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THE FIRST AMENDMENT AND THE RIGHT OF ACCESS TO DEPORTATION PROCEEDINGS

JONATHAN L. HAFETZ*

The events of September 11, 2001 have significantly redefined the boundary between liberty and national security in American law and society. As part of its “war against terrorism,” the federal government, led by the President, has attempted to find those responsible for the September 11 attacks and protect the country against future terrorist attacks. In the process, it has sought unprecedented power to detain and deport noncitizens,¹ broaden the definition of “terrorist activity,”² conduct physical searches and wiretaps of suspected terrorists,³ subject Arab and Muslim men to ethnic profiling by law enforcement authorities,⁴ require certain immigrants from Arab and Muslim countries to undergo a “special registration” process,⁵ and seize and detain indefinitely individuals in the United States whom the President has designated as “enemy combatants.”⁶

Immigrants have been the primary target of the new erosion of civil liberties. While the terrorist attacks of September 11 were themselves unprece-

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1. David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 960-66 (2002) (discussing mass preventive detention of aliens by the government).

2. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, Pub. L. No. 107-56, § 411, 115 Stat. 272, 345-50 (2001).

3. *Id.* § 218 (amending 50 U.S.C. §§ 1804(a)(7)(B) & 1823(a)(7)(B) (2001)) (eliminating the requirement under the Foreign Intelligence Surveillance Act that wiretaps and physical searches authorized without a showing of probable cause nonetheless be for the primary purpose of foreign intelligence, not criminal law enforcement).

4. See, e.g., Leti Volpp, *Critical Race Studies: The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1578 (2002) (“The U.S. Department of Justice has also engaged in racial profiling in what has been described as a dragnet—seeking to conduct more than five thousand investigatory interviews of male noncitizens between the ages of eighteen and thirty-three from ‘Middle Eastern’ or ‘Islamic’ countries or countries with some suspected tie to Al Qaeda, who sought entry into the country since January 1, 2000, on tourist, student, and business visas.”).

5. See Rachel L. Swarns, *Thousands of Arabs and Muslims Could Be Deported, Officials Say*, N.Y. TIMES, June 7, 2003, at A9.

6. See, e.g., *Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003), cert. granted, 124 S. Ct. 1353 (2004).

dened, the subsequent backlash reflects a familiar pattern of targeting immigrants during times of war and crisis. This article focuses on one of the first and most prominent aspects of the backlash: the attempt to close deportation hearings to the press and public in cases the government has designated as “special interest.”

Following the attacks of September 11, hundreds of individuals were arrested and detained on immigration violations; many were subsequently placed in deportation proceedings.⁷ The Department of Justice imposed heightened security measures on noncitizens it believed had a close connection to Al Qaeda or a related terrorist organization. Less than two weeks after the attacks, Chief Immigration Judge Michael Creppy issued a memorandum, known as the “Creppy Directive,” requiring immigration judges to close the courtroom in deportation proceedings in “special interest” cases, including to visitors, family, and the press.⁸ Under the directive, an immigration court could not even communicate whether a particular case was on the docket or scheduled for a hearing.⁹ The directive thus imposed a complete blackout on any information about an entire category of deportation proceedings. By the government’s own admission, as of April 2003, 766 detainees had been designated as “special interest” cases, 611 of whom had closed deportation hearings under the Creppy Directive and 505 of whom had already been deported.¹⁰

Upon uncovering the existence of secret deportation hearings—a process that took months—media organizations filed suit to gain access to the hearings under the First Amendment.¹¹ While the plaintiffs readily acknowledged that national security concerns might dictate closure in individual instances, they insisted that such determinations had to be made by immigration judges on a case-by-case basis based on particularized findings.¹² District courts in Michigan and New Jersey enjoined enforcement of the Creppy Directive.¹³ In Michigan, the injunction applied to a particular indi-

7. See Swarns, *supra* note 5.

8. Memorandum from Chief Immigration Judge Michael Creppy, to All Immigration Judges (Sept. 21, 2001), available at http://archive.aclu.org/court/creppy_memo.pdf (last visited Jan. 25, 2004).

9. *Id.*

10. Brief for Respondent in Opposition to Petition for Writ of Certiorari at 5, *North Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002), *cert. denied*, 123 S. Ct. 2215 (2003).

11. *North Jersey Media Group v. Ashcroft*, 205 F. Supp. 2d 288 (D.N.J. 2002); *Detroit Free Press v. Ashcroft*, 195 F. Supp. 2d 937 (E.D. Mich. 2002). The First Amendment provides in relevant part that “Congress shall make no law . . . abridging the freedom of speech, or of the press . . .” U.S. CONST. amend. I.

12. See Reply Brief for Petitioner in Support of Petition for Writ of Certiorari at 8, *North Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002), *cert. denied*, 123 S. Ct. 2215 (2003).

13. *North Jersey Media Group*, 205 F. Supp. 2d at 305; *Detroit Free Press*, 195 F. Supp.

vidual;¹⁴ in New Jersey, the injunction entered was nationwide.¹⁵ Both orders were appealed, and the district court's nationwide injunction was stayed pending appeal. In *Detroit Free Press v. Ashcroft*,¹⁶ the U.S. Court of Appeals for the Sixth Circuit affirmed the ruling that the Creppy Directive violated the public's First Amendment right to attend deportation proceedings.¹⁷ However, in *North Jersey Media Group, Inc. v. Ashcroft*,¹⁸ the U.S. Court of Appeals for the Third Circuit reached the opposite conclusion and reversed the district court's decision.¹⁹

In opposing plaintiffs' attempt to seek review from the Supreme Court, the government claimed that the closure policy was likely to be revised and that there remained few, if any, individuals whose deportation hearings could conceivably be closed under the Creppy Directive.²⁰ Despite a direct circuit split on a historically important issue, the Court denied certiorari.²¹ While the government has essentially abandoned its use of the Creppy Directive, the cases nonetheless raise significant issues in terms not only of the government's treatment of the September 11 detainees, but also First Amendment access rights in administrative proceedings generally.

Both circuit courts addressed the right of access issue under the Supreme Court's decision in *Richmond Newspapers, Inc. v. Virginia*,²² which recognized a First Amendment right to attend criminal trials.²³ Under the so-called "logic" and "experience" test set forth in *Richmond Newspapers* and its progeny,²⁴ a court must decide: whether the particular proceeding has "historically been open to the press and general public;" and whether "public access play[s] a significant positive role in the functioning" of that proceeding.²⁵ Assuming both prongs have been met, access cannot be denied absent a showing that it is "necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest."²⁶

14. *Detroit Free Press*, 195 F. Supp. 2d at 948.

15. *North Jersey Media Group*, 205 F. Supp. 2d at 305.

16. 303 F.3d 681 (6th Cir. 2002).

17. *Id.* at 711.

18. 308 F.3d 198 (3d Cir. 2002).

19. *Id.* at 221.

20. Brief for Respondent in Opposition to Petition for Writ of Certiorari at 13, *North Jersey Media Group v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002), *cert. denied*, 123 S. Ct. 2215 (2003).

21. *North Jersey Media Group*, 308 F.3d 198 (3d Cir. 2002), *cert. denied*, 123 S. Ct. 2215 (2003).

22. 448 U.S. 555 (1980).

23. *Id.* at 580.

24. *Press-Enterprise v. Superior Court*, 478 U.S. 1 (1986) ("*Press-Enterprise II*"); *Press-Enterprise v. Superior Court*, 464 U.S. 501 (1984) ("*Press-Enterprise I*"); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982). Although the basis of the test was outlined in Justice Brennan's concurring opinion in *Richmond Newspapers*, it was not formally employed by the Court until *Press-Enterprise II*.

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

This article explains why a constitutional right of access to deportation hearings is necessary to safeguard the First Amendment's structural role of ensuring the informed public debate essential to representative self-government and protecting against abuse of power by public officials. This article describes how these broader goals underlie the Court's decision in *Richmond Newspapers* and later right of access cases. It also cautions against an overly rigid application of *Richmond Newspapers*' "logic" and "experience" test, particularly the "experience" prong's purported requirement of a lengthy historical tradition of access to the proceeding in question. The article suggests how other, broader historical narratives, particularly the mistreatment of immigrants during times of crisis, may be more closely related to the First Amendment's underlying structural goals than the fact of a tradition of access itself. Finally, the article underscores why extending a constitutional right of access to deportation hearings would be consistent with the government's concern about opening all administrative proceedings and actions to the public. Although the closed hearings of the September 11 immigration detainees has faded, the legality of the hearings was never conclusively settled, and the potential for further closed hearings remains, especially in the wake of another terrorist attack.

Part I briefly summarizes the important doctrinal developments during the period preceding the Supreme Court's decision in *Richmond Newspapers*, noting how the Court sought to balance the role of public access in promoting core democratic values like informed self-government with concerns about opening all government operations and records to the public under the First Amendment. This Part examines the Court's rejection of claims of a general public "right to know" and of a newsgathering privilege for the press. Yet, it also describes the Court's resistance to restrictions on access to or discussion about criminal trials, even when imposed by lower courts to protect a defendant's constitutional right to a fair trial amid seemingly prejudicial publicity.

Part II describes the Court's decision in *Richmond Newspapers* and tracks the emergence of the so-called "logic" and "experience" test in subsequent right of access cases. It describes how the Court's understanding of the First Amendment's structural role influenced these decisions. It also examines how *Richmond Newspapers* marked an important expansion of First Amendment doctrine by transcending the traditional—and problematic—distinction between the dissemination and/or receipt of information, which was protected under the First Amendment, and access to public information, which was not.

Part III examines the decisions by the Third and Sixth Circuits and their application of the "logic" and "experience" test in determining whether there is a constitutional right of access to deportation proceedings.

Part IV sets forth the basis of a constitutional right of access to deportation proceedings based on *Richmond Newspapers* and the First Amendment's role in the country's political system. It outlines the structural argu-

ments favoring access, including ensuring the informed public debate so vital to a democratic society; checking the abuse of power by public officials; and countering the government's extensive, yet constitutionally limited power over immigration. It then describes how this understanding of the First Amendment overlaps with the "logic" and "experience" test that developed in *Richmond Newspapers* and its progeny. It also discusses the problems with a mechanical application of *Richmond Newspapers*' two-pronged test, particularly the history prong, and suggests other ways of viewing history that relate more closely to the structural goals underlying access rights. Finally, this Part outlines limiting principles that justify a structural-based right of access to deportation hearings under *Richmond Newspapers*, while avoiding a potentially limitless expansion of claims of access to other government information or proceedings.

I. THE RIGHT OF ACCESS BEFORE *RICHMOND NEWSPAPERS*

In the years preceding its decision in *Richmond Newspapers*, the Court resisted efforts by media organizations and others to establish a broad right of access under the First Amendment to government information, records, and operations. While the Court acknowledged the First Amendment's broader purpose of promoting informed public debate in decisions such as *Houchins v. KQED, Inc.*,²⁷ it hewed to a vision of the First Amendment that protected against government restrictions on speech but did not secure a right of access to government information, records, or operations. The Court was influenced by separation of powers principles and prudential concerns about the absence of limits on any such right of access. None of these cases, however, involved access to formal, adjudicatory proceedings, as *Richmond Newspapers* would.

At the same time, the Court assessed the constitutionality of various restrictions on criminal court proceedings. In each instance, the Court affirmed the open nature of the proceedings under the First Amendment, suggesting that a constitutional right of access to adjudicatory proceedings presented different if not unique issues than access to government information facilities.

This Part describes the pre-*Richmond Newspapers* right of access cases and the restrictions on trial-based publicity that form the background to *Richmond Newspapers*.

A. Newsgathering and the "Right to Know"

During the 1960s and 1970s, watershed events like the civil rights movement, the Vietnam War (as well as the Cold War generally), and Watergate increased popular distrust of the government and fueled support for

greater openness in government.²⁸ Congress enacted legislation intended to increase the public's access to government records, documents, and information.²⁹ It was against this background that courts considered assertions that a "right to know" was grounded in the Constitution.

Various commentators maintained that a "right to know," while not contained within any explicit constitutional provision, was implicit in the First Amendment and the general principles of a democratic society.³⁰ The roots of this idea harkened to Justice Brandeis's description of public discussion as a "political duty" and "fundamental principle" of American government,³¹ and were developed into a comprehensive theory of the First Amendment by the political philosopher Alexander Meiklejohn.

According to Meiklejohn, the purpose of the First Amendment was to protect the people's absolute right to free and unrestricted discussion of ideas about matters of public interest—a right he maintained flowed from the people's role as sovereign master over their elected agents and inherent right to self-government.³² Free speech, he maintained, should inform citizens of a wide range of views so that they can make the best decisions in matters of government.³³ The First Amendment's ultimate goal is not to protect the individual right of each person to speak freely, but rather to ensure that "everything worth saying shall be said" so that people may govern themselves effectively.³⁴ Meiklejohn viewed the First Amendment not merely as a limitation on the government's power to restrict speech, but also as an obligation of the government to take steps to ensure and enrich public

28. See Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 524, 540; Eugene Cerruti, "Dancing in the Courthouse": *The First Amendment Right of Access Opens a New Round*, 29 U. RICH. L. REV. 237, 237 (1995); David M. O'Brien, *The First Amendment and the Public's "Right to Know"*, 7 HASTINGS CON. L.Q. 579, 579, 619 (1980).

29. See, e.g., Freedom of Information Act, 5 U.S.C. § 552 (2002) (granting access to agency records); Government in the Sunshine Act, 5 U.S.C. § 552b (1995) (granting access to agency meetings). The Freedom of Information Act mandates disclosure of information requested from the executive agencies unless the information falls into one of nine enumerated categories. 5 U.S.C. § 552(b) (2002).

30. See O'Brien, *supra* note 28, at 580 (summarizing views).

31. *Whitney v. California*, 274 U.S. 357, 375 (1926) (Brandeis, J., concurring) ("Those who won our independence believed . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government.")

32. See generally ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* (1965) [hereinafter *POLITICAL FREEDOM*]; see also Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 255 ("The First Amendment does not protect a 'freedom to speak.' It protects the freedom of activities of thought and communication by which we 'govern.'"); Alexander Meiklejohn, *What Does the First Amendment Mean*, 20 U. CHI. L. REV. 461, 465 (1952-53) ("Our political freedom guaranteed by the [First] Amendment consists in the fact that 'We' have decided that as we go about the business of governing the nation, that governing shall not, on any grounds, be deprived of its freedom by action of any subordinate branch of government.")

