the Attorney General still maintain control over the enforcement of all laws surrounding immigration and naturalization.[29] However, this memo will only focus on the power Attorney General Ashcroft possessed at the time the Creppy Directive was issued, before the enactment of the Immigration Reform, Accountability and Security Enhancement Act of 2002.

Congress, using its authority to regulate immigration, passed the Immigration and Nationality Act, which charged the Attorney General, at the

27. Tostado, *supra* note 18, at 1042.

28. 8 U.S.C. § 1103(a)(1)(2003) stating:

> The Secretary of Homeland Security shall be charged with the administration and enforcement of this chapter and *all laws relating to the immigration and naturalization of aliens, EXCEPT* insofar as this chapter or such laws relate to the powers, functions, and duties conferred upon the President, *Attorney General*, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers: *Provided, however*, That determination and ruling by the Attorney General with respect to all question of law shall be controlling (emphasis added).

29. *Compare* 8 U.S.C. § 1103(a)(1)(2003) ("The Secretary of Homeland Security shall be charged with this chapter and *all laws relating to the immigration and naturalization of aliens, EXCEPT* insofar as this chapter or such laws relate to the powers, functions, and duties conferred upon the President, *Attorney General*, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers: *Provided, however*, that determination and ruling by the Attorney General with respect to all question of law shall be controlling" (emphasis added) *with* 8 U.S.C. § 1103(g)(1) (2003) ("The Attorney General shall have such authorities and functions under this chapter and all other laws relating to immigration and naturalization of aliens as were exercised by the Executive Office for Immigration Review, or by the Attorney General with respect to the Executive Office for Immigration Review on or before the effective date of the Immigration Reform, Accountability and Security Enhancement Act of 2002") *and* 8 U.S.C. §1103 (g)(2) (2003) ("The Attorney General shall establish such regulations, prescribe such forms of bond, reports, entries, and other papers, issue such instructions, review such administrative determinations in immigration proceedings, delegate such authority, and perform such other acts as the Attorney General determines to be necessary for carrying out this section."). Even though this issue seems convoluted under the present statute, it appears that 8 U.S.C. §1103(g)(2) is a catch-all and would still grant the Attorney General the power to issue the Creppy Directive.

time the Creppy Directive was issued, with "administration and enforcement" of "all . . . laws relating to the immigration and naturalization of aliens."[30] The act further "authorized the Attorney General to deport aliens for a variety of reasons," but generally for entering the United States without an inspection.[31]

There are several general classes of deportable aliens, some of which include criminal activity[32] and subversive activity.[33] Additionally, the Attorney General was also permitted to prescribe "such regulations . . . as he deems necessary for carrying out his authority,"[34] and to establish immigration judges and removal proceedings under the control of the executive branch.[35]

Pursuant to his authority, the Attorney General first established a regulation in 1965 mandating that "all hearings, other than exclusion hearings, shall be open to the public."[36] However, under this regulation the immigration judge may limit the number of people in attendance or close the hearings to protect "witnesses, parties or the public interest."[37] "The Creppy Directive was issued pursuant to this regulation" and with a purpose of protecting the public interest."[38]

30. *N. Jersey Media Group*, 308 F.3d at 202 n.1 (quoting 8 U.S.C. § 1103(a) (1994)). *See* 8 U.S.C. § 1103(g)(2) (2003): "The Attorney General shall establish such regulations . . . as the Attorney General determines to be necessary for carrying out this section").

31. *N Jersey Media Group*, 308 F.3d at 202-03 n.1 (quoting 8 U.S.C. §1251(1994)).

32. 8 U.S.C. § 1227(a)(2)(A)(I) (2003): "Any alien who is convicted of a convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status. . .) after the date of admission and is convicted of a crime for which a sentence of one year or longer may be imposed is deportable;" 8 U.S.C. § 1227(a)(1)(B)(2003); "Any alien who is present in the United States in violation of this chapter or any other law of the United States is deportable."

33. 8 U.S.C. § 1227 (a)(4)(A)(iii) (2003): "Any alien who has engaged, is engaged, or at any time after admission engages in . . . any activity or purpose for which is the opposition to, or the control or overthrow of, the Government of the United States by force, violence or other unlawful means is deportable." Additional reasons for deportation include: 8 U.S.C. § 1227 (a)(1) ("inadmissible at time of entry or of adjustment of status or violates statute"); 8 U.S.C. § 1227(a)(2) ("criminal offenses"); 8 U.S.C. § 1227(a)(3) ("failure to register and falsification of certain documents"); 8 U.S.C. § 1227(a)(4) ("security and related grounds"); 8 U.S.C. § 1227(a)(5) ("public charge"); 8 U.S.C. § 1227(a)(6) ("unlawful voters").

34. 8 U.S.C. § 1103(a)(3). It appears as if this duty now falls under the duty of the Secretary of Homeland Security.

35. *N. Jersey Media Group*, 308 F.3d at 203 n.1.

36. 8 CFR § 3.27 (2002); *N. Jersey Media Group*, 308 F.3d at 203 n.1. The Attorney General first promulgated this regulation in 1964 and it has remained substantially unchanged ever since.

37. 8 CFR § 3.27: The immigration judge may also limit the number of people in attendance or close the hearings: (1) due to the "physical facilities . . . with priority given to the press over the general public;" or (2) those "involving an abused alien spouse . . . [or] an abused alien child").

38. *N. Jersey Media Group*, 308 F.3d at 204 n.1.

Also, under the Immigration and Nationality Act, the Attorney General created the position of Chief Immigration Judge, who is responsible for the "general supervision, direction, and scheduling of [all] the Immigration Judges."[39] Additionally, the Chief Immigration Judge is responsible for the establishment of operational policies and the performance evaluations of the Immigration Courts.[40] Chief Immigration Judge Michael Creppy issued his famous directive pursuant to this regulation.

In conclusion, Chief Immigration Judge Michael Creppy and Attorney General John Aschroft were well within their powers to issue the Creppy Directive. Therefore, the remaining issue is whether the Creppy Directive is unconstitutional under the First Amendment because of its restrictions on the public's right of access to deportation hearings.

JUDICIAL PRECEDENT ON THE FIRST AMENDMENT RIGHT OF ACCESS

Supreme Court Precedent: The Watershed Cases

The Supreme Court's jurisprudence has only addressed the issue of a First Amendment right of access in criminal proceedings and their holdings have been criticized as having "fundamental inconsistencies."[41] These inconsistencies have caused the Court to waiver on the "scope, timing, constitutional source and purpose of a right of public access to trials," which in turn has confused lower courts.[42] Initially, the Court struggled with a mechanism to balance the defendant's Sixth Amendment right to an impartial jury and a public trial with the media's First Amendment right of access.[43] One method lower courts employed to restrict the media's access to criminal trials was the imposition of "gag orders," which restricted the information the press could print.[44] These "gag orders" were later held to be unconstitutional.

39. 8 CFR §3.9.

40. *Id.*

41. Kathleen K. Olson, *Courtroom Access After 9/11: A Pathological Perspective*, 7 COMM. L. & POL'Y 461, 473 (2002); Lewis F. Weakland, *Confusion in the Courthouse: The Legacy of the Gannett and Richmond Newspapers Public Right of Access Cases*, 59 S. CAL. L. REV. 603, 603 (1986).

42. Olson, *supra* note 41, at 475.

43. *Id.* at 474. *See* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . ."). The right exists at both the federal and state court level because of the Fourteenth Amendment. *See* Duncan v. Louisiana, 391 U.S. 145, 149 (1968) (Fourteenth Amendment extends Sixth Amendment rights to state trials); Near v. Minn. *ex. rel.* Olson, 283 U.S. 697 (1931) (Fourteenth Amendment protects First Amendment rights from state action).

44. Olson, *supra* note 41, at 474. *See* Neb. Press Assoc. v. Stuart, 427 U.S. 539, 570 (1976) (prohibiting the press from printing certain information from a trial was prior restraint and violated the First Amendment).

As a result, trial judges, attempting to limit the press's access to criminal trials, began to exclude the press from the courtroom.[45]

Gannett v. DePasquale was the first of several Supreme Court cases that addressed the issue of the public's First Amendment right to access.[46] In *Gannett*, the public and press were excluded from a pretrial hearing, on an unopposed motion by the defense, because of the concern that an "unabated buildup of adverse publicity had jeopardized the ability for a fair trial."[47] While a majority of the Justices concurred in the outcome of the case, four of the five Justices disagreed with the method employed in reaching the holding.[48] The Court held that closure of a pretrial hearing was constitutional, based on the Sixth Amendment's public trial provision.[49] In reaching this conclusion, "the Court admitted to a common law rule of open civil and criminal proceedings and a strong societal interest in public trials, but held that public access did not rise to the level of a constitutional right under the Sixth and Fourteenth Amendments."[50] The majority and dissenting opinions failed to decide whether the First Amendment and Fourteenth Amendment gave the public a right of access by assuming such a right existed and that the trial judge had taken it into account.[51] The Court then concluded that even if such a right had existed, that right was outweighed by the defendant's Sixth Amendment right to a fair trial.[52] The Court's ruling signaled that courtroom closures would be tolerated. Trial courts were eager to take advantage of the Supreme Court ruling and in the year after *Gannett* more than a hundred cases resulting from closed courtrooms were filed.[53]

One year to the day after the *Gannett* decision, the Supreme Court decided what has become known as the watershed case for the First Amendment right

45. Olson, *supra* note 41, at 474.

46. *Id.* at 475.

47. Gannett Co., Inc. v. DePasquale, 443 U.S. 368, 375 (1979).

48. *See* Gannett, 443 U.S. at 370 (Stewart, J, majority opinion), 394 (Burger, C.J., concurring), 397 (Powell, J., concurring), 403 (Rehnquist, J., concurring). Justice Pottor Stewart wrote the majority opinion and was joined by Justice Stevens. Chief Justice Warren Burger and Justices Powell and Rehnquist all wrote separate concurring opinions. All but Stevens wrote separate opinions.

49. *Gannett*, 443 U.S. at 394; Olson, *supra* note 41 at 474.

50. Olson, *supra* note 41, at 475 (citing *Gannett*, 443 U.S. at 383, 384) (internal citation removed).

51. Richmond Newspapers v. Virginia, 448 U.S. 555, 564 (1980); *Gannett*, 443 U.S. at 392, 447: "to the extent of recognizing a First and Fourteenth Amendment right to attend criminal trials . . . [w]e need not decide . . . whether there is any such constitutional right." The court also concluded that if such a right existed this right "was given all appropriate deference by the state . . . court in the present case"); Olson, *supra* note 41, at 475.