33. MEIKLEJOHN, *POLITICAL FREEDOM*, *supra* note 32, at 26.

debate.³⁵ Although he never explicitly linked the constitutional right of public access to his theories of democratic self-government, Meiklejohn's ideas provided the political underpinning of later claims of a "right to know."³⁶ Others expanded on Meiklejohn's ideas, describing how a right to know encompassed other First Amendment values such as ensuring individual autonomy³⁷ and a multiplicity of viewpoints.³⁸

Assertions of a right to know were closely associated with the belief that the press had a constitutional right to gather news, an idea that gathered momentum within the academy during the early 1970s,³⁹ obtaining some support from members of the Court.⁴⁰ If the right to know were to have a meaningful impact, it would require active participation by an institution like the press, with the power to disseminate information to the general public.⁴¹ Supporters of a special constitutional protection for the press believed it played an important role in limiting the abuse of power by government officials.⁴²

The Court had previously recognized the press's role in promoting the discussion of public affairs and safeguarding against abuses of power by public officials.⁴³ Yet, while the Court had protected the press's freedom to disseminate information from prior restraint even amid claims of national security,⁴⁴ it still resisted the notion that the press had a constitutional right of

35. *See id.* at 19-20.

36. *See, e.g.*, Lillian R. BeVier, *An Informed Public, An Informing Press: The Search for a Constitutional Principle*, 68 CAL. L. REV. 482, 497 (1980); Thomas I. Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U. L.Q. 1, 4; *cf.* Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 26 (1971) ("[T]he entire structure of the Constitution creates a representative democracy, a form of government that would be meaningless without freedom to discuss government and its policies.").

37. *See* THOMAS EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 4-5, 8 (1970).

38. *Id.* at 10. According to Emerson, the right to obtain information merely formed the "reverse side of the coin" from the right to communicate and disseminate ideas. *Id.* at 2.

39. *See, e.g.*, William W. Van Alstyne, *The First Amendment and the Free Press: A Comment on Some New Trends and Some Old Theories*, 9 HOFSTRA L. REV. 1, 4 n.17 (1990) (citing articles); Cerruti, *supra* note 28, at 247.

40. *See, e.g.*, *Pell v. Procunier*, 417 U.S. 817, 839-40 (1974) (Douglas, J., dissenting).

41. *Mills v. Alabama*, 384 U.S. 214, 219 (1966); *Branzburg v. Hayes*, 408 U.S. 665, 722 (1972) (Douglas, J., dissenting) ("The function of the press is to explore and investigate events, inform the people what is going on, and to expose the harmful as well as the good influences at work.").

42. *See, e.g.*, Blasi, *supra* note 28, at 527-44. Blasi, a leading proponent of this theory, did not view the checking value as the First Amendment's exclusive function but rather saw it as a supplement to other First Amendment values such as representative self-government, individual autonomy, and diversity. *See id.* at 528, 544. Blasi distinguished the checking and self-government values primarily based on the fact that the latter protects a much broader range of communication in comparison to the checking value's focus on official misconduct. *See id.* at 558.

43. *Mills*, 384 U.S. at 219 (invalidating a state statute prohibiting election-day newspaper endorsements or criticisms of candidates).

44. *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971) ("*The Pentagon Papers Case*").

access to information held by the government. Even Justice Stewart, who supported protecting the press's institutional role under the press clause, stopped short of advocating that any such privilege be extended to accessing information, as opposed to preventing restrictions on the press's ability to receive and disseminate information.⁴⁵

Until *Richmond Newspapers*, the Court's recognition of a right to know thus extended only to the freedom to receive and disseminate information and ideas,⁴⁶ which it declared "fundamental to our free society."⁴⁷ The government might be required to take steps to preserve existing channels of communication, at least in traditional public forums,⁴⁸ but the issue became more difficult when the information remained within the government's possession or control. Thus, although the Court acknowledged the importance of newsgathering to a democratic society in an abstract sense, it determined that newsgathering was not entitled to the same protection as traditional First Amendment activities like public speaking and publishing, and refused to acknowledge any special newsgathering privilege under the either the press or speech clause.⁴⁹

This issue first came before the Court in a trio of cases decided under the name *Branzburg v. Hayes*.⁵⁰ In *Branzburg*, the question was whether journalists could be required to appear and testify before a grand jury about information they might have obtained from confidential sources.⁵¹ Recogniz-

45. See Potter Stewart, *Or, of the Press*, 26 HASTINGS L.J. 631, 636 (1975) ("The public's interest in knowing about its government is protected by the guarantee of a Free Press, but the protection is indirect."); *Houchins v. KQED*, 438 U.S. 1, 16 (1978) (Stewart, J., concurring) ("The Constitution does no more than assure the public and the press equal access once the government has opened its doors."). Similarly, some commentators supported a special constitutional status for the press to the extent it would give the press defensive protection against certain forms of government interference, but did not advocate transforming this protection into a special right of access to information held by public officials. See, e.g., C. Edwin Baker, *Press Rights and Government Power to Structure the Press*, 34 U. MIAMI L. REV. 819, 838-45, 857 (1980) (distinguishing "defensive" and "offensive" rights of the press and arguing that only the former are entitled to constitutional protection because the latter, though possessing considerable force, do not maintain institutional autonomy or boundaries).

46. See, e.g., *Lamont v. Postmaster Gen.*, 381 U.S. 301 (1965) (declaring unconstitutional the detention of communist propaganda in the mails); *Martin v. Struthers*, 319 U.S. 141 (1943) (declaring unconstitutional a prohibition on door-to-door distribution of literature); *Grosjean v. Am. Press Co.*, 297 U.S. 233 (1936) (declaring unconstitutional a licensing tax on advertising).

47. *Stanley v. Georgia*, 394 U.S. 557, 564 (1969).

48. See Note, *Trial Secrecy and the First Amendment Right to Judicial Proceedings*, 91 HARV. L. REV. 1899, 1903-04 (1978) [hereinafter *Trial Secrecy and the First Amendment*].

49. See O'Brien, *supra* note 28, at 619-20 (noting that despite efforts by numerous litigants, the Court has never recognized an enforceable "right to know" under the First Amendment); see also Van Alstyne, *supra* note 39, at 1, 7-8 (noting the trend of setbacks in First Amendment claims by newspapers).

50. 408 U.S. 665 (1972).

51. *Id.* at 672-78. Two of the three cases in *Branzburg* involved challenges by journalists to grand jury subpoenas seeking testimony about their reporting on the Black Panther Party; the third case involved a challenge to a grand jury subpoena by a reporter investigating the

ing that “news gathering is not without its First Amendment protections,”⁵² the Court nonetheless concluded that the burden on newsgathering was outweighed by the public interest in law enforcement and effective grand jury proceedings.⁵³ The Court denied that the press possessed a privileged status under the First Amendment,⁵⁴ and noted the exclusion of journalists from grand jury proceedings, the Court’s own conferences, the meetings of other official bodies gathered in executive session, and the meetings of private organizations.⁵⁵ Restrictions on newsgathering, the Court explained, were distinct from restrictions on what the press might choose to publish, and only the latter was entitled to constitutional protection.⁵⁶

Branzburg produced a short concurring opinion by Justice Powell, who provided the decisive fifth vote, stressing the limited nature of the Court’s holding.⁵⁷ Two separate dissenting opinions described why the First Amendment supported a constitutional right to newsgathering that trumped the law enforcement concerns underlying grand jury subpoenas. Justice Douglas, relying primarily on the political theory of Alexander Meiklejohn,⁵⁸ maintained that journalists play a critical role in society by “bring[ing] fulfillment to the public’s right to know, . . . [which] is crucial to the governing powers of the people.”⁵⁹ Justice Stewart, in a dissenting opinion joined by Justices Brennan and Marshall, stressed that a reporter’s confidential relationship with his sources stemmed from the broad societal interest in the full and free flow of information to the public.⁶⁰ Justice Stewart also pointed out the artificiality of the Court’s distinction between dissemination and newsgathering: “without freedom to acquire information, the right to publish would be impermissibly compromised.”⁶¹

production of narcotics. *Id.* at 667-79.

52. *Id.* at 707.

53. *Id.* at 690-91.

54. *Id.* at 684 (“It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally.”).

55. *Id.* at 684-85.

56. *Id.* at 681-82. The Court had previously distinguished the right to speak and publish from the right to gather information in a decision sustaining the government’s refusal to validate passports to Cuba even though the restriction impeded the free flow of information concerning that country. *See Zemel v. Rusk*, 381 U.S. 1, 16-17 (1965). That decision, however, has been described as involving a restriction on freedom of movement—the right to travel—as opposed to the right to know. *See, e.g., EMERSON, supra* note 37, at 19; *see also* Kathleen A. Dockry, Note, *The First Amendment Right of Access to Government-Held Information: A Re-Evaluation after Richmond Newspapers, Inc. v. Virginia*, 34 RUTGERS L. REV. 292, 306 (1982).

57. 408 U.S. at 709-10 (Powell, J., concurring).

58. *See supra* notes 32-35 and accompanying text.

59. *Branzburg*, 408 U.S. at 721 (Douglas, J., dissenting).

60. *Id.* at 725 (Stewart, J., dissenting).

61. *Id.* at 728. As his opinions in subsequent right of access cases involving prisons would indicate, Justice Stewart’s views about protections for the press did not encompass a broad right to know. *See infra* notes 66-68 and accompanying text.

The Court next confronted the question of the First Amendment right of access in a trio of cases involving prisons.⁶² Here, the Court explicitly rejected claims of a constitutional newsgathering privilege and, by implication, of a "right to know." The first two cases, *Pell v. Procunier*,⁶³ and *Saxbe v. Washington Post Co.*,⁶⁴ decided together, involved challenges by inmates and news organizations to regulations precluding interviews between the press and specified prison inmates.⁶⁵ Relying on *Branzburg*, the Court held that because the regulations did not deny the press access to sources available to members of the general public, they did not violate the First Amendment.⁶⁶ Justice Stewart, who had dissented in *Branzburg*, authored the Court's opinions in *Pell* and *Washington Post*. While he had supported striking down restrictions on the press's relationships with private sources of information in *Branzburg*,⁶⁷ Justice Stewart now accepted restrictions on access to government-controlled information, thereby making the principle of government non-interference with press activities the axis of First Amendment protection.⁶⁸ Again, the dissenting opinions echoed Meiklejohn's ideals about the importance of openness and informed public debate in a democratic society, particularly where it involved institutions with extensive control over individuals as powerless as prisoners.⁶⁹

The third prison access case, *Houchins v. KQED, Inc.*,⁷⁰ involved the exclusion of the press and public from portions of a county jail. A broadcasting company claimed it had a First Amendment right to interview inmates and make recordings, films, and photographs for publication and broadcasting.⁷¹ The news organization emphasized the importance of an informed public as a safeguard against misgovernment and the critical role of the media in providing information in a democratic society.⁷² In a plurality opinion by three members of the Court,⁷³ Chief Justice Burger generally acknowledged

62. *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978); *Saxbe v. Wash. Post Co.*, 417 U.S. 843 (1974); *Pell v. Procunier*, 417 U.S. 817 (1974).

63. 417 U.S. 817 (1974).

64. 417 U.S. 843 (1974).

65. *Pell*, 417 U.S. at 819; *Wash. Post Co.*, 417 U.S. at 844. *Pell* involved a California prison regulation and *Washington Post* involved an analogous federal prison regulation.

66. *Pell*, 417 U.S. at 834-35; *Wash. Post Co.*, 417 U.S. at 849.

67. *Branzburg*, 408 U.S. at 725 (Stewart, J., dissenting).

68. *Pell*, 417 U.S. at 834-35; *Wash. Post Co.*, 417 U.S. at 849; see also Blasi, *supra* note 26, at 602 (noting the Court's ambivalence about the newsgathering interest because of its concern that newsgathering is somehow different than "such core First Amendment activities as public speaking, pamphleteering, and demonstrating").

69. *Pell*, 417 U.S. at 839-41 (Douglas, J., dissenting); *id.* at 863 (Powell, J., dissenting) ("What is at stake here is the societal function of the First Amendment in preserving free public discussion of government affairs.").

70. 438 U.S. 1 (1978).

71. *Id.* at 7-8.

72. *Id.* at 8.

73. Chief Justice Burger announced the judgment of the Court, and delivered an opinion in which Justices White and Rehnquist joined. Justice Stewart filed an opinion concurring in

the critical role of the press in informing the public about issues like prison conditions, but denied that the press possessed “special” access rights under the First Amendment.⁷⁴ Specifically, he distinguished cases upholding the press’s right to disseminate and receive information it has already obtained from its right to gather new information from government sources.⁷⁵ This dichotomy reflected an almost proprietary, laissez-faire understanding of free speech: once the information belongs to a speaker, First Amendment protection attaches to the speaker as well as a recipient; if, however, the information remains in the possession or control of the government, access may be denied. Again, the dissent stressed the First Amendment’s role in ensuring the free flow of information necessary to representative self-government.⁷⁶

Thus, *Houchins* and the other prison access cases seemed to squarely reject the notion of a general “right to know” about the inner workings of government institutions.⁷⁷ Subsequent decisions have also rejected assertions of a newsgathering privilege in other contexts.⁷⁸ At the same time, the prison cases did not involve a complete ban on access.⁷⁹ Although several statements in Chief Justice Burger’s plurality opinion in *Houchins* might suggest

the judgment and Justice Stevens filed a dissenting opinion joined by Justices Brennan and Powell; Justices Marshall and Blackmun took no part in the case.

74. *Houchins*, 438 U.S. at 11, 15.

75. Specifically, the Court distinguished *Grosjean v. Am. Press Co.*, 297 U.S. 233 (1936), which struck down a state licensing tax on advertising revenues of newspapers, and *Mills v. Alabama*, 384 U.S. 214 (1966), which struck down a state statute criminalizing publication of editorials about election issues on election day. *Houchins*, 438 U.S. at 8-14.

76. See *Houchins*, 438 U.S. at 30 (Stevens, J., dissenting) (“The preservation of a full and free flow of information to the general public has long been recognized as a core objective of the First Amendment . . . [T]he First Amendment protects not only the dissemination but also the receipt of information and ideas.”).

77. See *id.* at 9 (“[The] Court has never intimated a First Amendment guarantee of a right of access to all sources of information within government control.”). The Court would continue to articulate a restrictive view of the public and press’s First Amendment rights in the prison setting. See, e.g., *Bell v. Wolfish*, 441 U.S. 520 (1979) (upholding regulation allowing only publishers, bookstores, and book clubs to mail hardbound books to pretrial detainees for fear hardbound books might contain contraband); *Jones v. N.C. Labor Union, Inc.*, 433 U.S. 119 (1977) (upholding administrative restriction on preventing union organizing within a prison).

78. See, e.g., *Herbert v. Lando*, 441 U.S. 153 (1979) (no “editorial privilege” to prevent plaintiff in libel suit from inquiring directly into editors’ state of mind); *Zucher v. Stanford Daily News*, 436 U.S. 547 (1978) (search of student newspaper for evidence of identities of university students involved in attack upon the police was not unconstitutional burden on newsgathering process).

79. See *Pell*, 417 U.S. at 830 (“We note at the outset that this regulation is not part of an attempt by the state to conceal the conditions in its prisons or to frustrate the press’ investigation and reporting of those conditions. Indeed, the record demonstrates that, under current corrections policy, both the press and general public are accorded full opportunities to observe prison conditions.”); see also *Wash. Post*, 417 U.S. at 851 (Powell, J., dissenting) (“The ban against press interviews is not part[] of any general news blackout in the federal prisons.”). In *Pell*, the Court justified the restriction as a reasonable time, place, and manner restriction, underscoring the First Amendment’s role in maintaining the political system and the presumptive unconstitutionality of any prior restraint on speech. 417 U.S. at 832.

that the newsgathering function is without any First Amendment protection,⁸⁰ his opinion was joined by only two other justices (in a case in which only seven justices participated), and thus did not command a majority of the full Court.⁸¹ Moreover, the plurality opinion described the various ways the media could still learn indirectly about prison conditions.⁸²

B. Restrictions on Public Access to Trials

Around the same time it was addressing claims of a First Amendment right to gather news, the Court reviewed challenges to judicially imposed restrictions on access to court proceedings. These restrictions were a response by trial courts to what they saw as the growing risk of prejudice from the expansion of media coverage of criminal trials.⁸³ While courts historically had wide discretion in handling issues of prejudicial pretrial publicity,⁸⁴ they faced increasing pressure to take preventative action to ensure a fair trial. In reversing the conviction in *Sheppard v. Maxwell*,⁸⁵ the celebrated trial of a Cleveland doctor accused of murdering his wife, the Supreme Court cautioned trial courts to adopt “strong measures to . . . prevent the prejudice at its inception.”⁸⁶ Courts increasingly began to impose restrictions on the dissemination of information by the press and litigants.⁸⁷ Restrictions took the form of restraints on the press’s right to report information and the closure of segments of trials.⁸⁸ These restrictions seemed to pit a defendant’s Sixth Amendment right to a fair trial by an impartial jury against the First Amendment’s free speech guarantee, which Justice Black had called “two of the

80. See, e.g., 438 U.S. at 15 (“Neither the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government’s control.”); cf. *Cal-Almond, Inc. v. United States Dep’t of Agric.*, 960 F.2d 105, 109 n.2 (9th Cir. 1992) (stating that while *Houchins* recognizes “there is no general right of access to government information . . . the line of cases from *Richmond Newspapers* to *Press-Enterprise II* recognizes that there is a limited constitutional right to some government information”) (emphases in original).

81. See *supra* note 73.

82. *Houchins*, 438 U.S. at 15; see also *Pell*, 417 U.S. at 830 (noting that “the press and general public are accorded full opportunities to observe prison conditions”).

83. See Robert Hardaway & Douglas B. Tumminello, *Pretrial Publicity in Criminal Cases of National Notoriety: Constructing a Remedy for the Remediless Wrong*, 46 AM. U. L. REV. 39, 41 (1996); see also Hans A. Linde, *Fair Trials and Press Freedom—Two Rights Against the State*, 13 WILLAMETTE L.J. 211, 211 (1977) (noting increasing support for developing means to ensure fair trials in light of press coverage).

84. See Hardaway & Tumminello, *supra* note 83, at 42.

85. 384 U.S. 333 (1966).

86. *Id.* at 362-63; see also *Estes v. Texas*, 381 U.S. 532, 539 (1965) (suggesting that in high publicity trials, the presence of the press could be limited when it was apparent that the accused might otherwise be prejudiced or disadvantaged); *Rideau v. Louisiana*, 373 U.S. 723, 727 (1963) (allowing for reversal of conviction based on presumed prejudice).

87. *Trial Secrecy and the First Amendment*, *supra* note 48, at 1899.

the most cherished policies of our civilization.”⁸⁹

In *Nebraska Press Ass’n v. Stuart*,⁹⁰ the Court reviewed a First Amendment challenge to a gag order restricting information news organizations could publish or broadcast during a highly publicized murder trial. The Court recognized the danger prejudicial pretrial publicity posed to defendants and the need for trial judges to take steps to mitigate its effects.⁹¹ While it refused to assign one constitutional right priority over the other, the Court evaluated the restrictions on publicity in light of the heavy presumption against the validity of prior restraints,⁹² and held that the orders violated the First Amendment.⁹³

Other decisions during this period similarly reflect the Court’s resistance to restrictions on the receipt and dissemination of information about public trials. The Court declared an absolute right of the press to report matters transpiring in open court,⁹⁴ recognized the press’s right to report trial-related information obtained out of court,⁹⁵ and held that a newspaper could not be subject to criminal prosecution for divulging confidential information regarding proceedings before a state commission authorized to hear complaints about a judge’s disability or misconduct.⁹⁶ While such decisions fell within the traditional distinction between restrictions on the receipt or dissemination of ideas and access to government-controlled information, they also echoed the association between open trials and the First Amendment value of securing the free flow of information in the Court’s prior opinions.⁹⁷

89. *Bridges v. California*, 314 U.S. 252, 260 (1941). *But see* Linde, *supra* note 83, at 214-18 (rejecting that the conflict was in fact between the public’s First Amendment right of access and a defendant’s right to a fair trial).

90. 427 U.S. 539 (1976).

91. *Id.* at 554-55.

92. *Id.* at 561-62. As such, the Court determined whether the “‘gravity of the evil, discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.’” *Id.* (quoting *United States v. Dennis*, 183 F.2d 201, 212 (2d Cir. 1950) (Hand, J.), *aff’d*, 341 U.S. 494 (1951)).

93. *Id.* at 570. Three members of the Court asserted that prior restraints on the press could never be a constitutionally permissible means of protecting a defendant’s fair trial rights. *See id.* at 572 (Brennan, J., concurring).

94. *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975) (invalidating a Georgia statute authorizing an invasion of privacy suit for publication of the name of a rape victim revealed in connection with the prosecution for the crime).

95. *See Okla. Publ’g Co. v. District Court*, 430 U.S. 308 (1977) (declaring unconstitutional a trial court’s pretrial order enjoining the media from publishing the name and photograph of an 11-year-old boy in connection with a pending juvenile delinquency proceeding at which the media was present).

96. *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978).

97. *Sheppard v. Maxwell*, 384 U.S. 333, 349 (1966) (“The principle that justice cannot survive behind walls of silence has long been reflected in the ‘Anglo-American distrust for secret trials.’”) (quoting *In re Oliver*, 333 U.S. 257, 268 (1948); *Pennekamp v. Florida*, 328 U.S. 331, 361 (1946) (Frankfurter, J., concurring) (“Of course trials must be public and the public have a deep interest in trials.”); *see also Maryland v. Balt. Radio Show, Inc.*, 338 U.S. 912, 920 (1950) (Frankfurter, J., dissenting from denial of certiorari) (“One of the demands of a democratic society is that the public should know what goes on in the courts by being told

Trial judges responded to the Court's decision in *Nebraska Press* by closing courtrooms to the press and public,⁹⁸ which both reduced the risk of prejudice and avoided the type of prior restraint the Court had declared unconstitutional. A challenge to courtroom closure first reached the Court in *Gannett Co., Inc. v. Depasquale*,⁹⁹ where a pretrial suppression hearing was closed to the public, and again the following year in *Richmond Newspapers, Inc. v. Virginia*¹⁰⁰ when the entire trial was closed.

Before turning to these decisions, it is useful to summarize key themes that emerge from the Court's pre-*Richmond Newspapers* right of access jurisprudence. First, the Court distinguished between the right to disseminate and receive information (accorded full constitutional protection) and the right to gather news (not accorded full protection). Second, it suggested that access rights might involve political determinations best left to the legislature, especially where those rights affected the administrations of institutions like prisons. Third, a prudential concern appeared about the potentially expansive, if not limitless, nature of a right of access under which any restriction might be painted as a limitation on the free flow of information. Fourth, the Court's jurisprudence brought out the particular salience of First Amendment values in the context of courtroom proceedings. In short, the Court's resistance to recognizing a broad First Amendment right of access did not reflect a disagreement with the basic principle that information about government activities is important to informed public debate, but rather signaled concerns that any such right could be squared with the history and text of the First Amendment and the proper functioning of the respective branches of government.

As the next Part describes, the Court would re-examine these and similar assumptions when it confronted challenges to the closure of criminal trials.

II. RICHMOND NEWSPAPERS AND THE CONSTITUTIONAL RIGHT OF ACCESS TO CRIMINAL TRIALS

Until *Richmond Newspapers*, the right to a public trial was thought to extend only to the accused¹⁰¹ under the Sixth Amendment¹⁰² to ensure fair-

by the press what happens there, to the end that the public may judge whether our system of criminal justice is fair and right.”)

98. See Cerruti, *supra* note 28, at 255; see also Archibald Cox, *Foreword: Freedom of Expression in the Burger Court*, 94 HARV. L. REV. 1, 19 (1980) (“With the privilege to publish secured [by *Nebraska Press Ass’n v. Stuart*], the interest of the press in access to judicial proceedings intensified.”).

99. 443 U.S. 368 (1979).

100. 448 U.S. 555 (1980).

101. See, e.g., *In re Oliver*, 333 U.S. 257, 270 (1948) (“Whatever other benefits the guarantee to an accused that his trial be conducted in public may confer upon our society, the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution.”).

ness in individual cases.¹⁰³ The question remained, however, whether there was a constitutional right to attend a trial if the accused himself sought or consented to closure. In *Gannett Co., Inc. v. Depasquale*,¹⁰⁴ the Supreme Court first considered—and rejected—the claim that the press and public had a Sixth Amendment right to attend a pretrial suppression hearing. The following year, however, the Court held in *Richmond Newspapers* that the press and public have a First Amendment right to attend criminal trials¹⁰⁵—a right it would later extend to voir dire proceedings¹⁰⁶ and preliminary hearings¹⁰⁷ and that lower courts would extend to civil trials¹⁰⁸ and various other proceedings,¹⁰⁹ including some administrative proceedings.¹¹⁰ As explained more fully below, the expansion of constitutional access rights was driven principally by an understanding of the First Amendment's structural role and by the functional value of open proceedings.

A. *Gannett and the Court's Rejection of a Sixth Amendment Right of Access*

The Court was first presented with the question of whether the public and press had a constitutional right to attend criminal proceedings in *Gannett Co., Inc. v. Depasquale*.¹¹¹ In *Gannett*, the trial court had granted a defendant's unopposed motion to exclude the public and press from a pretrial suppression hearing in a murder case that had attracted extensive publicity.¹¹² The news organization challenged the exclusion order under both the Sixth and First Amendments.¹¹³ As to the Sixth Amendment claim, the media plaintiff argued that the public trial guarantee extended not only to the accused, but also to the public itself.¹¹⁴ The Court recognized a strong societal interest in public trials, noting that openness improves the quality of testi-

102. The Sixth Amendment provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . ." U.S. CONST. amend. VI.

103. *Trial Secrecy and the First Amendment*, *supra* note 48, at 1902.

104. 443 U.S. 368 (1979).

105. 488 U.S. at 580 (plurality opinion).

106. *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) ("*Press-Enterprise I*").

107. *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) ("*Press-Enterprise II*").

108. While the Supreme Court has never addressed the right to attend civil trials, every federal court of appeals to confront the issue has found a First Amendment right of access under *Richmond Newspapers*. See, e.g., *Rushford v. N.Y. Mag.*, 846 F.2d 249 (4th Cir. 1988); *Westmoreland v. CBS*, 752 F.2d 16 (2d Cir. 1984); *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059 (3d Cir. 1984); *In re Cont'l Ill. Secs. Litig.*, 732 F.2d 1302 (7th Cir. 1984); *Brown & Williamson Tobacco Co. v. Fed. Trade Comm'n*, 710 F.2d 1165 (6th Cir. 1983); *Newman v. Graddick*, 696 F.2d 796 (11th Cir. 1983).

109. See *infra* notes 193-95.

110. See *infra* note 197.

111. 443 U.S. 368 (1979).

112. *Id.* at 375.

113. *Id.* at 376.

114. *Id.* at 384.

mony and provides the public with an opportunity to observe the judicial system.¹¹⁵ It concluded, however, that this public interest did not create a constitutional right of access on the part of the public.¹¹⁶ Although the Court acknowledged the functional value of open trials in ensuring the fairness of individual proceedings and facilitating public participation in and scrutiny of the judicial system generally, it ultimately decided the case based on the Sixth Amendment's textual limitation of the public trial guarantee to the accused.¹¹⁷ The Court then dealt briefly with the alternative claim under the First Amendment, holding that even assuming the First Amendment guaranteed access in some situations, the actions of the trial judge were consistent with the requirements of any such right.¹¹⁸

Historical tradition played a more significant role in *Gannett* than in prior right of access cases, suggesting the influence it would soon exert on the First Amendment analysis in *Richmond Newspapers*. In describing the history of the Sixth Amendment's public trial guarantee, the Court noted the common law rule of open civil and criminal proceedings.¹¹⁹ It concluded, however, that while the Constitution may permit, even presume, open trials as a norm, it does not require them, but instead merely confers upon the accused the right to demand a public trial.¹²⁰ The existence of a common law rule of openness, the Court stated, does not itself create a constitutional right, absent any evidence of the Framers' intent.¹²¹ Moreover, the Court observed that pretrial proceedings were "never characterized by the same degree of openness as were actual trials."¹²² In a concurring opinion, Chief Justice Burger, who would author the plurality opinion in *Richmond Newspapers*, indicated that historical analysis, as well as questions of the public interest, was important in determining whether there was a constitutional right of access to judicial proceedings.¹²³ He emphasized, however, that in contrast to criminal trials, pretrial proceedings were not historically open to the public.¹²⁴

Justice Blackmun's dissent, likewise, underscored the importance of historical evidence, describing in detail the common law and colonial ante-

115. *Id.* at 383.