52. Olson, *supra* note 41, at 457.

53. *Id.* at 476.

of courtroom access, *Richmond Newspapers v. Virginia*.[54] In *Richmond Newspapers*, the Court for the first time recognized a First Amendment right of the public and the press to attend criminal trials.[55] This holding was significant because unlike earlier prison access cases, the court recognized the public had a First Amendment right of access to governmental information.[56] The Court further concluded that the public's First Amendment right of access was independent of the defendant's Sixth Amendment rights.[57]

In this case, the defendant, accused of murdering a hotel manager in Virginia, was undergoing his fourth trial for the same murder.[58] The judge closed the courtroom under the authority of the state law and presumably under the Supreme Court's ruling in *Gannett*. The excluded newspapers appealed.[59] Chief Justice Warren Burger, in a plurality opinion, defined the issue to be addressed as, "whether a criminal trial itself may be closed to the public upon the unopposed request of a defendant, without any demonstration that closure is required to protect the defendant's [Sixth Amendment] right to a fair trial, or that some other overriding consideration requires closure."[60] The Court distinguished *Gannett* because it addressed the defendant's Sixth Amendment rights, not the public's First Amendment access right, and the setting was a pretrial hearing opposed to a trial.[61] The *Richmond* Court ultimately held that

54. *Richmond Newspapers*, 448 U.S. at 555; *Gannett*, 443 U.S. at 368; Olson, *supra* note 41, at 476.

55. *Richmond Newspapers*, 448 U.S. at 583 (White, J., concurring); Daniel J. Solove, *Access and Aggregation: Public Records, Privacy and the Constitution*, 86 MINN. L. REV. 1137, 1201 (2002); Olson, *supra* note 41 at 476.

56. Olson, *supra* note 41, at 476. *See* Pell v. Procunier, 417 U.S. 817, 834 (1974) (no First Amendment constitutional right of access to state prisons); Saxbe v. Washington Post, 417 U.S. 843, 850 (1974) (no constitutional right of access to federal prisons).

57. *Richmond Newspapers*, 448 U.S. at 580 n.18. The Court held a First Amendment right of access existed independently of the defendants Sixth Amendment rights. The problem was the Court never articulated a clear standard to determine when the defendant's Sixth Amendment rights outweighed the First Amendment rights of the public.

58. *Id.* at 559-60. The police arrested a man and tried him for murder. During his fourth trial (the first had been reversed on appeal, and the second and third were declared mistrials), the defendant's counsel moved that the trial be closed to the public to avoid yet another instance of jury contamination. The prosecutor had no objections, so the judge ordered "that the courtroom be kept clear of all parties except the witnesses when they testify." Two newspaper reporters sought to vacate the closure order on First Amendment grounds, arguing that the court had made no evidentiary findings prior to issuing its order and also had failed to consider other, less dramatic measures within its power to ensure a fair trial.

59. *Id.*

60. *Id.* at 563-64; Olson, *supra* note 41, at 476.

61. *Richmond Newspapers*, 448 U.S. at 564; Olson, *supra* note 41, at 476.

the "First Amendment required that criminal trials be open to the public unless there is an overriding interest articulated in the findings by the court."[62]

Despite its watershed status, the seven concurring justices "were too divided to establish a clear cut doctrine of courtroom access."[63] This division and the resulting seven separate opinions left this new First Amendment right of access without a clear definition.[64] Chief Justice Burger's plurality opinion and Justice Brennan's concurrence emerged as the two principle opinions in the case.[65] Both opinions relied on a two-pronged analysis, with a historical prong and a functional or structural prong, to determine if a First Amendment right of access existed in a criminal trial.[66]

While these two principal opinions are similar, they disagree as to where to place the emphasis in the two-prong test. Burger's plurality opinion focused heavily on the historical analysis while Brennan's concurrence focused heavily on the functional role of the courts.[67]

In his opinion, Burger took a more historical approach to the issue and therefore placed more emphasis on history, both to understand the traditions upon which the Constitution was built and for determining its functional role.[68] Burger treated the issue more narrowly than Justice Brennan because he limited the First Amendment's right of access to criminal proceedings that were traditionally open.[69]

However, Burger also realized this history of openness was not enough to establish a First Amendment right of access and it was also necessary to

62. Olson, *supra* note 41, at 467-77. *See Richmond Newspaper*, 448 U.S. at 580, 581.

63. Olson, *supra* note 41, at 477.

64. *Id.; Richmond Newspapers*, 448 U.S. at 555, 581. Only Justice Rehnquist dissented, but there were five concurring opinions. Justice Powell did not participate in the case.

65. Olson, *supra* note 41, at 477.

66. *Id.*

67. *Id.* at 477, 479.

68. *Id.* at 477. *See* Richmond Newspapers, 448 U.S. at 565-73. Throughout Burger's opinion his emphasis on history is clear. In his opinion, Burger wrote: "historical evidence demonstrates conclusively that at the time when our organic laws were adopted, criminal trials both here and in England had long been presumptively open." He also traced the history of the Anglo-American law from before the Norman Conquest to the time of the trial and found an "unbroken, uncontradicted history" of public access. Additionally, he could not find a single instance of a criminal trial conducted in secret in any federal, state, or municipal court during the history of this country. *See also*, Olsen, *supra* note 41, at 477: "His opinion traced the history of the criminal trial from before the Norman Conquest in England and concluded that, 'throughout its evolution, the trial has been open to all who cared to observe.'"

69. Olson, *supra* note 41, at 477. Logically it makes sense that an emphasis on the historical prong would narrow the scope. Events or hearings that have a short history would not be open to the public and therefore would never enjoy a First Amendment right of access. However, these same hearings would be open if the openness served a functional and beneficial purpose, even if they enjoyed only a short history of openness.

determine the function that openness served in the court proceeding.[70] However, even in his functional analysis, Burger still placed great emphasis on history. He concluded that courtroom access should be protected by the First Amendment because the "Bill of Rights was enacted against the backdrop of the long history of trials being presumptively open [and] [p]ublic access . . . was regarded as an important aspect of the process."[71] Burger further analyzed that open public trials have traditionally had a functional "therapeutic value" to the public.[72] Open trials prevent vigilantism by providing "an outlet for community concern, hostility, and emotion," as well as increasing the public's confidence in the justice systems operation.[73] Additionally, the public oversight of trials ensures that fairness prevails by "discouraging perjury, the misconduct of participant, and judicial decisions based on secret bias or partiality."[74] As a result of all these factors, Burger recognized the right to attend criminal trials is implicit in the guarantees of the First Amendment and "absent an overriding interest articulated in findings, the trial of a criminal case must be open to the public."[75]

In his concurrence, "Brennan agreed that history was important to the analysis, both because the Constitution bears the 'gloss' of history and because 'the case for a right of access has special force when drawn from an enduring and vital tradition of public entrée to particular proceedings or information.'"[76] Brennan also echoed Burger's functional purposes for courtroom access and its importance in assuring judicial fairness, providing a societal outlet, and furthering "the particular public purpose of that critical judicial proceeding."[77] However, because of Brennan's structural model of the First Amendment, his concurrence placed more emphasis on and went further in analyzing the functional role of open trials.[78] In Brennan's view, "the primary value of a

70. Olson, *supra* note 41, at 476. "A common law tradition of openness . . . would not be sufficient standing alone."

71. *Richmond Newspapers*, 448 U.S. at 576, stating:

> [t]he Bill of Rights was enacted against the backdrop of the long history of trials being presumptively open. Public access to trials was then regarded as an important aspect of the process itself . . . . In guaranteeing freedoms such as those of the speech and press, the First Amendment can be read as protecting the right of everyone to attend trials so as to give meaning to those explicit guarantees.

72. Olson, *supra* note 41, at 476.

73. *Richmond Newspapers*, 448 U.S. at 571, 572; Olson, *supra* note 41, at 477.

74. *Richmond Newspapers*, 448 U.S. at 569.

75. *Id.* at 581.

76. Olson, *supra* note 41, at 478 (citing *Richmond Newspapers*, 448 U.S. at 589 (Brennan, J., concurring)).

77. *Richmond Newspapers*, 448 U.S. at 592, 595-96 (Brennan, J., concurring); Olson, *supra* note 41, at 479.

78. Olson, *supra* note 41, at 479.

public trial lay in its place in the constitutional framework, and the historical evidence served to confirm the importance of that role."[79]

Brennan's concurrence views the First Amendment as playing a structural role in "securing and fostering our republican system of self-government,"[80] as well as being a "commitment to free expression for its own sake."[81] A keystone principle to Brennan's structural model is not only should "debate on public issues . . . be uninhibited, robust, and wide open . . . but also . . . informed."[82] This expansion of the Court's traditional speech model not only prohibits interfering with the communication itself, but also protects "the indispensable conditions of meaningful communication."[83] Thus, "trial access possesses specific structural significance" because the judicial branch is a "coordinate branch of the government," and information about its workings is critical for the proper functioning of our democracy.[84]

The drawback of Brennan's structural model is that "the stretch of . . . protection is theoretically endless."[85] Consequentially, the public's access to information could expand beyond government-related information "to any type of information a free society may require for informed public discussion."[86] To overcome this drawback, Brennan determined that the "right to gather information in a particular case must be weighed against [any] countervailing interests with the guidance of two helpful principles: an examination of the tradition of openness for the particular proceeding and an assessment of the specific structural value of public access in the circumstances."[87] In deciding if a First Amendment right of access to criminal trials existed, Brennan reasoned that a court "must consult historical and current practice with respect to open trials, and weigh the importance of public access to the trial process itself."[88] He, therefore, concluded that closing trials violates the First Amendment because criminal trials have "historically been open and, more

79. *Id.* at 480-81.

80. *Richmond Newspapers*, 448 U.S. at 587 (Brennan, J., concurring); Olson, *supra* note 41, at 479.

81. Olson, *supra* note 41, at 479.

82. *Richmond Newspapers*, 448 U.S. at 587-88 (Brennan, J., concurring).

83. *Id.*

84. Olson, *supra* note 41, at 480 (citing Richmond Newspapers, 448 U.S. at 593-94).

85. *Richmond Newspapers*, 448 U.S. at 588.

86. Olson, *supra* note 41, at 480. Indeed, such a right has been expounded by legal commentators over the years, although it has not been adopted in any general way by the court. *See, e.g.*, Thomas I. Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U. L.Q. 1; James C. Goodale, *Legal Pitfalls in the Right to Know*, 1976 A.B.A. J. 667 (1959); Eric G. Olsen, Note, *The Right to Know in first Amendment Analysis*, 57 TEX. L. REV. 505 (1979).