116. *Id.* at 383-84.

117. *Id.* at 391.

118. *Id.* at 392-93. Justice Powell, who provided the decisive fifth vote in *Gannett*, disagreed, stating that a news reporter has a protectible First Amendment interest in attending a pretrial suppression hearing. He concluded, however, that the procedure followed by the trial court fully comported with the Constitution. *Id.* at 397-403 (Powell, J., concurring). The dissent, however, did not reach the First Amendment issue. *Id.* at 406 (Blackmun, J., dissenting).

119. *Gannett*, 443 U.S. at 385.

120. *Id.* at 385-86.

121. *Id.*

122. *Id.* at 387-88.

123. *Id.* at 394 (Burger, C.J., concurring) ("[I]nterest alone does not create a constitutional right.").

124. *Id.* at 396.

cedents and original understanding of the Sixth Amendment's public trial guarantee.¹²⁵ Justice Blackmun, however, invested the public trial guarantee with a much greater functional and structural role, suggesting that its main purpose, constitutional text notwithstanding, was not to protect the rights of the accused, but to ensure the effectiveness of the trial process and provide a check on judicial abuse.¹²⁶ That role, he believed, also applied to pretrial suppression hearings because they frequently represent a critical, even decisive stage of criminal proceedings.¹²⁷

Although it rejected the existence of a constitutional right of access to attend pretrial proceedings, the Court underscored that there was no absolute ban on access because a transcript of the suppression hearing was made available to the press and public.¹²⁸ Moreover, the Court's focus on historical tradition and the instrumental value of public trials seemed to indicate, at least in hindsight, that claims of a right of access to judicial proceedings would be treated differently than would claims of a right of access to government documents, facilities, and the like.

Gannett produced extremely negative reactions among commentators¹²⁹ and the press.¹³⁰ Meanwhile, the number of closure orders issued by trial courts—there were reportedly none prior to *Gannett*—rose rapidly.¹³¹ The following year the Court would again address a media challenge to a closure order, this time in the context of a First Amendment claim of access to the trial itself.

B. Richmond Newspapers and a First Amendment Right of Access

In *Richmond Newspapers, Inc. v. Virginia*,¹³² the Supreme Court first recognized a First Amendment right of access to criminal trials. The case involved a challenge to a closure order by the trial judge, granted without substantial explanation after an unopposed request by the defendant, in the defendant's fourth trial for murder.¹³³ While the result was nearly unanimous—

125. *Id.* at 419, 427 (Blackmun, J., dissenting).

126. *Id.* at 421-22.

127. *Id.* at 436.

128. *Id.* at 393.

129. See Cox, *supra* note 98, at 20 ("The *Gannett* case provoked screams of outrage from the press and much debate among judges, lawyers, and legal scholars."); Anthony Lewis, *A Public Right to Know About Public Institutions: The First Amendment as a Sword*, 1980 SUP. CT. REV. 1, 13.

130. See *Richmond Newspapers v. Virginia*, 448 U.S. 555, 602 n.2 (1980) (Blackmun, J., concurring) (citing criticism in the press).

131. Cerruti, *supra* note 28, at 261 (citing informal survey showing that within a year after *Gannett*, there were over 270 motions made to close some portion of a criminal case, of which 146 were granted); see also Lewis, *supra* note 129, at 1.

132. 448 U.S. 555 (1980).

133. The defendant's conviction had been reversed after the first trial; the next two trials ended in mistrials. See *id.* at 559. When the local press requested that the state court open the fourth trial to public and press, the court summarily denied the request with a citation to *Gan-*

of the eight Justices who participated,¹³⁴ only one dissented¹³⁵—the rationale was not, as six of the seven Justices who supported the result wrote separate opinions.¹³⁶ In addition to recognizing a First Amendment right to attend criminal trials, the Court established the basic framework to analyze future right of access claims. For the first time, the Court expanded the scope of First Amendment protection from preventing restrictions on the dissemination of information to ensuring access to information in the form of criminal court proceedings.¹³⁷

Chief Justice Burger's plurality opinion focused extensively on the long history of open criminal trials and the traditional distrust of secret judicial proceedings.¹³⁸ He distinguished the Court's prior right of access cases like *Houchins* as lacking a long tradition of openness.¹³⁹ The Chief Justice also asserted, however, that a long historical tradition of openness was necessary but not itself sufficient to establish a constitutional right of access.¹⁴⁰ Public trials, he stated, serve a range of values, including guaranteeing the fairness of the proceeding,¹⁴¹ providing the community with a therapeutic outlet,¹⁴² educating the public about the judicial process,¹⁴³ and promoting confidence in the administration of justice.¹⁴⁴

Noting the absence of any support for access rights in the text of the Constitution or Bill of Rights,¹⁴⁵ he drew upon an instrumentalist understanding of the First Amendment rooted in Meiklejohnian notions of constitutional structure. "[W]ithout the freedom to attend such trials, which people have exercised for centuries," he observed, "important aspects of freedom of

nett. See Cox, *supra* note 98, at 20.

134. Justice Powell took no part in the consideration of the case or in the decision.

135. *Richmond Newspapers*, 448 U.S. at 604 (Rehnquist, J., dissenting).

136. *Id.* at 558 (Burger, C.J.) (plurality opinion); *id.* at 582 (White, J., concurring); *id.* (Stevens, J., concurring); *id.* at 584 (Brennan, J., concurring); *id.* at 599 (Stewart, J., concurring); *id.* at 601 (Blackmun, J., concurring).

137. *Id.* at 582 (Stevens, J., concurring) ("[T]he Court has accorded virtually absolute protection to the dissemination of information or ideas, but never before has it squarely held that the acquisition of newsworthy matter is entitled to any constitutional protection whatsoever."); Cerruti, *supra* note 28, at 245 (noting that, notwithstanding prior dictum acknowledging a generalized right to know, the Court had never before held that the press or public was entitled to obtain information from the government against its will).

138. *Richmond Newspapers*, 448 U.S. at 566-74.

139. *Id.* at 576 n.11 (citing *Houchins v. KQED*, 438 U.S. 1 (1978)).

140. *Id.* at 575.

141. *Id.* at 570.

142. *Id.* at 570-72 ("The crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is done in a corner [or] in any covert manner.") (internal quotation marks omitted).

143. *Id.* at 572-73 ("Not only is respect for the law increased and intelligent acquaintance acquired with the methods of government, but a strong confidence in judicial remedies is secured which could never be inspired by a system of secrecy.") (quoting 6 JOHN H. WIGMORE, EVIDENCE § 1834 (James H. Chadbourne ed., 1976)).

144. *Id.* at 573.

145. *Id.* at 575.

speech and of the press could be eviscerated."¹⁴⁶ Going beyond the idea that open trials served a functional value by enhancing the integrity and fairness of individual proceedings, Chief Justice Burger also described their structural role in checking abuse¹⁴⁷ and promoting informed public debate about the judicial system.¹⁴⁸ The First Amendment's speech, press, and assembly clauses, he continued, "share a common core purpose of assuring freedom of communication on matters relating to the functioning of government."¹⁴⁹ Whereas previously that core purpose might have been construed as merely to prevent the government from imposing restrictions on the dissemination or receipt of information, here it required the government to affirmatively provide access to that information.

Justice Brennan's concurrence also focused on the history and functional value of public trials. Like Chief Justice Burger, Justice Brennan described the long tradition of open criminal trials.¹⁵⁰ Justice Brennan, however, placed greater emphasis on the structural role of public trials in "securing and fostering our republican system of self-government."¹⁵¹ Relying heavily on the political theory of Meiklejohn,¹⁵² he stated that debate on public issues should not only be "uninhibited, robust, and wide-open,"¹⁵³ but also "informed."¹⁵⁴ In addition, he observed, the Court had always seen the First Amendment's role not only as protecting the free communication of ideas, but also as opening the judicial system to public inspection.¹⁵⁵ Open trials thus served a checking function by supplying "a safeguard against any attempt to employ our courts as instruments of persecution," or "for the suppression of political and religious heresies."¹⁵⁶ Thus, whereas Chief Justice Burger had mainly emphasized the functional value of open trials in terms of improving individual outcomes, Justice Brennan emphasized their broader

146. *Id.* at 580 (internal quotation marks omitted).

147. *Id.* at 569 ("Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account.") (quoting 1 JEREMY BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE* 524 (1827)).

148. *Id.* at 573 (noting that open trials contribute to "public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system . . .") (quoting *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 587 (1976) (Brennan, J., concurring)).

149. *Id.* at 575.

150. *Richmond Newspapers*, 448 U.S. at 589-91 (Brennan, J., concurring).

151. *Id.* at 587. For a further discussion of the different approaches of these two opinions, see Note, *The Supreme Court, 1979 Term*, 94 HARV. L. REV. 75, 153; see also Lewis, *supra* note 129, at 2 (purpose of right of access is to hold "government institutions accountable").

152. Justice Brennan had previously acknowledged the influence of Alexander Meiklejohn. See William J. Brennan, Jr., *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965).

153. *Richmond Newspapers*, 448 U.S. at 587 (Brennan, J., concurring) (quoting *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964)).

154. *Id.*

155. *Id.*

156. *Id.* at 592 (internal quotation marks omitted).

importance in a democratic society, building upon views expressed in dissenting opinions in the Court's prior right of access cases.¹⁵⁷ In breaking with the Court's previous libertarian conception of the First Amendment, the "freedom from" restrictions became the "freedom to" obtain information; the protection of the free interchange of ideas became the protection of the underlying conditions that made such interchange possible.

Yet, Justice Brennan also expressed concern about the implications of his view of First Amendment access rights. To contain what he termed the "theoretically endless" potential for expansion of access rights,¹⁵⁸ he outlined two limiting principles in *Richmond Newspapers*: whether there is a historical tradition of openness that implies "the favorable judgment of experience,"¹⁵⁹ and whether access to a particular government process "is important in terms of that very process."¹⁶⁰ Here, Justice Brennan, like Chief Justice Burger, noted the long history of open trials¹⁶¹ and the value of openness in terms of the criminal trial itself, including ensuring that justice satisfies the appearance of fairness,¹⁶² checking abuse of judicial power,¹⁶³ and aiding accurate fact-finding.¹⁶⁴ These "two helpful principles"—historical tradition and functional value—would later form the foundation of right of access decisions under the "logic" and "experience" test.¹⁶⁵

Despite a common focus on both the history and functional value of open trials, there remained important distinctions between Chief Justice Burger and Justice Brennan's approaches.¹⁶⁶ For Chief Justice Burger, the historical tradition of criminal trials represented a unique aspect of the Anglo-American legal system and provided an important, if not the most important, justification for a First Amendment right of access; for Justice Brennan,

157. See, e.g., *Saxbe v. Wash. Post Co.*, 417 U.S. 843, 862-63 (1974) (Powell, J., concurring) ("[The First Amendment] embodies our Nation's commitment to popular self-determination and our abiding faith that the surest course for developing sound national policy lies in a free exchange of views on public issues."); *Houchins v. KQED*, 438 U.S. 1, 30 (1978) (Stevens, J., dissenting) ("The preservation of a full and free flow of information to the general public has long been recognized as a core objective of the First Amendment . . .").

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

159. *Id.* at 589.

160. *Id.*

161. See *supra* note 138 and accompanying text.

162. *Richmond Newspapers*, 448 U.S. at 594.

163. *Id.* at 596.

164. *Id.* at 596-97.

165. See 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, 611-18 (1986); Michael Hayes, Note, *What Ever Happened to "The Right to Know"?: Access to Government-Controlled Information Since Richmond Newspapers*, 73 VA. L. REV. 1111, 1117 (1987).

166. Like Justice Brennan, Justice Stevens supported a right of access based on the First Amendment's role in promoting informed discussion, as he had done in his dissent in *Houchins*. See *Houchins v. KQED*, 438 U.S. 1, 19 (1978) (Stevens, J., dissenting). Justice Stevens, however, rejected the need to rely on historical tradition in establishing a right of access to criminal trials. *Richmond Newspapers*, 448 U.S. at 582-84 (Stevens, J., concurring).

historical tradition constituted less a basis of the underlying right than a means of prudentially limiting its scope. Also, Chief Justice Burger supported access more for the way it enhanced the functioning of individual criminal trials and criminal justice administration generally than for its contribution to the ideals of informed public debate in a democratic society.¹⁶⁷ While Chief Justice Burger's analysis seemed confined to the context of criminal trials, with their long, unique history of openness, Justice Brennan's more structurally-oriented approach was thought by some to herald a new era of First Amendment law.¹⁶⁸

As the next section demonstrates, the tension between the more tradition-based approach of Chief Justice Burger and the more structural-based approach of Justice Brennan would play out in subsequent right of access cases before the Court as well as before lower courts. While an understanding of the First Amendment's broader political goals would ultimately drive the Court's expansion of access rights to ancillary criminal proceedings, the Court not only refused to dispense with the history requirement, but also increasingly appeared to formalize its role into a two-part "logic" and "experience" test.

C. *The Right of Access after Richmond Newspapers*

Some commentators believed *Richmond Newspapers* would usher in judicial recognition of a broad "right to know;" others, however, predicted the Court's holding would not extend beyond criminal proceedings.¹⁶⁹ While the Court later extended *Richmond Newspapers* to other stages of criminal proceedings, it has never explicitly recognized a right of access outside the context of criminal proceedings, nor acknowledged a general First Amendment "right to know."

In *Globe Newspaper Co. v. Superior Court*,¹⁷⁰ the Court's first post-*Richmond Newspapers* right of access case, the Court held that a Massachusetts provision barring the press and public from the courtroom during the

167. For a more general discussion of the difference between functional and structural approaches, see Joseph F. Kobylka & David M. Dehnel, *Toward a Structuralist Understanding of First and Sixth Amendment Guarantees*, 21 WAKE FOREST L. REV. 363 (1986). "To adopt a structuralist point of view is to see unfettered communication as the structural underpinning of the political order. . . . For the functionalist, the first amendment is 'good' insofar as it acts as a means to promote the 'proper' functioning of political institutions." *Id.* at 366.