87. Olson, *supra* note 41, at 480. *See Richmond Newspapers*, 448 U.S. at 588-89 (Brennan, J., concurring).

88. *Richmond Newspapers*, 448 U.S. at 589 (Brennan, J., concurring).

significantly, because of the importance of public access to the broader purposes of the trial process within the system of self-government."[89]

In summary, Brennan's structural approach differed from Burger's more functional approach in the amount of value placed on the benefit of having public access to criminal trials.[90] To Burger, courtroom access is important because it directly furthers justice, but this reason may be subordinate to other more important values such as national security.[91] Brennan agreed that "countervailing interests may outweigh the right of access, but his threshold for that to occur is much higher than Burger's."[92]

Supreme Court Precedent: The Trilogy Expanding Richmond Newspapers

Subsequent to *Richmond Newspapers*, the Supreme Court decided three more cases dealing with the First Amendment Right of access to court proceedings.[93] These cases further refined and shaped the test established in *Richmond Newspapers*.[94]

The first of these cases was *Globe Newspaper v. Superior Court*, which marked another shift in the Court's approach to this issue.[95] In this case, a Massachusetts law mandated that the general public and press be excluded from criminal trials when juvenile victims of sexual assault testified, in order to protect the juvenile's privacy.[96] In holding the state law violated the First Amendment, a majority of the Court adopted Brennan's structural analysis from his concurrence in *Richmond Newspapers*.[97] Therefore, the historical prong was regulated to a secondary status behind the logic prong.[98]

To fulfill the logic prong under Brennan's analysis, the Court addressed "whether public access plays a significant positive role in the functioning of

89. Olson, *supra* note 41, at 480.

90. *See id.* at 481.

91. *Richmond Newspapers*, 448 U.S. at 569-73; Olson, *supra* note 41, at 481 (courtroom access furthers justice through education, oversight, and catharsis).

92. Olson, *supra* note 41, at 481.

93. *Detroit Free Press*, 303 F.3d at 684 n.5. The subsequent cases were: Press-Enter. Co. v. Super. Ct., 478 U.S. 1 (1986) [hereinafter Press-Enterprise II]; Press-Enter. Co. v. Super. Ct., 464 U.S. 501(1984) [hereinafter Press-Enterprise I]; Globe Newspaper Co. v. Super. Ct., 457 U.S. 596 (1982).

94. *Detroit Free Press*, 303 F.3d at 684 n.5.

95. Olson, *supra* note 41, at 481.

96. *Globe Newspaper*, 457 US at 598.

97. This formalized what came to be known as the Richmond Newspapers "experience and logic" test. *N. Jersey Media Group*, 308 F.3d at 206.

98. Olson, *supra* note 41, at 481. *See Globe Newspapers*, 457 U.S. at 604: The Court acknowledged that "underlying the First Amendment right of access to criminal trials is the common understanding that a major purpose of that Amendment was to protect the free discussion of governmental affairs."

the particular process and the government as a whole."[99] According to the Court, "public access to criminal trials permits the public to participate in and serve as a check upon the judicial process—an essential component in our structure of self-government."[100]

The major confusion in *Globe* arose in Brennan's approach to the historical prong. In the majority opinion, Brennan affirmed the value of an inquiry into historical traditions but seemed to determine that because there was a general right of access to criminal trials, the particular type of criminal trials did not matter.[101] In his dissent, Burger strongly emphasized the history prong and "its importance in limiting the right of access where there was no tradition of openness."[102] The dissent further criticized the majority's reading of *Richmond Newspaper* "as spelling out a First Amendment right of access to all aspects of all criminal trials under all circumstances . . . plainly incorrect."[103]

Globe was the first case in this series to address and try to provide a standard on how to weigh competing interests. In *Richmond Newspapers*, the court did not give much attention to this issue, and the only standard articulated was for the "trial judge to release findings that articulate "an overriding interest" in closing the trial.[104] In *Globe*, the Court required the application of the strict scrutiny test to a "compelling governmental interest" in order to close a courtroom without violating the First Amendment.[105] As applied, this required the trial judge to show that the "denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest."[106] Justice Brennan further articulated that this evaluation must be

99. *N. Jersey Media Group*, 308 F.3d at 206; *Press-Enterprise II*, 478 US at 8-9; *Globe Newspapers*, 457 U.S. at 605-06.

100. *Globe Newspapers*, 457 U.S. at 606.

101. *Id.* at 605 n.13: "In Richmond Newspapers, the Court discerned a First Amendment right of access to criminal trials based in part on the recognition that as a general matter criminal trials have long been presumptively open. Whether the First Amendment right of access to criminal trials can be restricted in the context of any particular criminal trial, such as a murder trial (the setting for the dispute in Richmond Newspapers) or a rape trial, depends not on the historical openness of that type of criminal trial but rather on the state interests supporting the restriction." *See also*, Olson, *supra* note 41 at 482.

102. Olson, *supra* note 41, at 482.

103. *Globe Newspapers*, 457 U.S. at 613 (Burger, C.J., dissenting). Burger was joined by Justice Rehnquist.

104. Olson, *supra* note 41, at 481 (citing *Globe Newspapers*, 457 U.S. at 598 (Brennan, J., concurring)). In Richmond Newspapers "Brennan stated that, while examination of countervailing interests must be made, the blanket nature of the statute made unnecessary a finding of what interests might be sufficiently compelling to weigh against access."

105. *Globe Newspapers*, 457 U.S. at 606-07; Olson, *supra* note 41, at 483.

106. *Globe Newspapers*, 457 U.S. at 606-07; Olson, *supra* note 41, at 483: "In Globe, the Court found the state's interest in protecting minor victims of sexual offenses from further trauma

done "on a case-by-case basis" because "it is clear that the circumstances of the particular case may affect the significance of the [government's] interest."[107]

In cases after *Globe*, the Court extended this First Amendment right to access beyond the immediate criminal trial to jury selection as well.[108] In *Press-Enterprise Co. v. Superior Court* ("Press-Enterprise I"), the trial court restricted public access to the voir dire testimony of prospective jurors in a capital murder trial.[109] Press-Enterprise moved for a release of the complete transcript of the voir dire proceedings after the jury was empaneled and at the conclusion of the trial, but the trial court refused because of concern for juror privacy since certain sensitive matters were discussed.[110] Chief Justice Burger once again wrote the opinion for the majority and, while addressing both prongs, again placed the majority of the emphasis on the historical analysis.[111] His analysis of the history and logic prongs mirrored his analysis in *Richmond Newspapers*.[112] Ultimately, the Court held that there was a "public interest in ensuring that jurors are fairly and openly selected and concluded that the trial court too broadly closed off access and failed to consider alternatives that were available to protect the jurors' privacy."[113] Burger, agreeing with Brennan in *Globe*, also articulated that the standard for overturning this "presumption of openness" was strict scrutiny: "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 those interests."[114] He further elaborated on his standard from *Richmond Newspapers* by requiring

and embarrassment a compelling governmental interest, but found that the mandatory closure statute was not narrowly tailored."

107. *Globe Newspapers*, 457 U.S. at 607-08.

108. Solove, *supra* note 55, at 1202. *See, e.g., Press-Enterprise I*, 464 U.S. at 511 (holding in criminal cases the First Amendment right of access extended to pretrial jury selection proceeding).

109. Solove, *supra* note 55, at 1202. *See also Press-Enterprise I*, 464 US at 503 ("The trial judge. . .permitted [the public] to attend only the general voir dire. He stated that counsel would conduct the individual voir dire with regard to death qualifications and any other special areas that counsel may feel some problem with regard to . . . in private. The voir dire consumed six weeks and all but approximately three days were closed to the public.").

110. Solove, *supra* note 55, at 1202; *See Press-Enterprise I*, 464 US at 504.

111. *Press-Enterprise I*, 464 U.S. at 505. Chief Justice Burger again echoes his plurality opinion in *Richmond Newspapers* by stating, A historical view "reveals that, since the development of the trial by jury, the process of selection of jurors has presumptively been a public process with exceptions only for good cause shown."

112. *Id.* at 505-09. Like in *Richmond Newspapers*, Burger traces the history of access to pre-trial jury questioning from before the Norman Conquest to present day. He also places heavy emphasis on the therapeutic effects this history of access has played on the judicial process.

113. Solove, *supra* note 55, at 1202.

114. *Press-Enterprise I*, 464 U.S. at 510.

"the interest to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered."[115]

Two years later, the "Court all but overruled its decision in *Gannett*" when it extended the First Amendment right of access to preliminary hearings in criminal cases in *Press-Enterprise Co. v. Superior Court* ("Press-Enterprise II").[116] Chief Justice Burger, again writing for the majority, articulated the two "complementary" prongs of the *Richmond Newspaper* test.[117] The first "historical" prong considered "whether the place and process have historically been open to the press and general public," because a "tradition of accessibility implies the favorable judgment of experiences."[118] The standard articulated by the Court for the second "logic" prong is whether "public access plays a significant positive role in the functioning of the particular process in question."[119] The Court also recognized that these two prongs of experience and logic are related because "both history and experience shape the functioning of the governmental process."[120] Despite this relationship, the Court still independently applied both prongs of the test.[121] The Court further reaffirmed its prior holdings by recognizing that a First Amendment access right "is not absolute" and may be restricted, but only if the reason for closure passes the *Globe* strict scrutiny test.[122]

In summary, *Richmond Newspapers* and its progeny have laid out a doctrine that recognizes a First Amendment right of access to "judicial proceedings based upon two primary sources: (1) a history of openness; and (2) the structural role of access, through a finding that public access plays a significant positive role in the functioning of the particular proceeding in

115. *Id.*

116. Olson, *supra* note 41, at 484. *See Press-Enterprise* II, 478 US at 13 ("We therefore conclude that the qualified First Amendment right of access to criminal proceedings applies to preliminary hearings as they are conducted in California."). *Compare Gannett*, 443 U.S. at 383 (no right of access in preliminary hearings in criminal cases) *with Press-Enterprise II*, 478 U.S. at 13 ("the public has a qualified First Amendment right of access to preliminary hearings in criminal cases if the historical and structural prongs are satisfied.").

117. *Press-Enterprise II*, 478 U.S. at 8.

118. *Id.* (quoting *Globe Newspapers*, 457 U.S. at 605); *Richmond Newspapers*, 448 U.S. at 589 (Brennan, J., concurring).

119. *Press-Enterprise II*, 478 U.S. at 8 (quoting *Globe Newspapers*, 457 U.S. at 606).

120. *Id.* at 9. These considerations of experience and logic are, of course, related, for history and experience shape the functioning of governmental process.

121. *Id.* at 10, 11.

122. *Id.* at 9-10:

> 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. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.

question."[123] However, the Court has recognized this "right isn't absolute and must be weighed against countervailing interests."[124] In "balancing [countervailing] interests, courts must apply a strict scrutiny standard: the interest must be compelling and the closure must be narrowly tailored to serve that interest."[125]

123. Olsen, *supra* note 41, at 484.

124. *Id.*

125. *Id.*

Lower Court Decisions: Expanding the Scope of the Richmond Newspapers Doctrine

Since the Supreme Court's ruling in *Richmond Newspapers* and its progeny, lower courts have applied the two-pronged test.[126] Some lower courts have expanded the scope of the First Amendment to declare a constitutional right of access exists in entrapment hearings, bail hearings, civil cases and administrative hearings.[127] In deciding these cases, some courts have taken Burger's approach and relied heavily on the historical tradition of openness to expand the constitutional right of access.[128] As one legal scholar noted, when "analyzing the historical tradition of specific proceedings, some [courts] have drawn analogies with established proceedings[129] or have examined the history, however short, of the specific proceeding at issue."[130] Kathleen Olson goes on to write, "in areas where public access has clearly not been a tradition in American law, such as family court proceedings or grand juries, courts have been reluctant to find a presumptive right of access under the First Amendment."[131]

126. *Id.* at 485.