168. See, e.g., Lillian R. BeVier, *Like Mackerel in the Moonlight: Some Reflections on Richmond Newspapers*, 10 HOFSTRA L. REV. 311, 311 (1982); see also *Richmond Newspapers*, 448 U.S. at 582 (Stevens, J., concurring) (calling *Richmond Newspapers* "a watershed case"); Cerruti, *supra* note 28, at 279-80.

169. See Hayes, *supra* note 165, at 1111-12 (describing the wide spectrum of opinion); see also Cox, *supra* note 98, at 22-23; Cerruti, *supra* note 28, at 295, 305 (recognizing that *Richmond Newspapers*' potential for transformation of the right of access has not been realized).

trial testimony of minor rape victims violated the First Amendment.¹⁷¹ In an opinion by Justice Brennan, the Court adopted the structural explanation of the First Amendment,¹⁷² stating that the purpose of a right of access to criminal trials was to ensure that the constitutionally protected free discussion of public affairs “is an informed one.”¹⁷³ The Court again noted the importance of the “two helpful factors” described in *Richmond Newspapers*: a historical tradition of openness and the functional value of openness to the proceeding in question.¹⁷⁴ The Court, however, rejected the argument that the party seeking access needed to demonstrate a historical tradition of openness with respect to the trial testimony of minor rape victims because of the existence of an over-arching right of access to criminal trials generally.¹⁷⁵ The Court’s treatment of history prompted a dissent by Chief Justice Burger, who described a long tradition of closure of trials involving sexual assaults, especially against minors, and insisted that *Richmond Newspapers* required “an unbroken, uncontradicted” history of openness.¹⁷⁶ The absence of any meaningful reliance by the Court on historical evidence caused some commentators to speculate that the history prong had faded from importance in the right of access analysis.¹⁷⁷

In its next two right of access decisions, *Press-Enterprise v. Superior Court* (“*Press-Enterprise I*”)¹⁷⁸ and *Press-Enterprise v. Superior Court* (“*Press-Enterprise II*”),¹⁷⁹ the Court extended *Richmond Newspapers* to voir dire and preliminary hearings, respectively. These opinions, both by Chief Justice Burger, seemed to move away from a discussion of broader structural concerns and closer towards a more formalized two-pronged test based on the historical tradition and functional value of access. In recognizing a right of access to voir dire proceedings in *Press-Enterprise I*, Chief Justice Burger observed that such proceedings have traditionally been open to the public¹⁸⁰

171. *Id.* at 610-11.

172. *Id.* at 604-05 (citing, *inter alia*, Justice Brennan’s concurrence in *Richmond Newspapers*).

173. *Id.* at 605.

174. *Id.* at 605-06. Although the Court did not articulate a formal two-pronged test in *Globe Newspaper*, lower courts subsequently began using “tradition of openness” and “contribution to function” as the test for determining whether a right of access existed. See Hayes, *supra* note 165, at 1118.

175. *Globe Newspaper*, 457 U.S. at 605 n.13.

176. *Id.* at 614 (Burger, C.J., dissenting) (quoting *Richmond Newspapers*, 448 U.S. at 573).

177. See Cerruti, *supra* note 28, at 280; Beth Hornbuckle Fleming, Comment, *First Amendment Right of Access to Pretrial Proceedings in Criminal Cases*, 32 EMORY L.J. 619, 630 (1983).

178. 464 U.S. 501 (1984).

179. 478 U.S. 1 (1986).

180. 464 U.S. at 505 (describing the tradition of open voir dire proceedings as “helpful”); see also Kobyłka & Dehnell, *supra* note 167, at 386 (noting that *Press-Enterprise I* “ignores structural concerns in several ways”).

and that openness has served an important function.¹⁸¹ The evidence of a tradition of openness, however, was less compelling than in *Richmond Newspapers*, and the Court relied on isolated examples from the historical record to support its decision in favor of access rights.¹⁸² In contrast, Justice Stevens' concurring opinion provided an explicit structural justification for open voir dire proceedings, stating that the purpose of access "was much broader" than "simply the interest in effective judicial administration," and reflected the First Amendment's goal of ensuring the informed public debate central to representative self-government.¹⁸³

Press-Enterprise II involved a challenge to a trial court's closure of a preliminary proceeding in which a magistrate had determined there was probable cause to bind the defendant over for trial. Just two years before, the Court had held that the defendant's Sixth Amendment right to a public trial extended to a pretrial suppression hearing,¹⁸⁴ reasoning that the right of the accused was "no less protective of a public trial than the implicit First Amendment right of the press and public."¹⁸⁵ Like *Press-Enterprise I*, *Press-Enterprise II* did not explicitly discuss the structural principles underlying the First Amendment right of access to preliminary hearings. Rather, the Court described the historical tradition and functional value of a tradition of open pretrial proceedings,¹⁸⁶ and appeared to incorporate those values into a two-pronged "logic" and "experience" test.¹⁸⁷ With respect to the latter, the Court pointed to the celebrated treason trial of Aaron Burr in 1807¹⁸⁸ and decisions by state courts—mostly after *Richmond Newspapers* and the earliest in 1976—as evidence of open pretrial hearings.¹⁸⁹ The Court also noted that during the mid-nineteenth century, preliminary hearings were presumptively open and could only be closed for cause shown.¹⁹⁰ Thus, the Court in *Press-Enterprise II* eschewed any need for a lengthy tradition of openness in order to find a constitutional right of access, a point noted by Justice Stevens in his

181. *Press-Enterprise I*, 464 U.S. at 508 (noting that open voir dire proceedings enhance "both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system"). As in *Richmond Newspapers*, the Court also described the therapeutic value of openness in *Press-Enterprise I*. *Id.* at 508-09 ("Proceedings held in secret would deny this outlet and frustrate the broad public interest; by contrast, public proceedings vindicate the concerns of the victims and the community in knowing that offenders are being brought to account for their criminal conduct by jurors fairly and openly selected.").

182. *Id.* at 506-07.

183. *Id.* at 517 (Stevens, J., concurring). "[T]he underpinning of our holding today is not simply the interest in effective judicial administration; the First Amendment's concerns are much broader." *Id.*

184. *Waller v. Georgia*, 467 U.S. 39 (1984).

185. *Id.* at 46.

186. 478 U.S. 1 (1986).

187. *Id.* at 8-9 ("If the particular proceeding in question passes these tests of experience and logic, a qualified First Amendment right of public access attaches.").

188. *See id.* at 10.

189. *See id.* at 12 n.3.

190. *Id.* at 10-11.

dissent.¹⁹¹ With respect to the “logic” prong, the Court essentially reiterated the functional values of access expressed in *Press-Enterprise I*, though also adding that the absence of a jury enhanced the importance of open preliminary proceedings, which served as “an inestimable safeguard against the corrupt or overzealous prosecutor.”^{191,192}

Lower courts, meanwhile, extended *Richmond Newspapers* to additional ancillary criminal proceedings such as various types of pretrial hearings,¹⁹³ plea and sentencing hearings,¹⁹⁴ criminal court documents,¹⁹⁵ civil trials,¹⁹⁶ and to some administrative proceedings.¹⁹⁷ At the same time, some courts sought to restrict the scope of *Richmond Newspapers*, claiming it represented a narrow exception to the general rule against a constitutional right of access to government information.¹⁹⁸

The application of *Richmond Newspapers*’ “logic” and “experience” test has also varied widely among lower courts. Some have strictly applied the test, insisting on a demonstration of both a tradition of access and the utility

191. *Id.* at 21-24 (Stevens, J., dissenting) (noting the relative weakness of historical evidence of openness in *Press-Enterprise II*, compared to *Richmond Newspapers*).

192. *See id.* at 12-13.

193. *See* Fleming, *supra* note 177, at 637 n.61, 645 (citing cases extending the right of access to various pretrial proceedings including suppression hearings, entrapment hearings, competency hearings, pretrial detention hearings, and bail reduction hearings).

194. *See, e.g., In re Wash. Post Co.*, 807 F.2d 383, 390 (4th Cir. 1986).

195. *See, e.g., Search Warrant for Secretarial Area Outside Office of Gunn*, 855 F.2d 569, 572-73 (8th Cir. 1988) (right of access to affidavit in support of a search warrant); *Seattle Times Co. v. United States Dist. Court*, 845 F.2d 1513, 1517 (9th Cir. 1988) (right of access to pretrial release documents).

196. *See supra* note 108.

197. *See, e.g., United States v. Miami Univ.*, 294 F.3d 797, 824 (6th Cir. 2002) (right of access to university student disciplinary board proceedings); *Whiteland Woods, L.P. v. Township of W. Whiteland*, 193 F.3d 177, 181 (3d Cir. 1999) (right of access to municipal planning meeting); *Cal-Almond, Inc. v. United States Dep’t of Agric.*, 960 F.2d 105, 109 (9th Cir. 1992) (applying *Richmond Newspapers* to a claim for access to a list of voters eligible to vote in a referendum on a marketing order); *Soc’y of Prof’l Journalists v. Sec’y of Labor*, 616 F. Supp. 569, 574 (D. Utah 1985) (right of access to formal administrative hearing conducted by the mine safety commission), *vacated as moot*, 832 F.2d 1180 (10th Cir. 1987). *But see* *First Amendment Coalition v. Judicial Inquiry & Review Bd.*, 784 F.2d 467, 472 (3d Cir. 1986) (applying *Richmond Newspapers* test to hearings of an administrative disciplinary board established by the Pennsylvania Supreme Court to investigate complaints against state judges but denying a constitutional right of access based on “the unique history and function of the [board]”).

198. *See, e.g., Ctr. for Nat’l Sec. Studies v. Dep’t of Justice*, 331 F.3d 918, 935-36 (D.C. Cir. 2003) (rejecting application of *Richmond Newspapers* to request for access to arrest records of those detained during investigation into attacks of September 11), *cert. denied*, 124 S. Ct. 1041 (2004); *Capital Cities Media, Inc. v. Chester*, 797 F.2d 1164, 1173 (3d Cir. 1986) (rejecting that *Richmond Newspapers* and its progeny provide a right of access to executive branch files of a state environmental agency because they “hold no more than that the government may not close government proceedings which have historically been open unless public access contributes nothing of significant value to that process or unless there is a compelling state interest in closure and a carefully tailored resolution of the conflict between that

of openness to the particular proceeding in question.¹⁹⁹ While the party seeking access has generally been able satisfy the “logic” prong, the “experience” prong has presented greater obstacles and has served as a basis for denying access in a number of instances.²⁰⁰ Conversely, other courts have relied more heavily, sometimes exclusively, on the “logic” prong in recognizing a right of access without reference to any evidence of a tradition of openness.²⁰¹ Another approach has been to avoid the application of the “logic” and “experience” test altogether in favor of a more conventional balancing test that weighs the public interest in disclosure against the government’s interest in denying access.²⁰²

Thus, in the aftermath of *Richmond Newspapers*, courts have extended a First Amendment right of access to various proceedings other than criminal trials. The history prong has proven among the most controversial aspect of access law, and some courts have either downplayed its importance or ignored it altogether in light of its minimal relation to the structural and functional value of access. Also, while courts have extended the *Richmond Newspapers* framework to various administrative proceedings, prior to September 11, none had addressed its application to immigration proceedings nor confronted a blanket closure rule like the Creppy Directive. The following Part discusses the decisions by the first—and only—two appeals courts that have addressed the question of whether the press and public possess a First Amendment right to attend deportation hearings.

199. See, e.g., *In re Reporters Comm. for the Freedom of the Press*, 773 F.2d 1325 (D.C. Cir. 1985) (Scalia, J.) (denying right of access to evidentiary exhibits in civil proceedings). “With neither the functioning constraint of text nor the constraint of historical practice, nothing would separate the judicial task of constitutional interpretation from the political task of enacting laws currently deemed essential.” *Id.* at 1332.

200. See, e.g., *Capital Cities Media*, 797 F.2d at 1174-76.

201. See, e.g., *United States v. Simone*, 14 F.3d 833, 838 (3d Cir. 1994) (finding a right of access to post-trial juror examinations based only on the “logic” prong where no tradition of access had been established); *Seattle Times Co. v. United States Dist. Court*, 845 F.2d 1513, 1516 (9th Cir. 1988) (finding a right of access to pretrial release proceedings and documents based principally on the growing importance of such proceedings); *United States v. Criden*, 675 F.2d 550, 555 (3d Cir. 1982) (finding a right of access to pretrial hearings based upon the “societal interests” at stake); *United States v. Chagra*, 701 F.2d 354, 363 (5th Cir. 1983) (finding right of access to bail reduction hearings despite the absence of a historical tradition); see also Fleming, *supra* note 177, at 626, 633-34 (arguing that history alone does not provide a logical basis for limiting a right of access to trials given the First Amendment’s structural role and the increase in relative importance of pretrial proceedings to the criminal justice process in the last 200 years); cf. *In re Consumer Power Co. Secs. Litig.*, 109 F.R.D. 45, 53-55 (E.D. Mich. 1985) (analyzing First Amendment challenge to protective order restricting public access to pretrial discovery documents in terms of “the functional needs of contemporary society” and recognizing general right of access but upholding the particular protective order); *Herald Co., Inc. v. Bd. of Parole*, 499 N.Y.S.2d 301, 308 (N.Y. Sup. Ct., Onondaga County 1985) (right of access to parole revocation hearings; emphasizing the structural importance of access when the merits of the parole process “are being hotly debated”).

202. *Hayes*, *supra* note 165, at 1122 (citing cases).

III. THE APPLICATION OF *RICHMOND NEWSPAPERS* TO DEPORTATION HEARINGS BY THE THIRD AND SIXTH CIRCUITS

In the wake of September 11, both the Third and Sixth Circuits addressed constitutional challenges to the Creppy Directive, which closed deportation hearings in a category of so-called “special interest” cases based on an unreviewable decision by the U.S. Department of Justice.²⁰³ In *Detroit Free Press v. Ashcroft*,²⁰⁴ the Sixth Circuit affirmed the district court’s preliminary injunction against enforcement of the Creppy Directive, finding the blanket closure rule unconstitutional. In contrast, in *North Jersey Media Group, Inc. v. Ashcroft*,²⁰⁵ the Third Circuit reversed the district court’s order enjoining enforcement of the blanket closure rule. While the injunction in *Detroit Free Press* applied to a single individual’s immigration proceedings,²⁰⁶ the injunction in *North Jersey Media Group* was nationwide in scope.²⁰⁷ Although they reached opposite conclusions, both courts rejected the government’s argument for a more deferential standard of review in favor of review under *Richmond Newspapers*. This Part will examine the two decisions, focusing on each court’s treatment of the First Amendment’s structural role, the application of *Richmond Newspapers*’ “logic” and “experience” test, and the relevance of the government’s extensive, but constitutionally limited power over immigration to the question of First Amendment access rights.