127. Solove, *supra* note 55, at 1202-03. *See, e.g.*, United States v. Criden, 675 F.2d 550, 557 (3d Cir. 1982) (entrapment hearings); United States v. Chagra, 701 F.2d 354, 363 (5th Cir. 1983) (bail hearings); Publicker Indus. V. Cohen, 733 F.2d 1059 (3d Cir. 1984) (civil proceedings): Westmoreland v. CBS, 752 F.2d 16 (2d Cir. 1984) (civil proceedings); Rushford v. New Yorker Magazine, 846 F.2d 249 (4th Cir. 1988) (civil proceedings); Brown & Williamson Tobacco Co. v. FTC, 710 F.2d 1165 (6th Cir 1983) (civil proceedings); In re Cont'l Ill. Sec. Litig., 732 F.2d 1302 (7th Cir 1984) (civil proceedings); Newman v. Graddick, 696 F.2d 796 (11th Cir 1983) (civil proceedings); Tribune Co. v. D.M.L., 566 So.2d 1333 (FL. Dist. Ct. App. 1990) (applying the two prong test to administrative commitment hearings); Herald Co. v. Weisenburg, 455 N.Y.S.2d 413, aff'd, 59 N.Y.2d 378 (N.Y. Sup. Ct. 1982) (administrative unemployment benefits proceedings).

128. Olson, *supra* note 41, at 485. (citing *Criden*, 675 F.2d at 557 (extended right of access to entrapment hearings based in part on their history of openness); *Publicker*, 733 F.2d at 1059 (extended right of access to motion hearings in a corporate litigation case based on the history of openness of civil proceedings)).

129. Olsen, *supra* note 41, at 485 (citing First Amendment Coalition v. Judicial Inquiry & Review Bd. 784 F.2d 467, 484-85 (3d Cir. 1986) (Adams, J., Concurring in part and dissenting in part) (calling for an analogy between judicial disciplinary proceedings and judicial impeachment hearings, which had historically been open); Soc'y of Prof'l Journalists v. Sec'y of Labor, 616 F.Supp 569 (D. Utah 1985) (analogizing administrative fact-finding proceedings to civil trials, which enjoyed a long history of openness, appeal dismissed and judgment below vacated and remanded as moot, 832 F.2d 1180 (10th Cir. 1987)).

130. Olsen, *supra* note 41, at 485 (citing *First Amendment Coalition*, 784 F.2d at 472 (extent of access right must be guided by "unique history and function" of 14-year-old Judicial Review Board)).

131. Olsen, *supra* note 41, at 485. *See, e.g.*, San Bernardino Co. Dept. of Pub. Soc. Serv. v. Super. Ct., 232 Cal. App. 3d 188 (Cal. Ct. App. 1991) (family court proceeding). First Amendment right of access does not extend to juvenile dependency proceedings, based in part on

Other courts, in deciding these types of cases, take Brennan's approach in *Richmond Newspapers* and *Globe* and have reduced the importance of historical openness and increased the emphasis on the structural value of access.[132] In *United States v. Chagara*, the court held that bail reduction hearings enjoy a First Amendment right of access because they "attract significant public interest, and invite legitimate and healthy public scrutiny," despite lacking the history of openness articulated in *Richmond Newspapers*.[133] Other courts have elevated the focus on the structural value of access above the historical analysis in showing a right of access to, presidential press conferences,[134] pretrial documents,[135] and denying access to discovery materials.[136]

Lower Court's Decisions: Applying the Richmond Newspaper Test to Administrative Hearings

Lower courts have commonly applied the *Richmond Newspaper* test to administrative hearings but have been divided in their outcomes. In *Tribune Co. v. D.M.L.*, the court never specifically articulated the two prong test, but appeared to rely on Chief Justice Burger's historical analysis in finding a First Amendment right of access.[137] However, after finding a First Amendment

history of closed proceedings.) In re Donovan, 801 F.2d 409 (D.C. Cir. 1986) (per curiam) (no First Amendment right of access to grand jury materials in criminal investigation of labor secretary due to long tradition of grand jury secrecy and need for secrecy for proper functioning of grand juries).

132. Olsen, *supra* note 41, at 485.

133. United States v. Chagra, 701 F.2d 354, 363 (5th Cir. 1983); Olson, *supra* note 41, at 485-86.

134. *See* Cable News Network v. American Broad. Cos., 518 F. Supp. 1238, 1244,1245 (N.D. Ga. 1981). Court found a First Amendment right of access to presidential press conferences in spite of the comparatively short history of access. The court referred to the short history as an "enduring and vital tradition of public" access.).

135. Jurisprudence surrounding the First Amendment right of access to pretrial documents has been convoluted. *Compare* Assoc. Press v. United States Dist. Ct., 705 F.2d 1143, 1145 (9th Cir. 1983) (finding a First Amendment right of access to pretrial documents in general), *with* Chicago Tribune Co. v. Bridgestone/Firestone, Inc., 263 F.3d 1304, 1310 (11th Cir. 2001) (finding the First Amendment right of access did not extend to discovery materials and was properly left to the discretion of the trial court.

136. *See Chicago Tribune*, 263 F.3d at 1310.

137. The court never applied the facts of their case to the two-prong test, but seemed to rationalize that administrative hearings were similar to civil and criminal court proceedings. The standard the court articulated was, "civil and criminal court proceedings in Florida are public events, and we must adhere to the well established common law right of access to court proceedings and records. Closure of such proceedings or records should only occur in limited circumstances, for example, when, as in this case, it is necessary to comply with established

right of access, the court reasoned that under strict scrutiny, the right of confidentiality of medical records outweighed the First Amendment right of access and the hearings were allowed to be closed.[138] Other lower courts have refused to extend the First Amendment right of access to medical and judicial disciplinary proceedings.[139] On the other hand, several lower courts have applied the *Richmond Newspaper* test and found a First Amendment right of access.[140] In making its ruling in *Society of Professional Journalists v. Secretary of Labor*, a federal district court recognized that the hearings were of "relative recent origin" but held the hearing at issue was analogous to a civil trial.[141]

In conclusion, lower courts are able to manipulate the history prong to either "limit or expand access, depending on whether the court examines the tradition of openness for the particular proceeding (as in *Society of Professional Journalists v. Secretary of Labor*), for similar proceedings (as in administrative fact-finding hearings), or for general types of proceedings (as with civil trials)."[142]

II. CASE FACTS AND PROCEDURAL HISTORY

Sixth Circuit: Detroit Free Press v. Ashcroft

On December 19, 2001, Immigration Judge Elizabeth Hacker conducted a bond hearing for Rabih Haddad ("Haddad"), a case the government had

public policy set forth by the legislature and to avoid substantial injury to [the defendants]" Tribune Co. v. D.M.L., 566 So.2d 1333, 1334 (FL. Dist. Ct. App. 1990).

138. *Tribune Co*., 566 So.2d at 1333-34 ("the party seeking closure of a hearing. . . has the burden at the trial level, and on appeal, to justify closure").

139. *See, e.g.*, Johnson Newspaper Corp. v. Melino, 564 N.E.2d 1046 (N.Y. 1990) (dentist's disciplinary proceeding did not meet either criterion of the Richmond Newspaper test); *First Amendment Coalition*, 784 F.2d at 467 (judicial misconduct hearing failed to show a need for public access).

140. *See, e.g.*, Herald Co. v. Weisenberg, 455 N.Y.S.2d 413, aff'd, 59 N.Y.2d 378 (N.Y. Sup. Ct. 1982) (finding a First Amendment right of access to administrative unemployment benefits hearing); Soc'y of Prof'l Jounalists v. Sec. of Labor, 616 F.Supp. 569 (D. Utah 1985) (finding a First Amendment right of access to a fact-finding hearing by the federal Mine Safety and Health Administration).

141. Olson, *supra* note 41, at 487 (citing *Soc'y of Prof'l Journalists*, 616 F.Supp. at 575). The Court found a First Amendment right of access to the administrative fact-finding hearings of the federal Mine, Safety and Health Administration. In making the analogy to a civil trial the court concluded that "to the extent that there his a tradition of holding this type of hearing, there is a tradition that the hearings have been open to the public," despite the fact that the Mine, Safety and Health Administration almost always closed it's hearings to the public.

142. *Id.*

secretly designated as a "special interest" case.[143] Haddad was subject to deportation for overstaying his tourist visa.[144] His case was classified as "special interest" because "the government suspected the charity Haddad operated supplied funds to terrorist organizations."[145] Haddad's family, members of the public, and several newspapers sought to attend his deportation hearing.[146] Without prior notice to the public, Haddad, or his attorney, courtroom security officers announced that the hearing was closed to the public and the press.[147] Haddad was denied bail, detained, and remained in government custody.[148] Haddad and several newspapers filed complaints for injunctive and declaratory relief, asserting, among other things, First and Fifth Amendment violations.[149] They named Attorney General Ashcroft, Chief Immigration Judge Creppy and Immigration Judge Hacker as defendants (collectively "the Government").[150] The newspapers, separately from Haddad, sought a declaratory judgment that the Creppy directive, facially and as applied, violated their First Amendment right of access to Haddad's deportation proceedings.[151] In their opinions, the district court, and subsequently the circuit court, only addressed the declaratory judgment motion by the newspapers.[152]

The district court initially granted the Newspaper's motion for declaratory judgment, finding that the Newspapers had a First Amendment right of access to the proceedings under *Richmond Newspaper* and its progeny.[153] The government timely filed its notice of appeal and on April 10, 2002, obtained a temporary stay of the district court order from the Sixth Circuit.[154] The Sixth Circuit's opinion, upholding a First Amendment right of access for the newspapers, was issued August 26, 2002.[155]

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

144. *Id.* at 684 n.2 ("With the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Congress changed the nomenclature of exclusion and deportation proceedings. Both are now refereed to as "removal" hearings. *See* 8 U.S.C §1229(a). However, the historical and legal distinctions still remain. *See* Zadvdas v. Davis, 533 U.S. 678, 693 (2001)").

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

146. *Id*.

147. *Id.*

148. *Id.*

149. *Id*.

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

151. *Id.*

152. *Id.* at 684 n.4.

153. *Id.* at 684.

154. *Id.*

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

Third Circuit: North Jersey Media Group v. Aschroft

From November 2001 to February 2002, reporters from the New Jersey Law Journal and Herald News ("Newspapers") were repeatedly denied docket information and access to deportation proceedings in Newark's Immigration Court.[156] On March 6, 2002, Newspapers filed a federal district court challenge to the Creppy Directive, asserting that its mandated policy of closing every "special interest" case violated their First Amendment right of access to the deportation hearings.[157] They argued not only that individualized inquiries are proper and practical, but also that because the Directive permits special interest detainees themselves to disseminate information concerning their proceedings, its "veil of secrecy is ineffective at best."[158] Although the Creppy Directive did not itself prohibit aliens and their counsel from themselves disclosing information about special interest hearings, a recently promulgated regulation authorizes immigration judges to issue protective orders and seal records as necessary to protect sensitive "law enforcement or national security information."[159] As this regulation took place on the day the District Court rendered its decision, it played no role in that opinion.[160]

The District Court applied the two-part First Amendment analysis set forth in *Richmond Newspapers* and found that since the promulgation of the modern immigration regulations there has been a "presumption of openness for deportation proceedings," or at a minimum, there has been "no tradition of their presumptive closure.[161] The District Court accordingly granted Newspaper's motion and temporarily enjoined the Creppy Directive's operation.[162] On June 17, 2002, the Third Circuit granted expedited review of the Governments appeal but denied a stay.[163] A week later the Supreme Court granted a stay of the District Court's injunction pending the final disposition of this appeal.[164] The Third Circuit Court of Appeals issued its opinion on October 8, 2002.[165]

III. COURT'S ANALYSIS

156. *N. Jersey Media Group*, 308 F.3d at 203.

157. *Id.* at 203-04.

158. *Id.* at 204.

159. *Id.* n.2 (describing 67 Fed. Reg. 36799 (2002)).

160. *Id.*

161. *N. Jersey Media Group*, 308 F.3d at 204 (citing N. Jersey Media Group, Inc. v. Ashcroft, 205 F.Supp.2d 288, 300).

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* at 198.

Sixth Circuit: Detroit Free Press v. Aschroft

The United States District Court in Michigan, and later the Sixth Circuit Court of Appeals, were the first courts to determine if the Creppy Directive violated the First Amendment access rights to deportation hearings.[166] Initially, the district court held the Creppy Directive violated the First Amendment right of access.[167] In reaching this outcome, the court concluded that the *Richmond Newspaper* test should apply to deportation hearings, and a First Amendment right of access existed.[168] The district court also refused to determine if national security was a "compelling governmental interest" under the lesser "deference standard" and instead determined an analysis under "strict scrutiny" was necessary.[169]

The district court's ruling was upheld by a unanimous panel of the Sixth Circuit.[170] Judge Damon Keith, writing for the court, also determined that the *Richmond Newspapers* test was applicable to deportation hearings and concluded that the public had a First Amendment right of access to the hearings.[171]

The first issue of law Judge Keith and the Sixth Circuit addressed was the correct standard of review to apply in this case.[172] The government contended that because it has plenary authority over immigration, its power supercedes any First Amendment right of access, and even if the First Amendment is applicable to deportation hearings, the court should review its actions using "deferential review" as opposed to the normal strict scrutiny test.[173] Under deferential review, the governmental policy infringing upon the First Amendment access right would be upheld if "facially legitimate and bona fide."[174] The court refused to accept the government's arguments and instead held that the "Constitution meaningfully limits non-substantive immigration laws and does not require special deference to the Government."[175] In reaching its holding, the court recognized a distinction between substantive

166. *Compare Detroit Free Press*, 303 F.3d at 681 (decided August 26, 2002) *with N. Jersey Media Group*, 308 F.3d at 198 (decided October 8, 2002).

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

168. *Detroit Free Press*, 195 F.Supp.2d at 947.

169. *Id.* at 945.

170. *Detroit Free Press*, 303 F.3d at 683.

171. *Id.* at 705.

172. *Id.* at 685.

173. *Id.* at 686 n.7. Instead of applying the normal strict scrutiny test, the government argues that their plenary power over immigration matters entitles them to more deference. *See, e.g.*, *Kleindienst*, 408 U.S. at 753 (no First Amendment bar to excluding people because of their beliefs); Wong Wing, 163 U.S. at 237 (courts cannot limit Congress from expelling "aliens whose race or habit render them undesirable as citizens").

174. *Detroit Free Press*, 303 F.3d. at 686; *see Kleindienst*, 408 U.S. at 770.

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

immigration laws, which the courts must give special deference, and non-substantive immigration laws, which are reviewed under strict scrutiny.[176] The court supported and justified this distinction with several arguments. The court first determined that the watershed case on immigration, *The Chinese Exclusion Case*, and all subsequent cases, gave deference to the federal government only in substantive immigration issues.[177] The court further explained that if it were to adopt the deferential standard for non-substantive issues, the Constitution would be unable to limit the powers over immigration matters and would allow the government to "transform the First Amendment from the great instrument of open democracy to a safe harbor from public scrutiny."[178]

The second issue the court addressed was determining if the First Amendment should apply to non-citizens.[179] The court began its analysis on this issue by examining other types of constitutional issues the Supreme Court and other circuits have deemed apply to deportation hearings and non-citizens.[180] In the areas of due process and the Fifth Amendment the Supreme Court has held that non-citizens seeking entry into the United States have no Constitutional rights because they have little or no ties with the United States.[181] But, non-citizens living within the United States have sufficient ties,

176. *Id.* at 686 ("The difference between a substantive and non-substantive immigration is that substantive immigration laws answer the questions, 'who is allowed entry' or 'who can be deported'").

177. *Id.* at 685-86. *See Chae Chan Ping*, 130 U.S. at 604, 606: "If the government . . . considers the presence of foreigners of a different race in this country . . . to be dangerous to its peace and security, . . . this determination is conclusive upon the judiciary." The court however, acknowledges that Congress's power over immigration matters was limited by "the constitution itself"; *Fiallo*, 430 U.S. at 792 (in a deportation hearing, the Court concluded "the power to expel or exclude aliens is a fundamental sovereign attribute exercised by the government's political department's largely immune from judicial control"). *See also Detroit Free Press*, 303 F.3d at 687 (distinguishing Kleindienst by two ways: (1) *Kleindienst* involved a substantive immigration decision; (2) Kleindienst refused to balance the First Amendment right against the government's plenary power, because the law was a substantive immigration law).

178. *Detroit Free Press*, 303 F.3d. at 686. The court also notes that the "dominant purpose of the First Amendment is to prohibit the widespread practice of governmental suppression of embarrassing information." Justice Murphy also noted that to allow the government to transform the First Amendment to a "safe harbor from public scrutiny . . . would make our constitutional safeguards transitory and discriminatory in nature . . . we cannot agree that the framers of the Constitution meant to make such an empty mockery of human freedom" (citations omitted).

179. *Id.* at 687-88.

180. *See id.* 688-89.

181. *Id.* (citing Hellenic Lines Ltd. V. Rhoditis, 398 U.S. 306, 309 (1970)) (stating that "once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders"). *See also Ex rel. Mezei*, 345 U.S. at 212 (an alien on the threshold of initial entry stands on different footing with regard to due process); Knauff v. Shaughnessy, 338 U.S. 537 (1950) (can exclude the wife of a United States citizen

and therefore have the same Constitutional rights and protections as citizens.[182] The court further extrapolated this to conclude that non-citizen deportees would get the full protection of the First Amendment because, like the Fifth Amendment, the First Amendment applies to "people" and not just to citizens, and the deportee has sufficient ties to count as a "person" under the Constitution.[183]

Judge Keith then addressed the issue of "whether the First Amendment affords the public a right of access to deportation hearings."[184] The government "contended that *Richmond Newspapers* and its progeny are limited to judicial proceedings" and therefore the court should apply the "more deferential standard articulated in *Houchins v. KQED*."[185] Yet, the court held that the appropriate standard for determining if a First Amendment right of access exists in administrative deportation hearings is set out in *Richmond Newspapers*.[186] In support of its holding, the court determined that the facts in *Houchins* were distinguishable from the facts in *Detroit Free Press*.[187] Also, *Richmond Newspaper* was decided chronologically after *Houchins*, so it is controlling precedent.[188] Additionally, the court noted that other courts, as well as the Sixth Circuit, have expanded the *Richmond Newspaper* test outside the criminal judicial context, and therefore, it ultimately concluded that the

without a hearing or reason); Kwock Jan Fat v. White, 253 U.S. 454 (1920) (trying to deport a person claiming citizenship based on evidence produced in absentia and not recorded or released to the deportee violates his Fifth Amendment right); Landon v. Plasencia, 459 U.S. 21, 32 (1982) (court stated that "once an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly").

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

183. *Detroit Fee Press*, 303 F.3d at 690-91.

184. *Id.* at 694.

185. *Id*.

186. *Id.*

187. *Compare id.* at 694, (Newspaper Plaintiffs request that they be able to attend the hearings on equal footing with the public. Court is interpreting the speech clause of the First Amendment) *with* Houchins v. KQED, Inc., 438 U.S. 1, 3 (1978) (issue decided was "whether the news media have a constitutional right of access to a county jail, over and above that of other persons, to interview inmates and make sound recordings, films and photographs for publication." The court was deciding the issue based upon the press clause of the First Amendment).

188. "The Richmond Newspaper's two part test sufficiently addresses all the Houchins court's concerns for the implications of a constitutionally mandated general right of access to government information." Also, by the Supreme Court "repeatedly applying the Richmond Newspapers test to assess the merits of case claiming First Amendment access rights to different government proceedings, it is clear that the Court has since moved away from its position in Houchins." *Detroit Free Press*, 303 F.3d at 694-95.

Richmond Newspaper test should apply to administrative deportation hearings.[189]

The court then applied the *Richmond Newspaper* test. In evaluating the experience prong, the court held that "deportation proceedings historically have been open . . . [a]lthough exceptions may have been allowed, the general policy has been one of openness."[190] In its analysis, the Sixth Circuit adopted Brennan approach and determined that "although historical context is important, a brief historical tradition might be sufficient to establish a First Amendment right of access where the beneficial effects of access to that process are overwhelming and uncontradicted."[191] In justifying its holding, the court partially relied on the Immigration and Naturalization Act and subsequent INS regulations. The court determined that since the Act was enacted in 1882, Congress had passed numerous statutes closing exclusion hearings, but none of these statutes ever required deportation hearings to be closed.[192] In fact, "since 1965 INS regulations have explicitly required deportation proceedings to be presumptively open," and Congress has yet to correct them by amending the Act.[193]

In addressing the logic prong of *Richmond Newspapers*, the court held that public access "undoubtedly enhances the quality of deportation hearings."[194] In reaching this conclusion, the court rearticulated much of the same reasoning as is found in *Richmond Newspapers*. The five reasons given by the court were: (1) "public access acts as a check on the actions of the Executive by ensuring . . . proceedings are conducted fairly and properly;"[195] (2) "openness

189. *Id.* at 695 (citing United States v. Miami Univ., 294 F.3d 797, 824 (6th Cir. 2002) test applied to university student disciplinary board proceedings); *Brown & Williamson Tobacco*, 710 F.2d at 1177-79 (Sixth Circuit applied the test to a civil action against administrative agency); *Publicker Indus*, 733 F.2d at 1059 (Third Circuit applied test to a civil trial); *Whiteland Woods*, 193 F.3d at 181 (Third Circuit applied test to a municipal planning meeting); Cal-Almond, Inc. v. United States Dept. of Agric., 960 F.2d 105, 109 (9th Cir. 1992) (test applied to agriculture department's voters list); *Soc'y of Prof'l. Journalists*, 616 F.Supp. at 574 (test applied to administrative hearing).