A. *Detroit Free Press v. Ashcroft*

In *Detroit Free Press*, several newspapers sought to challenge an immigration judge’s closure of a bond hearing for one individual, Rabi Haddad, who was subject to deportation for having overstayed his tourist visa.²⁰⁸ The government further suspected that the Islamic charity Haddad operated was supplying funds to terrorist organizations.²⁰⁹ Haddad was denied bail and detained, and subsequent hearings were closed to the press, public, and members of Haddad’s family.²¹⁰ Plaintiffs, two media organizations and a congressional representative, sued, claiming the closure of Haddad’s proceedings violated the First Amendment.²¹¹ The district court ruled in favor

203. See *supra* note 8 and accompanying text.

204. 303 F.3d 681 (6th Cir. 2002), *pet. for reh’g en banc denied* (Jan. 22, 2003).

205. 308 F.3d 198 (3d Cir. 2002), *cert. denied*, 123 S. Ct. 2215 (2003).

206. 195 F. Supp. 2d 937, 947 (E.D. Mich. 2002).

207. 205 F. Supp. 2d 288, 305-06 (D.N.J. 2002).

208. 195 F. Supp. 2d at 940-41.

209. See Dan Eggen & Kari Lydersen, *In Michigan, Anti-Terrorism Effort Goes Public: Haddad Case Forces Rare Glimpse of Secret U.S. Campaign*, WASH. POST, May 6, 2002, at A3.

210. *Id.*

211. Haddad brought a separate action claiming that the closure of his deportation proceedings violated his Due Process rights under the Fifth Amendment. See *Haddad v. Ashcroft*, 221 F. Supp. 2d 799 (E.D. Mich. 2002).

of the plaintiffs,²¹² and the Sixth Circuit affirmed.²¹³

As a threshold matter, the Sixth Circuit addressed the standard of review governing plaintiffs' First Amendment claim. The court rejected the government's argument that the Creppy Directive was entitled to deferential review,²¹⁴ finding that while Congress' plenary authority over immigration extended to "substantive" immigration decisions—who may be deported or excluded—it did not extend to non-substantive ones, such as whether to close a deportation hearing to the public.²¹⁵ The Supreme Court, the Sixth Circuit observed, "has always interpreted the Constitution meaningfully to limit non-substantive immigration laws, without granting the Government special deference,"²¹⁶ including the Due Process²¹⁷ and First Amendment²¹⁸ rights of individuals facing deportation.

The court distinguished *Kleindienst v. Mandel*,²¹⁹ a Cold War-era decision upholding the Attorney General's denial of a non-immigrant visa to a self-proclaimed "revolutionary Marxist" to speak at a university conference under a statute prohibiting the entrance of "anarchists" or "persons advocating the overthrow of government."²²⁰ In rejecting a First Amendment challenge by the intended audience of professors, the Court stated that it would not look behind a facially legitimate and bona fide explanation for the Executive's exercise of congressionally delegated power over the policies and rules governing the exclusion of aliens.²²¹ The Sixth Circuit concluded, however, that *Kleindienst* involved Congress' substantive power to set immigration policy, whereas the Creppy Directive involved a procedural mechanism chosen to carry out that policy.²²² In maintaining the substance-procedure dichotomy, the court invoked the checking purpose at the heart of the First Amendment that prevents the government from "act[ing] arbitrarily and behind closed doors."²²³ The traditional deference given to the government's decisions over whom to admit, the court stated, did not extend to the procedures used to administer the deportation process itself.²²⁴ Although the court did not expressly draw the analogy, a similar point could have been made

212. *Detroit Free Press v. Ashcroft*, 195 F. Supp. 2d 937, 948 (E.D. Mich. 2002).

213. *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002). Haddad's removal proceedings were subsequently opened to the public, except for portions that were closed to protect sensitive sources and identifying information. Haddad's removal order was later affirmed by the Bureau of Immigration Appeals. *In re Haddad*, 27 Immig. Rptr. B1-47 (2003).

214. *Detroit Free Press*, 303 F.3d at 685-86.

215. *Id.* at 686 (citing *The Chinese Exclusion Case*, 130 U.S. 581, 604 (1889)).

216. *Id.* at 688.

217. *Id.* at 688-90 (discussing Fifth Amendment due process cases).

218. *Id.* at 690-91 (noting the "ample foundation" for this proposition).

219. 408 U.S. 753 (1972).

220. *Id.* at 756-59.

221. *Id.* at 769-70.

222. *Detroit Free Press*, 303 F.3d at 687.

223. *Id.* at 693.

224. *Id.*

about *Richmond Newspapers* itself: while the government possesses broad powers to establish substantive matters of criminal law to determine who may be punished for what activity, that power is separate from the process used to implement those decisions, including whether to close a criminal trial to the press and public.

The court also distinguished *Houchins v. KQED, Inc.*,²²⁵ which it characterized as involving a claim for special press rights beyond those granted to the general public.²²⁶ More importantly, the court concluded that access to prison facilities posed fundamentally different questions than access to quasi-judicial proceedings like deportation hearings.²²⁷ It emphasized that a deportation hearing, though administrative in name, remains an adversarial, adjudicative process in which the stakes for the individual are equal to, if not greater than, those in many criminal or civil actions.²²⁸ The court noted that recent Supreme Court decisions underscored the importance of analyzing the nature and function of a proceeding rather than looking only at its label.²²⁹ It concluded that to the extent *Houchins* remained valid after *Richmond Newspapers*, it did not apply to formal, adversarial proceedings such as deportation hearings.²³⁰

The court next applied *Richmond Newspapers*' "logic" and "experience" test to determine whether there was a constitutional right of access to deportation hearings. Relying on *Press-Enterprise II* and its own precedents, the court proceeded to reject the government's argument that the plaintiffs needed to demonstrate a common law tradition of access.²³¹ It instead interpreted the Supreme Court's post-*Richmond Newspapers* decisions as elevating the importance of "logic" over "experience," and concluded that, while some history of openness was necessary, even "a brief historical tradition" might suffice where "the beneficial effects of access to that process are overwhelming and uncontradicted."²³²

225. 438 U.S. 1 (1978). For a discussion of *Houchins*, see *supra* notes 70-77 and accompanying text.

226. *Detroit Free Press*, 303 F.3d at 694.

227. *Id.* at 696. Further, in *Houchins* there existed alternative, though less effective, means of gaining information, in contrast to the blanket closure policy under the Creppy Directive. *Id.* at 696 n.12 (citing *Houchins*, 438 U.S. at 12-16).

228. *Id.* at 696 ("Deportation can be the equivalent of banishment or exile.") (quoting *Delgado v. Carmichael*, 332 U.S. 388, 391 (1947)).

229. *Id.* at 696-97. The court cited two decisions: *Fed. Mar. Comm. v. S.C. State Ports Auth.*, 122 S. Ct. 1864 (2002), which held that state sovereign immunity bars an administrative agency's adjudication of complaints by a private party against a non-consenting state since such administrative proceedings closely resemble those in civil litigation that typically fell within the state sovereign immunity bar; and *Sims v. Apfel*, 530 U.S. 103 (2000), which held that because Social Security proceedings were not adversarial proceedings, the ordinary waiver rule did not apply to claims not presented on an administrative appeal of the agency's initial decision by an administrative law judge.

230. *Detroit Free Press*, 303 F.3d at 699.

231. *Id.* at 700.

232. *Id.* at 701.

The court concluded that there was a sufficient tradition of openness to satisfy *Richmond Newspapers*' history prong. While Congress had repeatedly enacted statutes closing exclusion hearings since the late nineteenth century, it had never required closure of deportation hearings.²³³ Moreover, the court noted, INS regulations had established a presumption of open deportation hearings since 1964.²³⁴ The absence of a common law right of access to administrative proceedings could be explained by the relatively recent birth of the modern administrative state and its evolving nature in the direction of greater openness.²³⁵

Turning to *Richmond Newspapers*' "logic" prong, the court described the various ways in which access improves the functioning of deportation proceedings, including checking the actions of Executive branch officials, ensuring the proceedings are conducted fairly, increasing the accuracy of determinations in individual cases, allowing for a much-needed catharsis after the traumatic events of September 11, and helping ensure the participation of citizens in the democratic process by fostering informed public debate.²³⁶ After concluding that the history and functional value prongs had been met, the court determined that the blanket closure order did not satisfy strict scrutiny because it was neither narrowly tailored nor required particularized findings to justify its application to Haddad's case.²³⁷

While the Sixth Circuit adhered to the "logic" and "experience" test, its understanding of the First Amendment was informed by the structural considerations underlying *Richmond Newspapers* that stress the way open proceedings promote informed public debate and check the abuse of power by government officials. The Constitution, the court stated, requires open deportation hearings because "[d]emocracies die behind closed doors."²³⁸ The court underscored the particular salience of a First Amendment right of access to deportation hearings in light of the government's extensive power over immigration policy. Indeed, it is here, where the government's power is otherwise at or near its zenith, that a right of public access becomes even more important as a check on the abuse of that power.²³⁹

233. *Id.*

234. *Id.* (citing 8 C.F.R. § 3.27, redesignated as 8 C.F.R. § 1003.27 (2003)). As the court observed, the tradition of open deportation hearings stands in contrast with that of exclusion hearings, where no comparable tradition of access exists. *Id.* (citing Immigration Laws and Regulations, Article 6, at 4 (Mar. 11, 1893); Act of Mar. 3, 1903, ch. 1012, 32 Stat. 1213 (1903); Immigration and Nationality Act of 1952, 66 Stat. 163, § 236(a) (1952)).

235. *Detroit Free Press*, 303 F.3d at 702-03. The court further noted that to the extent there were functional common law analogues to deportation proceedings—for example, the orders of transportation or banishment entered in criminal trials—they were open to the public. *Id.* at 702.

236. *Id.* at 703-05.

237. *Id.* at 705.

238. *Id.* at 683; see also *id.* at 704-05 (referring specifically to the First Amendment's self-government and checking values in its analysis under *Richmond Newspapers*' functional value prong).

239. *Id.* at 704 ("In an area such as immigration, where the government has nearly

B. North Jersey Media Group v. Ashcroft

In *North Jersey Media Group, Inc. v. Ashcroft*,²⁴⁰ the Third Circuit reached a different outcome than the Sixth Circuit, but came to a similar conclusion on the threshold question of whether *Richmond Newspapers* applied to deportation proceedings. *Richmond Newspapers*, the Third Circuit maintained, was not limited to proceedings under Article III of the Constitution, despite the absence of an explicit textual guarantee of access in non-Article III proceedings like deportation hearings.²⁴¹ The court rejected the government's argument that the proper degree of access to administrative proceedings should be left to the political branches, citing its own precedents applying *Richmond Newspapers* to determine whether there was a constitutional right of access to the records of a state environmental agency²⁴² and to a judicial disciplinary review board.²⁴³

The Third Circuit concluded, however, that *Richmond Newspapers* did not support a constitutional right of access to deportation hearings.²⁴⁴ In contrast to criminal trials, it observed, there was no long history of a general right of public access to deportation hearings or other governmental proceedings or information.²⁴⁵ In contrast to the Sixth Circuit,²⁴⁶ the Third Circuit concluded that the 1964 INS regulations creating a rebuttable presumption of openness in deportation hearings did not provide a sufficient basis to establish a constitutional right of access, particularly in light of its conclusion that some deportation hearings may have been closed to the public, such as those conducted in prisons, hospitals, or private homes.²⁴⁷ While the court acknowledged that a showing of openness at common law was not required,²⁴⁸ it nonetheless refused to find that *Richmond Newspapers*' "experience" prong had been met where the historical evidence was "ambiguous or lack-

unlimited authority, the press and the public serve as perhaps the only check on abusive government practices.").

240. 308 F.3d 198 (3d Cir. 2002), cert. denied, 123 S. Ct. 2215 (2003).

241. *Id.* at 207.

242. *Id.* at 208 (citing *Capital Cities Media, Inc. v. Chester*, 797 F.2d 1164 (3d Cir. 1986)).

243. *Id.* (citing *First Amendment Coalition v. Judicial Inquiry & Review Bd.*, 784 F.2d 467 (3d Cir. 1986)).

244. *Id.* at 220-21.

245. Specifically, the court noted the views of certain Framers, such as Patrick Henry, that not all government activities, including "military operations or affairs of great consequence," should be publicized. *Id.* at 209 (quoting 3 ELLIOT'S DEBATES 170 (Jonathan Elliot ed., 1881)). The court also observed that the Senate had met behind closed doors until 1794 and the House until after the War of 1812, and that congressional committee sessions remained closed until the mid-1970s. *Id.* at 209-10. Many proceedings, it further observed, before administrative agencies are closed, such as Social Security disability hearings and disbarment hearings. *Id.* at 210.

246. See *supra* notes 232-36 and accompanying text.

247. *North Jersey Media Group*, 308 F.3d at 212.

248. *Id.* at 213.

ing” or, alternatively, to recognize a First Amendment right of access based on “logic” alone.²⁴⁹ Distinguishing its prior precedents denying the relevancy of historical analysis in determining First Amendment access rights to pre-trial criminal proceedings,²⁵⁰ the court emphasized the importance of the history prong, even in the administrative context.²⁵¹ Finally, while the court rejected the government’s argument that the political branch’s plenary power over immigration required deference to the executive branch’s decision to close deportation hearings,²⁵² it nonetheless invoked more general principles of deference to an administrative agency’s attempt to formulate its own rules of procedure,²⁵³ thus re-characterizing *Richmond Newspapers*’ “experience” prong as a device to “preserve administrative flexibility and avoid constitutionalizing ambiguous, and potentially unconsidered, executive decisions.”²⁵⁴

Turning to the “logic” prong, the Third Circuit employed a novel approach. It acknowledged that openness in deportation hearings serves the same values it serves in public criminal trials.²⁵⁵ It stated, however, that courts must also take account of “the flip side”—the extent to which openness “impairs the public good.”²⁵⁶ Here, the court detailed the various ways open deportation hearings in a narrow category of “special interest” cases would threaten national security²⁵⁷—the type of concerns that typically would have been addressed under a strict scrutiny analysis only after a court had first determined that there was qualified right of access under *Richmond Newspapers*. In light of the profound and unknown dimension of terrorist threats, the court found that openness did not on balance play a positive role in “special interest” deportation proceedings.²⁵⁸ Because open hearings failed to satisfy either the “experience” or “logic” prongs, the court found no First Amendment right of access to “special interest” deportation hearings.²⁵⁹

249. *Id.*

250. *United States v. Criden*, 675 F.2d 550, 555 (3d Cir. 1982). The court explained that *Criden* had arisen in the criminal context, where the tradition of openness was well established, in contrast to administrative proceedings, where the historical evidence was more uneven and ambiguous. *North Jersey Media Group*, 308 F.3d at 213 (citing *Criden*, 675 F.2d at 555).