190. *Detroit Free* Press, 303 F.3d. at 701.

191. *Id.*

192. *Id*. An exclusion hearing is a hearing to prevent someone from entering the country, while a deportation hearing is to remove someone from the country.

193. *Id.* Since 1965, Congress has amended the Immigration and Nationality Act at least 53 times.

194. *Id.* at 703. The standard for the logic prong being articulated is "whether public access plays a significant positive role in the functioning of the particular process in question."

195. *Detroit Free Press*, 303 F.3d at 703-04. The court reasoned that "[i]n an area such as immigration, where the government has nearly unlimited authority; the press and the public serve as perhaps the only check on abusive government practices.

ensures the government does its job properly [and] doesn't make mistakes;"[196] (3) deportation hearings serve a "therapeutic purpose as outlets for community concern, hostility, and emotions" after the devastation of September eleventh;[197] (4) "openness enhances the perception of integrity and fairness;"[198] and (5) "public access helps ensure that individual citizens can effectively participate in and contribute to our republican system of self-government."[199]

Having found that both prongs of *Richmond Newspapers* were satisfied and a First Amendment right of access existed, the Sixth Circuit analyzed whether the government had made a sufficient showing of a compelling interest to overcome that right under strict scrutiny.[200] The court, disagreeing with the district court, held that national security was a "compelling interest sufficient to justify closure."[201] The court gave great deference to the declarations of the F.B.I. agents in determining that the government had a compelling interest because the "agents are certainly in a better position to understand the contours of the investigation and intelligence capabilities of terrorist organizations."[202] However, the court held that the Creppy Directive failed under strict scrutiny because it was not "narrowly tailored to serve that interest," and the immigration judge did not articulate "findings specific enough that a reviewing court can determine whether the closure order was properly entered."[203]

196. *Id.* at 704 (citing *Kwock Jan Fat*, 253 U.S. at 464 ("It is better that many [immigrants] should be improperly admitted than one natural born citizen of the United States should be permanently excluded from his country"); *Soc'y of Prof'l Journalists*, 616 F.Supp. at 575-76 ("Congressional 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. [Moreover,] the natural tendency of government officials is to hold their meetings in secret. They can thereby avoid criticism and proceed informally and less carefully.").

197. *Id.*

198. *Detroit Free Press*, 303 F.3d at 704: "The most stringent safeguards for a deportee would be of limited worth if the public is not persuaded that the standards are being fairly enforced. Legitimacy rests in large part on public understanding." *See First Amendment Coalition*, 784 F.2d at 486 (Adams, J., concurring in part, dissenting in part).

199. *Id.* at 704-05 (quoting Globe Newspaper, 457 U.S. at 604). The court's reasoning is public access "helps inform the public on affairs of the government [and this] direct knowledge . . . enhances [their] ability to affirm or protest government's effort." *Id.* at 705.

200. *Id.* at 705.

201. *Id.* The compelling governmental interest is "the protection of national security by safeguarding the government's investigation of the September eleventh terrorist attack and other terrorist conspiracies."

202. *Id.* at 707 (citing CIA v. Sims, 471 U.S. 159, 180 ("it is the responsibility of the Director of Central Intelligence, not that of the judiciary, to weigh the variety of complex and subtle factors in determining . . . the Agencies intelligence gathering process.")).

203. *Detroit Free Press*, 202 F.3d at 707. *See Globe Newspapers*, 457 U.S. at 606-07 ("[D]enial [of a First Amendment access right] is necessitated by a compelling governmental

The Creppy Directive and the decision to close the deportation hearing failed the strict scrutiny analysis both on its face and as applied. Immigration Judge Hacker "failed to make specific findings before closing . . . [the] deportation proceedings," and the Creppy Directive failed to give this instruction to the immigration judges.[204] A second reason the Creppy Directive failed the strict scrutiny analysis was because it was not "narrowly tailored."[205]

In deciding the "narrow tailoring" requirement of strict scrutiny the court agreed with the newspaper's argument that the "Creppy Directive is ineffective in achieving its goal because the detainees and their lawyers are allowed to publicize the proceedings."[206] Furthermore, the court determined there are less restrictive alternatives to serve the governments purpose than the Creppy Directive.[207] Therefore, the court concluded the same information could be kept from the public on a "case-by-case basis through protective orders or in camera reviews."[208] The government also argued that "open hearings would reveal the amount of intelligence that the government does not possess."[209] The court rejected this argument because in deportation hearings the issue is narrowly focused, the government has control over the evidence it introduces, and the standards for deportation are very low.[210] The court also held that the case-by-case analysis required under strict scrutiny cannot be done in secret by the government and must be done in a manner that will lend itself to review.[211]

In summary, the Sixth Circuit held the Creppy Directive failed strict scrutiny because it is both under-inclusive and over-inclusive.[212] It was

interest, and is narrowly tailored to serve that interest"); *Press-Enterprise II*, 478 U.S. at 10 ("The interest is to be articulated along with findings specific enough tat a reviewing court can determine whether the closure order was properly entered.")

204. *Id*. *See Press-Enterprise II*, 478 U.S. at 13 (instructs that in cases where partial or complete closure is warranted, there must be specific findings on the record so that a reviewing court can determine whether closure was proper and a less restrictive alternative exists).

205. *Detroit Free Press*, 303 F.3d at 707.

206. *Id.*

207. *Id.* at 708.

208. *Id.* The government contends that there is sensitive information that would be disclosed if closure occurred on a case-by-case basis such as the name of the defendant and by the mere closure of the hearing the terrorists would be alerted that the government is aware of a person's involvement. The court rejects this argument because "the information is already being disclosed to the public through the detainees themselves or their counsel."

209. *Id.* at 709.

210. *Detroit Free Press*, 303 F.3d at 709: "To deport, the immigration judge must be convinced by clear and convincing evidence that the alien was admitted as a non-immigrant for a specific period, that the period has elapsed, and that the alien is still in this country, *see* Shahla v. INS, 749 F.2d 561, 563 (9th Cir. 1984)".

211. *Id.* at 710.

212. *Id.*

"under-inclusive by permitting the disclosure of sensitive information, while at the same time drastically restricting First Amendment access rights" and over-inclusive by "categorically and completely closing all special interest hearings without demonstrating, beyond speculation, that such a closure is absolutely necessary."[213]

Third Circuit: North Jersey Media Group v. Aschcroft

Initially, the United States District Court in North Jersey, like the Sixth Circuit, held the Creppy Directive violated the First Amendment right of access to deportation hearings.[214] In reaching this outcome, the district court concluded that deportation hearings fulfill both prongs of the *Richmond Newspapers* analysis.[215] The district court reasoned that deportation hearings have a First Amendment right of access because of the "presumption of openness for deportation proceedings"[216] and the "undeniable similarities" between deportation hearings and judicial hearings, which "lead[s] to the conclusion that the same functional goals served by openness in the civil and criminal judicial contexts would be equally served in the context of deportation hearings."[217]

The trial court's ruling was ultimately reversed by a divided panel of the Third Circuit.[218] Chief Judge Becker wrote for the majority and applied the *Richmond Newspapers* test, yet concluded that there was no First Amendment right of access.[219] Judge Scirica, in his dissent, agreed that the *Richmond Newspapers* test was applicable to administrative hearings but concluded there was a First Amendment right of access.[220]

The first issue of law Chief Judge Becker and the Third Circuit addressed was the applicability of the *Richmond Newspapers* test to administrative deportation proceedings. The government contended that the *Richmond Newspapers* test, "developed as it was for criminal trials, [had] no proper

213. *Id.*

214. *N. Jersey Media Group*, 205 F. Supp. 2d at 301-02.

215. *Id.* at 300

216. *Id*.

217. *Id.* at 301; *Recent Case: First Amendment—Public Accesss to Deportation Hearings—Third Circuit Holds that the Governmetn Can Close "Sepcial Interest" Deprotation Hearings—North Jersey Media Group, Inc, v. Ashcroft, 308 F.3d 198 (3d Cir. 2002)* 116 HARV. L. REV. 1193, 1193 (2003) [herinafter Harvard Article.]

218. *N. Jersey Media Group*, 308 F.3d at 204-05; Harvard Article, *supra* note 217, at 1193.

219. *N. Jersey Media Group*, 308 F.3d at 199, 201. Chief Judge Becker was joined in the majority opinion by Judge Greenberg. Becker is probably best known to law students as the chief architect of the new procedure adopted by the Third Circuit and many other circuits for delaying hiring of law clerks until the second year of law school.

220. *Id.* at 221.

application outside the judicial realm."[221] The government's argument rested on the notion that Article III of the Constitution is silent on the question of public access to judicial trials.[222] Conversely, Articles I and II do "address the question of access, and they do not provide for Executive or Legislative proceedings to be open to the public."[223] Therefore, the government's argument concluded that *Richmond Newspapers* should not apply "where the Constitution's structure dictates that no First Amendment right applies and should be left to the political branches to determine the proper degree of access to administrative proceedings."[224] The Third Circuit rejected this argument and agreed with the district court and other circuits, in holding that the *Richmond Newspapers* test is applicable in administrative setting such as deportation hearings.[225]

Chief Judge Becker then addressed the issue of whether, under the *Richmond Newspapers* test, the public has a First Amendment right of access.[226] The court first evaluated the experience prong and held that "the tradition of open deportation hearings is too recent and inconsistent to support a First Amendment right of access."[227] The court began its analysis by determining that the question of whether a proceeding has been "historically

221. *Id.* at 204. The government is basing its argument for not expanding the scope of the First Amendment beyond criminal cases partly because Justice O'Connor specifically stated that the Court's holdings in Richmond Newspapers and Globe Newspaper do not "carry any implications outside the context of criminal trials." *Globe*, 457 U.S. at 611 (O'Connor, J., concurring).

222. *N. Jersey Media Group*, 308 F.3d at 207.