251. *North Jersey Media Group*, 308 F.3d at 214.

252. *Id.* at 219 n.15.

253. *Id.* at 216 (citing *Vt. Yankee Nuclear Power Corp. v. Nat’l Res. Def. Council, Inc.*, 433 U.S. 519, 544 (1978)).

254. *Id.*

255. *Id.* at 217 (describing those values as: promoting informed discussion of government affairs; promoting public perception of fairness; supplying an outlet for community concern, hostility, and emotion; checking corrupt practices by exposing the judicial process to public scrutiny; enhancing the performance of those involved; and discouraging perjury).

256. *Id.*

257. *Id.* at 217-18.

258. *Id.* at 220.

259. *Id.* The court, however, never explicitly addressed the issue of a First Amendment right of access to typical, i.e., non-special interest, deportation proceedings. “We do not decide that there is no right to attend administrative proceedings, or even that there is no right to attend civil immigration proceedings. Our judgment is confined to the extremely narrow class

*C. Comparing the Third and Sixth Circuit's
Application of Richmond Newspapers*

In rejecting the government's arguments for deferring to the Creppy Directive as an exercise of the government's plenary power over immigration, the Third and Sixth Circuits refused to treat deportation hearings as categorically different than criminal (or civil) proceedings for purposes of deciding whether to apply *Richmond Newspapers*' "logic" and "experience" test. Both courts thus found it more significant that the restriction on access involved an adjudicative proceeding rather than the fact it involved the federal immigration power—a view echoed by the D.C. Circuit in its recent decision involving release of the names and other information about the September 11 detainees.²⁶⁰ In other respects, however, the two courts diverged sharply in addressing the issues surrounding a constitutional right of access to deportation proceedings.

In rejecting the plaintiffs' argument that the historical evidence of open deportation proceedings satisfied the "experience" prong, the Third Circuit emphasized the importance of history as a limiting factor and the need to restrict *Richmond Newspapers* to its original context of criminal trials.²⁶¹ At the same time, it rejected the traditional approach to the "logic" prong by incorporating national security concerns to determine whether, on balance, access played a significant positive role in the functioning of the particular subcategory of proceedings in question, i.e., "special interest" deportation hearings, as opposed to deportation hearings generally.²⁶² This approach effectively transforms *Richmond Newspapers*' "logic" prong into an analysis of whether closure in a narrow category of cases is justified—an approach the Court itself seemed to reject in *Globe Newspaper*.²⁶³ The Third Circuit's ap-

of deportation cases that are determined by the Attorney General to present significant national security concerns." *Id.*

260. See *Ctr. for Nat'l Sec. Studies v. United States Dep't of Justice*, 331 F.3d 918, 934 (D.C. Cir. 2003) (rejecting plaintiffs' claim for disclosure of the names of September 11 detainees under the First Amendment because "*Richmond Newspapers* does not extend to *non-judicial* documents that are not part of a criminal trial, such as the investigatory documents [akin to "arrest records"] at issue here.") (emphasis added), *cert. denied*, 124 S. Ct. 1041 (2004). In distinguishing *Detroit Free Press*, the D.C. Circuit suggested the critical feature of *Richmond Newspapers* was not that it involved a criminal trial but that plaintiffs sought access to an adjudicatory proceeding rather than an investigation. See *id.* at 936. Although the plaintiffs in *Center for National Security Studies* also sought relief under the First Amendment, their primary claim was under the Freedom of Information Act.

261. *North Jersey Media Group*, 308 F.3d at 212.

262. *Id.* at 217-19.

263. 457 U.S. 596, 605 n.13 (1982) (emphasizing that the threshold focus must be on the right of access to criminal trials rather than on the arguments for restricting access in a particular instance); see also *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8 (1986) ("*Press-Enterprise II*") (focusing threshold inquiry on whether access benefited the functioning of preliminary hearings generally, not its benefit in a particular case); *First Amendment Coalition v. Judicial Inquiry & Review Bd.*, 784 F.2d 467 (3d Cir. 1986) (looking not to past practices of state's disciplinary board, but rather to tradition of access to judicial disciplinary

proach could also relieve the government of its burden, assuming a First Amendment right of access exists, of narrowly tailoring restrictions, and thus sanctioning blanket closure rules in the name of national security.

In contrast, the Sixth Circuit hewed to a more straightforward application of the “logic” and “experience” test, basing a First Amendment right of access to deportation proceedings on the historical evidence of openness—which was less than the hundreds of years of openness in *Richmond Newspapers*, but was nonetheless consistent with the type of historical evidence of openness described in *Press-Enterprise II*—and on the functional value of openness in an adversarial, trial-type proceeding even if the proceeding is administrative in name.²⁶⁴ While the Sixth Circuit acknowledged the important national security concerns at stake, it restricted consideration of these concerns to a determination of whether the government had narrowly tailored the restrictions rather than allowing those concerns to swallow the antecedent question of whether openness was generally beneficial in terms of the proceeding itself.²⁶⁵

Detroit Free Press and *North Jersey Media Group* together suggest some differences in applying *Richmond Newspapers* to deportation hearings, particularly in the aftermath of September 11 and heightened concerns of terrorism. In limiting *Richmond Newspapers*’ reach by insisting on an excessively lengthy tradition of access—lengthier than under its own precedents—and subsuming the national security concerns for a select category of cases into the overall “logic” prong analysis, *North Jersey Media Group* undercuts the important structural role of access that lies at the heart of *Richmond Newspapers* and the First Amendment. Its assessment of the length of time deportation hearings have been open to the public may not only underestimate the tradition of openness,²⁶⁶ but also overwhelms fundamental concerns about the dangers of eliminating for an entire class of people access to a proceeding with important similarities to criminal trials. It also negates the obvious functional value of open deportation hearings and frees the government to close any deportation hearing when it deems necessary, without ensuring that this power be employed cautiously based on an individualized assessment of the facts.

The Sixth Circuit’s approach hews more closely to the Supreme Court’s decisions in *Richmond Newspapers* and its progeny. Yet, *Detroit Free Press* also highlights some of the potential risks of a rigid application of the “logic” and “experience” test. While, as the Sixth Circuit concluded, the historical evidence indicates that deportation hearings have a sufficient history

and grand jury proceedings generally).

264. *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 701-05 (6th Cir. 2002).

265. *Id.*

266. See Reply Brief for Petitioner in Support of Petition for Writ of Certiorari at 5, *North Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002) (suggesting that open deportation hearings predate significantly the 1964 INS regulation establishing presumptively closed deportation proceedings), *cert. denied*, 123 S. Ct. 2215 (2003).

of openness to satisfy the “experience” prong under the Court’s precedents,²⁶⁷ the history of openness itself does not explain the link between open deportation proceedings and the broader considerations underlying First Amendment access rights. Before presenting another approach to these issues, some subsequent developments in this litigation will be briefly discussed.

D. The Continuing Importance of a Right of Access to Deportation Hearings

Following the Third Circuit’s decision, the plaintiffs sought review in the Supreme Court.²⁶⁸ In its opposition papers, the government claimed for the first time that the Creppy Directive was “currently under review” and would “likely be revised.”²⁶⁹ The government further noted that it had already promulgated and was applying, in appropriate circumstances, an emergency interim regulation that allowed for closure on a case-by-case basis.²⁷⁰ The government also noted that the decision in the Sixth Circuit affected only one individual’s case and that those proceedings had now been administratively completed.²⁷¹ Notwithstanding that the Creppy Directive remained in existence and that there existed a direct circuit split on its constitutionality, the Court denied certiorari.²⁷²

Less than a week later, the Office of Inspector General (“OIG”), the internal monitoring arm of the Department of Justice, issued a 239-page report detailing various abuses associated with the government’s secret detention of 762 immigrants after September 11.²⁷³ Although cognizant of the increased pressures on law enforcement officials after September 11, the report sharply criticized the government’s treatment of the detainees in numerous respects, including: the “indiscriminate” and “haphazard” labels applied to nonciti-

267. *Detroit Free Press*, 303 F.3d at 701-03.

268. *Petition for Writ of Certiorari, North Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002), *cert. denied*, 123 S. Ct. 2215 (2003).

269. Brief for Respondent in Opposition to Petition for Writ of Certiorari at 13, *North Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002), *cert. denied*, 123 S. Ct. 2215 (2003).

270. *Id.* (citing 67 Fed. Reg. 36,799 (2002) (codified at 8 C.F.R. § 1003.46 (2003))).

271. *Id.* at 10.

272. 123 S. Ct. 2215 (May 27, 2003) (No. 02-1289). The denial of certiorari was criticized by the press. *See, e.g.*, Editorial, *Are Secret, Post-9/11 Hearings OK? Court Should Say*, NEWSDAY, May 28, 2003, at A30; *cf.* Editorial, *Deportation Behind Closed Doors*, N.Y. TIMES, May 30, 2003, at A26 (linking Court’s denial of certiorari to government’s indication that it was currently reviewing its procedures for closed hearings and would reduce its use of closed hearings in the future).

273. OFFICE OF THE INSPECTOR GENERAL, THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS (April 2003) (released June 2, 2003), available at <http://www.fas.org/irp/agency/doj/oig/detainees.pdf> (last visited Jan. 29, 2004) [hereinafter “OIG REPORT”].

zens with no connection to terrorism that significantly prolonged their detention;²⁷⁴ a blanket “no bond” policy regardless whether there was any evidence to detain aliens in individual cases;²⁷⁵ restrictions on the detainee’s access to counsel;²⁷⁶ and the terrible conditions of confinement, including allegations of physical and verbal abuse.²⁷⁷ The OIG report not only links the deportation hearings with a broader policy of abuse,²⁷⁸ but also underscores that the prolonged secret detentions lacked justification.²⁷⁹

In short, while the government signaled its intention not to enforce the Creppy Directive, it refused to disavow it, and, in light of the prolonged and indefinite nature of the “war against terrorism,” might again resort to the directive or a similar policy in the future. Indeed, the Attorney General responded to the OIG report criticizing the treatment of the September 11 detainees by denying that the Justice Department did anything wrong and seeking even greater powers from Congress.²⁸⁰ Meanwhile, the basic question of whether there is a constitutional right of access to deportation proceedings—among the most important and complex questions in First Amendment access law since *Richmond Newspapers*—remains unaddressed by the nation’s highest court. Additionally, the Court more recently denied review in a case involving a September 11 immigration detainee whose entire federal habeas corpus proceedings in the district court were closed to the public and all court filings sealed.²⁸¹ The challenge by media organizations was brought only after a clerk of the court inadvertently disclosed the existence of the appeal by listing it on a public oral argument calendar and showing its name under the Public Access to Court Electronic Records (PACER) service, which led to a nationally published newspaper story.²⁸² The entire habeas case, including its very existence, was “heard, appealed, and decided

274. *Id.* at 70; *see also id.* at 37-71.

275. *Id.* at 72-90.

276. *Id.* at 130-42, 172-77.

277. *Id.* at 142-50, 177-82.

278. *See, e.g.,* David Cole, *We’ve Aimed, Detained and Missed Before*, WASH. POST, June 8, 2003, at B1 (discussing abuses highlighted by the OIG report; underscoring the dangers of “preventative” detention).

279. *See, e.g.,* Adam Liptak, *The Pursuit of Immigrants in America After September 11*, N.Y. TIMES, June 8, 2003, § 4, at 14 (“The detentions were often supported by flimsy evidence and inconsistent criteria.”).

280. *See, e.g.,* *Ashcroft Defends Government on Detainees*, REUTERS, June 5, 2003, <http://www.nytimes.com/reuters/politics/politics-congress-ashcroft.html> (last visited June 6, 2003) (on file with author); Erich Lichtblau, *Ashcroft Seeks More Power to Pursue Terrorist Suspects*, N.Y. TIMES, June 6, 2003, at A1. *But see* Erich Lichtblau, *U.S. Will Tighten Rules on Holding Terror Suspects*, N.Y. TIMES, June 13, 2003, at A1 (noting planned changes by federal authorities in response to shortcomings in anti-terrorism and detention policies highlighted by the OIG report).

281. *M.K.B. v. Warden*, 124 S. Ct. 1405, No. 03-6747, 2004 WL 324470 (Feb. 23, 2004).

282. *Petition for Writ of Certiorari, M.K.B. v. Warden*, No. 03-6747, 2003 WL

in complete secrecy.”²⁸³

IV. THE CONSTITUTIONAL RIGHT OF ACCESS TO DEPORTATION HEARINGS

This Part describes the importance of a constitutional right of access to deportation proceedings based not only upon *Richmond Newspapers*, but also upon the broader goals of the First Amendment.

First, it examines how structural theories of the First Amendment run through the Court’s free speech decisions in many areas. It identifies the two principal—and related—components of a structurally-based constitutional right of access: ensuring the informed political debate fundamental to representative self-government; and checking the abuse of power by public officials.

Second, this Part explains why *Richmond Newspapers*, rather than other First Amendment access decisions like *Houchins*, provides the appropriate starting point to approach the question of whether there is a constitutional right to attend deportation hearings.

Third, it describes the basis for a First Amendment right of access to deportation hearings. It describes why access is required by the First Amendment’s structural goals. It emphasizes the significance of the similarity between deportation hearings and criminal trials from the First Amendment perspective. It then discusses how *Richmond Newspapers*’ “experience” prong should not be applied rigidly in light of the country’s past practice of mistreating noncitizens in times of crisis and its otherwise expansive power to regulate immigration.