223. *Id.* Footnote 4 declares that the only constitutionalized access requirement vis-à-vis the Executive is that the President "from time to time give to the Congress Information of the State of the Union." U.S. CONST. art. II, §3. The Constitution also requires Congress to publish a "regular Statement and Account of the Receipts and Expenditures of all Public Money," U.S. CONST. art. I, §9, cl. 7, and instructs each House of Congress to publish a journal of proceedings from which it may withhold "such parts as it may in its judgment require secrecy." U.S. CONST. art. I, §5, cl. 3.

224. *Id.*

225. *Id.* at 207-09. In rejecting this argument the court relies heavily on its precedent in *Publicker*, 733 F.2d at 1059, in which the court applied the Richmond Newspapers test to civil trials and found a First Amendment right of access. *See also First Amendment Coalition*, 784 F.2d at 467 (the Third Circuit applied the Richmond Newspaper test to administrative hearings but concluded "these administrative proceedings, unlike conventional criminal and civil trials, do not have a long history of openness."); *Whiteland Woods*, 193 F.3d at 177 (applied the Richmond Newspaper test and determined a man did not have the right to videotape a township planning commission meeting).

226. *Id.* at 204-05. The Third Circuit disagreed with the district court's analysis and application of the *Richmond Newspapers* test. Not the application of the test to administrative deportation hearings.

227. *N. Jersey Media Group*, 308 F.3d at 211.

open" is only an objective inquiry.[228] The court acknowledged that since deportation procedures were implemented, the "governing statutes have always expressly closed exclusion hearings but have never closed deportation hearings."[229]

Newspapers argued that the Justice Department's regulations created a presumption of openness by stating, "all hearings, other than exclusion hearings, shall be open to the public except that . . . for purposes of protecting . . . the public interest, the Immigration Judge may limit attendance or hold a closed hearing."[230] Despite this argument, Judge Becker observed that, in practice, deportation hearings have been frequently closed to the public or held in locations inaccessible to the public whereas, criminal trials have been open to the public since the Norman Conquest and access to civil trials is "beyond dispute."[231] The court also observed that the government has a tradition of closing sensitive proceedings before administrative agencies.[232] The court ultimately concluded that according to both Supreme Court and Third Circuit precedent, in order to satisfy the experience prong, the history of openness must be beyond dispute.[233] Justice Becker was also hesitant to find that deportation hearings should fulfill the experience prong because of the "perverse consequences" that may result.[234] He concluded that the court must

228. *Id.*

229. *Id.*

230. *Id.* at 212 (citing 8 C.F.R § 3.27).

231. *Id.* at 212-13 (deportation hearings involving children are closed to the public. Deportation hearings are also sometimes held in prisons, hospitals, or private homes which are inaccessible to the general public); Harvard Article, *supra* note 217, at 1195.

232. *N. Jersey Media Group*, 308 F.3d at 210 (citing 20 C.F.R § 404.944, which closes Social Security hearings to "the parties and to other persons the administrative law judge considers necessary and proper.") Likewise, disbarment hearings are presumptively closed. 12 C.F.R § 19.199 (Office of Comptroller of Currency); 12 CFR § 263.97 (Federal Reserve Board of Governors) are proceedings which are all presumptively or mandatory closed the public. Additionally, several hearings are closed at the administrator's discretion for good cause to protect the public interest or other similar standards. *See, e.g.* 5 CFR § 185.132(d) (Office of Personnel Management); 10 CFR § 13.30(d) (Nuclear Regulatory Commission); 13 CFR § 142.21(d) (Small Business Administration); 28 CFR §68.39(a) (Department of Justice); 31 CFR § 500.713(a) (Office of Foreign Asset Control); 38 CFR § 42.30(d) (Office of Veteran's Affairs). *See also* 5 CFR § 2638.505(e)(2) (hearings on ethics charges against government employees may be closed "in the best interests of national security, the respondent employee, a witness, the public or other affected persons"); 10 CFR § 1003.62(a) (hearings before department of Energy House of Hearings and Appeals may be closed at the discretion of the administrator).

233. *Id.* at 212-13: "the court noted an "unbroken, uncontradicted history" of public access to criminal trials in Anglo American law running from before the Norman Conquest to the present, and it emphasized that it had not found a single instance of a criminal trial conducted in camera in any federal, state, or municipal court during the history of this country. Likewise in *Publicker*, 733 F.2d at 1059, we found that access to civil trials at common law was beyond dispute."

234. *Id.* at 215

adopt a "rigorous experience test" because it was "necessary to preserve the basic tenet of administrative law, that agencies should be free to fashion their own rules and procedure."[235]

In reaching this holding, the most difficult case for the Third Circuit to interpret was the recent Supreme Court decision in *FMC v. South Carolina Ports Authority*.[236] In that case, the Supreme Court held state sovereign immunity applies to administrative proceedings because even though formalized administrative adjudications were unheard of in the framers' time, administrative adjudications "walk, talk, and squawk [were] very much like a [civil] lawsuit."[237] The Sixth Circuit distinguished *North Jersey Media* from *South Carolina State Ports Authority* by holding that "while sovereign immunity is akin to a fundamental right, there is no fundamental right to attend governmental proceedings, and the court thus declined to loosen the *Ports Authority* analysis from its Eleventh Amendment moorings."[238]

For these reasons, the court ultimately held "the tradition of open deportation hearings is simply not comparable" to the tradition of access to criminal and civil trials.[239] The court also recognized that in its precedent it does not require a showing of openness at common law.[240] However, this precedent does not require the court to dispense with the *Richmond Newspapers* "experience requirement where history is ambiguous or lacking, and to recognize a First Amendment right based solely on the logic enquiry."[241] Furthermore, the court opined that it would "not recognize a First Amendment right based solely on the logic prong if there is history of closure" because it would compel "the executive to close its proceeding to the public ab initio or risk creating a constitutional right of access that would preclude [the government] from closing [administrative proceedings] in the future."[242]

235. *Id.* at 216 (internal quotations removed) (quoting Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 544 (1978)).

236. *See id. at* 214-15.

237. *N. Jersey Media Group*, 308 F.3d at 215 (citing Fed. Maritime Comm'n v. S.C. State Ports Auth., 122 S. Ct. 1872 (2002)); Harvard Article, *supra* note 217, at 1200 n. 23.

238. Harvard Article, *supra* note 217, at 1200 n.23 (internal citations removed). *See also N. Jersey Media*, 308 F.3d at 216.

239. *N. Jersey Media Group*, 308 F.3d at 213. *See also* Harvard Article, *supra* note 217, at 1195.

240. *N. Jersey Media Group*, 308 F.3d at 213 (citing *Criden*, 675 F.2d at 555 (Third Circuit finding a right of access to pretrial hearings even though no right existed at common law); United States v. Simone 14 F.3d 833, 838 (3d Cir. 1994) (finding a right although no history predated 1980); *Whiteland Woods*, 193 F.3d at 181 (finding a tradition of accessibility based on a recent statutory guarantee)).

241. *Id.*

242. *Id.* at 216. The court failed to completely adopt the government's argument that by recognizing a First Amendment right of access it would permanently consitutionalize a right of

In evaluating the logic prong of the *Richmond Newspapers* test, Judge Becker began by agreeing with the district court that "the same functional goals served by openness in the civil and criminal judicial contexts would be equally served in the context of deportation hearings."[243] Yet, he faulted the district court and other courts for not taking into account the flip-side of this analysis, and he appeared to create a balancing test in the logic prong analysis by noting that "any inquiry into whether a role is positive must . . . consider whether it is potentially harmful."[244] Otherwise, he reasoned the logic inquiry is irrelevant in the *Richmond Newspapers* analysis, and it would be difficult to "conceive of a government proceeding to which the public would not have a First Amendment right of access."[245]

In considering this flip-side, the court found that "the government presented substantial evidence that open deportation hearings would threaten national security."[246] Judge Becker based this conclusion on the speculative declaration of F.B.I. official Dale Watson, "which set forth several potential national security dangers" created by these "special interest" deportation hearings.[247] However, the court justified the speculative declaration by giving

access whenever an executive agency does not consistently bar all public access to a particular proceeding.

243.

> The Third Circuit has noted in subsequent cases six values 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.

(quoting *Simone*, 14 F.3d at 839).

244. *Id.* at 200-01, 217

245. *N. Jersey Media Group*, 308 F.3d at 217. The court additionally notes that they were unable to locate any proceeding which passed the experience test through its history of openness, yet failed the logic test by not serving community values. Additionally, the court also observed that the Supreme Court obviously didn't mean to conclude that the logic test shouldn't take into account the positive and the negative because otherwise public access to any governmental affair, even internal CIA deliberations, would promote informed discussion among the citizenry and therefore be open.

246. *Id.;* Harvard Article, *supra* note 217, at 1195.

247. *N. Jersey Media Group*, 308 F.3d at 218-19; Harvard Article, *supra* note 217 at 1195. The specific six dangers to national security presented in the Watson declaration are: (1) public hearings would necessarily reveal sources and methods of investigation; (2) the information given on how the individual entered the country would allow terrorist organizations to see patters of entry that worked and didn't; (3) information will reveal to terrorists which cells have been discovered by the government and which cells are still clandestine; (4) if a terrorist organization discovers a particular member is detained, or that information about a plot is known, it may

great deference to Dale Watson because it was "hesitant to conduct a judicial inquiry into the credibility of these security concerns, as national security is an area where courts have traditionally extended great deference to Executive expertise."[248] The court found that the district court had considered these national security dangers but had incorrectly considered them only under their strict scrutiny analysis after finding a First Amendment right of access existed.[249] Instead, the Sixth Circuit concluded these considerations must be taken into account in the logic prong analysis.[250] The court also used this evidence of a national security threat to find support for the government's request to reject a case-by-case closure determination because even "bits and pieces of information that may appear innocuous in isolation can be fit into a bigger picture by terrorist groups . . . [and] given judges relative lack of expertise regarding national security and their inability to see the mosaic, we should not entrust to them the decision whether an isolated fact is sensitive enough to warrant closure."[251] For these reasons, the court concluded the logic prong of the *Richmond Newspapers* test, like the experience prong, was not satisfied.

In conclusion, the court held that "open deportation hearings do not pass the two-part *Richmond Newspapers* test, [and as a result] the press and public possess no First Amendment right of access."[252] Therefore, the court reasoned, it was unnecessary to determine if the Creppy Directive would "pass a strict

accelerate the timing of the planned attack and not give the government enough time to stop it; (5) a public hearing would allow terrorist organizations to interfere with the pending proceedings by creating false or misleading evidence; (6) INS detainees have a privacy interest in having their possible connection to an ongoing investigation kept undisclosed because even if they later found not to be linked to a terrorist organization, the public may still consider them a terrorist; (7) proceedings can't be closed on a case by case basis because the judges lack knowledge on what is secret and what is not.

248. *N. Jersey Media Group*, 308 F.3d at 219.

249. *Id.* at 217.

250. *Id.* "Although the district court discussed these concerns as part of its strict scrutiny analysis, they are equally applicable to the question [of] whether openness, on balance serves a positive role in removal hearings." The court recognized "there is an evidentiary overlap between the Richmond Newspaper logic prong and the subsequent compelling government interest strict scrutiny investigation necessary upon finding a First Amendment right of access. Nonetheless, the court concludes the inquiries are not redundant because it is possible for openness to serve a positive role under a balanced logic prong even though the government has a compelling interest in closure. This would simply require that the policy rationales supporting openness be even more compelling than those supporting closure." *Id.* at 217 n.13.

251. *N. Jersey Media Group*, 308 F.3d at 219 (quoting Declaration of Dale L. Watson at 8-9); Harvard Article, *Supra* note 217 at 1195).

252. *Id.* at 221.

scrutiny analysis and whether the district court's "national in scope" injunction was too broad."[253]

IV. AUTHOR'S ANALYSIS

The overriding issue in both cases is: did the closure of administrative immigration cases to the public violate the First Amendment? In this circuit split created between the Sixth and Third Circuits, the Sixth Circuit in *Detroit Free Press v. Ashcroft* correctly applied the *Richmond Newspapers* test in upholding the newspapers' right of access to the hearings. In reaching this conclusion, the court correctly held there was a First Amendment right of access that was overshadowed by the compelling interest of national security. The court then correctly determined the Creppy Directive was unconstitutional because under strict scrutiny it did not narrowly serve the government's interest. While everyone may not agree with the Sixth Circuit's analysis and outcome, the Sixth Circuit has correctly applied and analyzed the problem under *Richmond Newspapers* test that was articulated by the United States Supreme Court. On the other hand, the Third Circuit in *North Jersey Media v. Ashcroft* wrongly interpreted the Supreme Court's precedent and misapplied the test in determining there was no First Amendment right of access.

There are several preliminary issues that both the Third Circuit and the Sixth Circuit addressed before applying the actual *Richmond Newspapers* test. The first significant issue both circuits addressed was whether the Supreme Court's *Richmond Newspapers* doctrine should be applied to administrative proceedings, such as deportation hearings, to determine if the public had a First Amendment right of access. Both circuits reached the same conclusion, that the *Richmond Newspapers* analysis should be applied in administrative deportation hearings. In reaching this conclusion, the government's main concern was that by granting a public right of access to administrative proceedings, the floodgates would be open and the public would have access to all administrative hearings. However, this very issue was addressed by Justice Brennan and is protected against in the *Richmond Newspapers* analysis. His solution, and the Supreme Court's solution, was to allow closure of proceedings that fulfilled both prongs of the *Richmond Newspapers* test, if the compelling reason survived strict scrutiny. Additionally, the very structure of the *Richmond Newspapers* two pronged analysis is a prophylactic device against this concern. Within the two prongs of the test, if the governmental proceeding has a history of openness *and* the public right of access in this particular occasion would benefit the proceedings, then a First Amendment right of access exists. These two prongs of the test naturally limit public access to most "secret" governmental, administrative proceedings and

253. *Id.*

therefore the government's concerns are unjustified. Additionally, even if the two prong test would conclude the public has an access right to a sensitive administrative hearing, the government would still be able to show that the public should be excluded under strict scrutiny. This would require the government to show that in this particular instance, access to this proceeding would jeopardize a compelling state interest and the method the government used to close the proceeding was the least restrictive. For these reasons, both circuits correctly determined that the *Richmond Newspapers* analysis should be expanded to administrative deportation proceedings in order to determine if the public has a First Amendment right of access.

In expanding the application of the *Richmond Newspapers* test to administrative deportation hearings, the courts should have further expanded its scope. It would make sense not to limit the use of the *Richmond Newspapers* analysis to judicial or quasi-judicial proceedings but rather to make it the uniform test to determine if the public has a right of access to any governmental meeting or activity. The two prongs of the test can be applied either under Justice Brennan's functional approach or Justice Burger's historical approach to effectively limit most public access to governmental proceedings where no real benefit of openness would exist, and where there traditionally has been little or no access. Additionally, the government is allowed to present a compelling governmental interest to close those proceedings. Depending on the type of government proceeding, the court could evaluate this government interest under strict scrutiny or a standard that is more deferential to the government's decision to close the proceedings. This uniform analysis in determining if a First Amendment right of access existed for the public would alleviate much of the confusion in this area of law. It would allow lower courts to reach more consistent results while at the same time allowing the government to restrict public access to confidential proceedings.

The major issue, and what ultimately creates a circuit split, is the interpretation and application of the *Richmond Newspapers* test by the Third and Sixth Circuits. The problem is partially in the misinterpretation of the Supreme Court precedent by the Third Circuit and partially a result of the ambiguity in the case law as to which prong of the two-prong analysis is most important. There are two primary approaches in deciding which prong of the two-pronged analysis is most important: Justice Brennan's and Justice Burger's. If a court were to adopt Justice Brennan's logic, as the Third Circuit did, it would be more likely to determine there is a First Amendment right of access to proceedings, which recently came into existence, because less weight is placed on the history of the openness and more weight is placed on the benefits that public access will bring to the procedure. However, if a procedure has a long history of openness but this openness provides very little

benefit to the proceedings, Justice Brennan's approach may find there is no First Amendment right of access. Conversely, if a court were to adopt Justice Burger's approach to the *Richmond Newspapers* analysis, it would focus greater attention on the history of openness that has been enjoyed by the particular process as opposed to the benefits the proceeding derived from this openness. Most courts seem to interpret Justice Burger's approach as being one that requires a long history of openness. But, it appears that events like deportation hearings, with a relatively short history of openness, would satisfy Burger's approach if their history of openness extended as long as they were in existence. In today's ever-changing world with new regulations and governmental proceedings being carried out, it makes more sense to apply Justice Brennan's approach and evaluate the history of openness, but place the majority of the emphasis of the test on the benefits the proceeding derives from public access. Even though this approach has the potential of providing greater public access to proceedings, it can still be restricted by a compelling governmental interest under strict scrutiny. Therefore, this approach appears to be the best alternative to recognize the importance of public access to recently created proceedings.

The other reason the circuit split was created was the Third Circuit's misapplication and misinterpretation of the *Richmond Newspapers* test. In evaluating the history of deportation hearings under the experience prong, the Third Circuit concluded deportation hearings do not have a long enough history of openness. The reason articulated for reaching this conclusion was that the history of openness for deportation hearings is much shorter than the history of openness for criminal trials. However, the court failed to take into account the fact that deportation hearings have existed for a much shorter time than criminal trials and throughout their history deportation hearings have always been presumptively open. A contributing factor to the Third Circuit's false conclusion is the fact the court is unable to rely on judicial precedent to establish a history of openness because deportation hearings are an administrative function with little judicial oversight, and are rarely challenged in court system. As a result, it may appear as if deportation hearings do not have a history of openness, when in fact they do. Therefore, the Third Circuit incorrectly concluded that deportation hearings do not have a history of openness sufficient to satisfy the experience prong. Additional evidence in support of this conclusion is the fact that the Attorney General has issued a regulation mandating "all hearings, other than exclusion hearings, shall be open to the public."

In their findings that the government may close deportation hearings, the Third Circuit, also misinterpreted the logic prong of the *Richmond Newspapers* test as it was laid out by the United States Supreme Court. The Third Circuit appeared to create a balancing test that considered both the positive and

negative aspects of opening deportation hearings to the public. This judicial innovation by the Third Circuit was wrong for two reasons. First, there was no precedent for creating this innovation in the Supreme Court's analysis. Secondly, it goes against the policy rationale of the First Amendment. The First Amendment was drafted to allow public access to governmental proceedings because public access is required for our republic to survive. The cornerstone requirement of a democratic nation is an informed public which is stifled if the government is allowed to act in secret, away from the scrutiny of the public. As a result, it is imperative that any test constructed to determine if the First Amendment right of access err on the side of allowing too much public access. In other words, it should be relatively easy to qualify for First Amendment protection. Therefore, the *Richmond Newspapers* test was constructed so that most proceedings are considered protected under the First Amendment right of access if they have, in the least bit shown to have been open to the public or can benefit by public access. If, in analyzing the functional prong of the *Richmond Newspapers* test, the courts were to analyze the negative as well as the positive aspects of opening, the test would greatly restrict when there is a presumption of openness under the First Amendment. Additionally, the Supreme Court, in articulating the *Richmond Newspapers* test provided a mechanism to consider any negative aspects of opening the proceeding to the public. The Court determined that the correct time and place to analyze the drawbacks of opening a procedure to the public was after determining if the First Amendment right of access was applicable to those particular proceedings. The Court has further articulated that the proceedings may be closed if the negative aspect of opening the proceedings is a compelling government interest and the closure is accomplished in the least restrictive means possible. Therefore, the Third Circuit incorrectly considered the negative aspects of opening deportation hearings under the logic prong of the analysis and, therefore, wrongly held the First Amendment access rights did not extend to deportation hearings.

The Sixth Circuit used the correct method for interpreting and applying the Supreme Court's *Richmond Newspapers* test. The court correctly held that both prongs of the test were satisfied because deportation hearings have a sufficient history of openness and serve a functionally significant role. After concluding that a First Amendment right of access applies to deportation hearings the court went on to analyze, under strict scrutiny, any compelling governmental reasons for closing the hearings. The court correctly determined that closing the hearings to protect national security was a compelling governmental interest. However, the court then, correctly held Creppy Directive was unconstitutional because it violated the strict scrutiny analysis because it is overbroad.

IV. CONCLUSION

In the wake of September 11, 2001, Chief Immigration Judge Michael Creppy and Attorney General John Ashcroft issued the Creppy Directive, which authorized immigration courts to restrict public access to "special interest" deportation hearings. This Directive was challenged in both the Sixth and Third Circuits as violating the public's First Amendment right of access. The Sixth Circuit, in *Detroit Free Press v. Ashcroft*, held the Directive was unconstitutional because it was not narrowly tailored and therefore violated strict scrutiny. However a circuit split was created when the Third Circuit, in *North Jersey Media Group v. Ashcroft*, held the Directive was constitutional, and therefore the public could and should be excluded from "special interest" deportation hearings.

In conclusion, the Sixth Circuit correctly interpreted and applied the United States Supreme Court's *Richmond Newspapers* analysis in determining the Creppy Directive violated the First Amendment and was therefore unconstitutional. The court correctly held that deportation hearings were presumptively open after applying the test. It also held that the government articulated a compelling interest of protecting national security. However, the court held the Creppy Directive was unconstitutional because it was not narrowly tailored and therefore failed strict scrutiny. The Third Circuit, on the other hand, misinterpreted and misapplied the *Richmond Newspapers* test in holding the Creppy Directive was constitutional. Therefore, the Creppy Directive is unconstitutionally overbroad and is void. However, it is clear the government has a compelling interest in closing deportation hearings to protect national security. So, if another more restrictive directive were to be issued by the government, the public could be excluded from deportation hearings without violating the First Amendment.

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