A. Structural Theories of the First Amendment

Under a structurally-based theory of free speech, the First Amendment’s main concern is not to protect an individual’s right to speak out but rather the people’s right to the free flow of information that is so central to the democratic process itself.²⁸⁴ This view of the First Amendment has existed since the time of the Framers,²⁸⁵ and was developed into a political theory by Alexander Meiklejohn.²⁸⁶ Modern proponents of deliberative democracy similarly view the First Amendment as safeguarding and facilitating the process of deliberation among citizens on matters of public importance.²⁸⁷

283. *Id.* at *9.

284. See Ashutosh Bhagwat, *Patronage and the First Amendment: A Structural Approach*, 56 U. CHI. L. REV. 1369, 1384-85 (1989) (“This structural approach presumes that if the political process remains untainted, then the sovereign people can be counted on to protect their own freedoms.”).

285. *Id.* at 1385 n.86 (citing authorities).

286. See *supra* note 32 and accompanying text.

287. See, e.g., CASS SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 241-52 (1993) (advocating that First Amendment law should be reconceptualized to strengthen democratic deliberation by increasing citizens’ access to public issues and by facilitating a

The idea of the First Amendment's structural role in the political system also dovetails with the political process theory of judicial review. In its seminal footnote four in *Carolene Products*,²⁸⁸ the Warren Court signaled its refusal to defer to legislation that restricted the political process or involved prejudice against "discrete and insular minorities."²⁸⁹ In what John Hart Ely later described as the "representation-reinforcing" view of the judiciary,²⁹⁰ courts could exercise judicial review over speech restrictions that inhibited full and meaningful participation in the political process.²⁹¹ In its broadest form, political process theory suggests that democratic government cannot flourish if the majority is able to suppress competing political views.²⁹²

The Supreme Court has relied on a structural interpretation of free speech in expanding the First Amendment beyond its traditional scope of protecting against prior restraints. The Court has underscored the structural role of the First Amendment in striking down restrictions on expression, initially in cases involving subversive speech²⁹³ and later in cases involving more indirect forms of censorship, such as the imposition of a licensing tax on the owners of newspapers²⁹⁴ and restrictions on the right to receive information.²⁹⁵ The Court's reformulation of libel law in matters involving public officials was based on its commitment to the principle that "debate on public issues should be uninhibited, robust, and wide-open."²⁹⁶ Its recognition of the First Amendment's broader political purpose helps explain its resistance to restrictions on the receipt and dissemination of information in the courthouse and on the press's ability to publish information about or obtained during

greater diversity of viewpoints).

288. *United States v. Carolene Prods. Corp.*, 304 U.S. 144, 152 n.4 (1938).

289. *Id.*

290. See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

291. See *id.* at 93-94; see also *Richmond Newspapers v. Virginia*, 448 U.S. 555, 587 (1980) (Brennan, J., concurring) (citing *Carolene Products* for the proposition that the First Amendment has "a structural role to play in securing and fostering our republican system of self-government"). Notably, Ely also maintained that courts should act to facilitate the representation of noncitizens, who cannot vote in any state and who have been long subject to hostility. See ELY, *supra* note 290, at 161-62.

292. See Michael J. Klarman, *Symposium on Democracy and Distrust: Ten Years Later: The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 755 (1991).

293. See, e.g., *Stromberg v. California*, 283 U.S. 359, 369 (1931) ("The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system."); see also *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937).

294. *Grosjean v. Am. Press Co.*, 297 U.S. 233, 249-50 (1936) (stating that the First Amendment protects not only against censorship but also "any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights").

295. *Lamont v. Postmaster Gen.*, 381 U.S. 301 (1965) (declaring unconstitutional detention of communist propaganda in the mails); *Martin v. Struthers*, 319 U.S. 141 (1943) (declaring unconstitutional prohibition on door-to-door distribution of literature).

public trials.²⁹⁷ The informed public opinion engendered by a free press has also been cited in a range of contexts, from providing a restraint on the executive branch's enormous power over national security policy²⁹⁸ to serving as a basis for striking down restrictions on the legal decisions of government-funded legal service lawyers.²⁹⁹ In addition, the Court has underscored the First Amendment's related role of checking the abuse of power by officials.³⁰⁰

As previously noted, however, prior to *Richmond Newspapers* the Court never saw the First Amendment's structural role as a basis for granting a broad right of access to government records, documents, or facilities.³⁰¹ Access to information possessed by the legislative or executive branches was suggested to be a political question beyond the province of the judiciary.³⁰² Attempts to weave a broad constitutional right to know out of the cloth of Meiklejohn's political theory of the First Amendment were limited to the dissenting opinions of a few justices.³⁰³ Moreover, since *Richmond Newspapers*, the Court has adhered to the dichotomy between information within the government's control and the receipt or dissemination of information, reasserting that restricting access to the former does not violate the First Amendment.³⁰⁴

As we have also seen, the expansion of access rights in *Richmond*

297. See, e.g., *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 495 (1975) ("The freedom of the press to publish [official court records] appears to . . . be of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business."); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 839 (1978) ("The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.") (quoting *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966)).

298. *N.Y. Times Co. v. United States*, 403 U.S. 713, 727-28 (1971) (Stewart, J., concurring) ("*The Pentagon Papers Case*").

299. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 548 (2001) ("It is fundamental that the First Amendment 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'") (quoting *N.Y. Times*, 376 U.S. at 269).

300. *N.Y. Times*, 376 U.S. at 273-76; *Mills v. Alabama*, 384 U.S. 214, 218-19 (1966) (invalidating restrictions on press coverage of elections).

301. See *supra* notes 44-49 and accompanying text.

302. See *Houchins v. KQED*, 438 U.S. 1, 12 (1978) (stating that the argument for a right of access "invites the Court to involve itself in what is clearly a legislative task which the Constitution has left to the political process"); see also *Capital Cities Media, Inc. v. Chester*, 797 F.2d 1164, 1170 (3d Cir. 1986) (describing roots of view that access to executive branch materials is a political question).

303. See, e.g., *Pell v. Procunier*, 417 U.S. 817, 839-40 (1974) (Douglas, J., dissenting) (granting the press a preferred position in access to prison conditions would enable it to fulfill its role in "bring[ing] fulfillment to the public's right to know . . . which is crucial to the governing powers of the people"); *Saxbe v. Wash. Post Co.*, 417 U.S. 843, 850-62 (1974) (Powell, J., dissenting) (categorical interview ban would preclude active and effective reporting on prison conditions, a matter that directly implicates "the societal function of the First Amendment in preserving free public discussion of governmental affairs").

304. See *L.A. Police Dep't v. United Reporting Publ'g Corp.*, 528 U.S. 32, 40 (1999)

Newspapers and its progeny rested upon a mix of structural conceptions of the First Amendment's role and the "complementary considerations" of historical tradition and functional value.³⁰⁵ While the Court's approach is generally described in terms of the formalized two-pronged "logic" and "experience" test, it is not entirely clear that the Court ever intended this to always be a rigid requirement. Certainly, a more reductionist approach has helped enable lower courts to employ a more concrete, streamlined framework when confronting the multitude of access questions that arose after *Richmond Newspapers*.³⁰⁶ Yet, as discussed more fully below, an overly inflexible application of the "logic" and "experience" test, particularly an insistence on a long, unbroken history of access, can undermine the broader structural concerns embodied in the First Amendment, which assume a particular salience in the immigration context.

B. The Application of *Richmond Newspapers* to Deportation Hearings

To date, the Supreme Court has yet to apply *Richmond Newspapers* outside the context of criminal proceedings. While lower courts have applied *Richmond Newspapers* to civil trials and to some administrative proceedings, *Detroit Free Press* and *North Jersey Media Group* represent the first time any court has considered *Richmond Newspapers*' applicability to deportation hearings.³⁰⁷ While they reached different outcomes, both the Sixth and Third Circuits concluded that *Richmond Newspapers* furnished the proper test to determine whether there is a First Amendment right of access to deportation proceedings and rejected the government's argument that particular deference should be given to the Creppy Directive because it involves the government's exercise of its immigration power.

The principles underlying *Richmond Newspapers* and its extension by lower courts beyond the criminal context strongly support its application to deportation proceedings. As both circuit courts observed, deportation hearings involve adjudicative, adversarial trial-type proceedings similar in criti-

305. *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8 (1986) ("*Press-Enterprise II*").

306. See, e.g., *North Jersey Media Group v. Ashcroft*, 205 F. Supp. 2d 288, 299 (D.N.J. 2002) (describing how "the considerations giving rise to the presumption of openness espoused in *Richmond Newspapers* have been distilled into a working standard"), *rev'd on other grounds*, 308 F.3d 198 (3d Cir. 2002), *cert. denied*, 123 S. Ct. 2215 (2003).

307. Prior to *Richmond Newspapers*, a district court had found a right of public access to the deportation hearing of an individual alleged to have concealed his Nazi past based on the power of openness to check abuse in a matter involving individual liberty. See *Pechter v. Lyons*, 441 F. Supp. 115, 117-18 (S.D.N.Y. 1977) (holding that the INS regulation setting forth the presumptive openness of deportation hearings "is but one of countless manifestations of a public policy centuries old that judicial proceedings, especially those in which the life or liberty of an individual is at stake, should be subject to public scrutiny, not only for the protection of the individual from unwarranted and arbitrary conviction, but also to protect the public from law prosecution").

cal respects to criminal trials.³⁰⁸ The functional and structural values described by Chief Justice Burger in *Richmond Newspapers*—guaranteeing the fairness of the proceedings,³⁰⁹ providing the community with a therapeutic outlet³¹⁰ and educating the public³¹¹—are also aspects of deportation hearings. In addition, deportation hearings, like criminal trials, involve an attempt by the government to deprive individuals of their liberty in a coercive fashion. While deportation is not considered criminal punishment, it nonetheless carries severe consequences, potentially resulting “in the loss of all that makes life worth living.”³¹² This principle—that liberty may not be taken away in a closed proceeding—helped drive *Richmond Newspapers*.³¹³ Indeed, it is difficult to imagine that such a sweeping celebration of the Anglo-American legal tradition would have been made in discussing access to a commercial dispute, regardless of the tradition of openness in such proceedings.

Furthermore, it is precisely the fact that deportation hearings are formal adjudicative proceedings where liberty is at stake that distinguishes them from the Court’s pre-*Richmond Newspapers* access cases like *Houchins*. *Houchins* did not involve access to a trial-type proceeding but rather to a large public institution (a prison), with whose operation the Court was reluctant to interfere.³¹⁴ Indeed, if there were any relevance of *Houchins* to the deportation of the post-September 11 detainees, it would be on the question of access to immigration detention centers, not to the deportation hearings themselves. The main difference between *Houchins* and *Richmond Newspapers* is not that one is “administrative” and the other “criminal,” but rather that in the latter the press and public sought access to a formal proceeding where an individual’s liberty was at stake, while in the former they attempted to gather information about a large, government-run institution and bureaucracy. Indeed, the Court’s more recent discussion of *Houchins* suggests that it remains limited to some types of information in the government’s control, and should not be extended to adjudicative proceedings.³¹⁵

308. *Cf. Ctr. for Nat’l Sec. Studies v. United States Dep’t of Justice*, 331 F.3d 918, 936 (D.C. Cir. 2003) (suggesting the applicability of *Richmond Newspapers* to adjudicative proceedings like deportation hearings as opposed to investigations), *cert. denied*, 124 S. Ct. 1041 (2004). Although the D.C. Circuit cited *Detroit Free Press*, it failed to note that the Third Circuit had also found *Richmond Newspapers* the appropriate framework to assess a First Amendment right of access claim to deportation hearings. *Id.*

309. *Richmond Newspapers v. Virginia*, 448 U.S. 555, 570 (1980).

310. *Id.* at 571.

311. *Id.* at 572-73.

312. *Bridges v. Wixon*, 326 U.S. 135, 147 (1945) (internal quotation marks omitted).

313. 448 U.S. at 574 (“The principle that justice cannot survive behind walls of silence has long been reflected in Anglo-American distrust for secret trials.”) (quoting *Sheppard v. Maxwell*, 384 U.S. 333, 349 (1966)) (internal quotation marks omitted).

314. 438 U.S. 1, 8-9 (1978).

315. *Cf. L.A. Police Dep’t v. United Reporting Publ’g Corp.*, 528 U.S. 32, 40 (1999) (citing *Houchins* in support of restriction on access to arrest records, information in the government’s control). Although the question of a First Amendment right of access to the names of the September 11 detainees is beyond the scope of this article, the fact that such arrests are

For these reasons, recognizing a right of access to deportation proceedings would not implicate the separation-of-powers concerns expressed in *Houchins*. There the government acted in an administrative capacity, whereas in deportation hearings it acts in a quasi-judicial capacity, whose main feature is adjudication, not bureaucratic management. Deportation hearings are also distinct from grand jury proceedings,³¹⁶ which, while involving individual liberty, are investigatory and not adjudicative in nature.³¹⁷ Deportation hearings are governed by similar notions of due process as criminal trials (even if less process is due), and their operation cannot, like prison management, be deemed “a legislative task which the Constitution has left to the political processes.”³¹⁸ Rather, though labeled administrative, deportation hearings are sufficiently similar to criminal trials in terms of the nature of the proceedings and issues at stake to require the question of access be analyzed in light of *Richmond Newspapers*, not pre-*Richmond Newspapers* access decisions like *Houchins*. In addition, the extension of *Richmond Newspapers*’ principles to deportation hearings, with their almost unique similarities to criminal trials, would alleviate the Court’s concerns about extending *Richmond Newspapers* more broadly in the administrative setting and unleashing a potentially endless stream of demands for government documents, records, and operations.³¹⁹

C. *The First Amendment and a Constitutional Right of Access to Deportation Hearings*

Assuming *Richmond Newspapers* provides the appropriate framework through which to analyze access to deportation hearings, the question remains whether a constitutional right of access exists. This section describes why the First Amendment’s broader goals support a right of access to deportation proceedings, particularly in the wake of September 11. It then addresses the relationship of those goals to *Richmond Newspapers*’ limiting principles of historical tradition and functional value.

functionally equivalent to criminal arrests suggests that this issue should also be analyzed under *Richmond Newspapers*, not *Houchins*.

316. See *Branzburg v. Hayes*, 408 U.S. 665 (1972); see also First Amendment Coalition v. Judicial Inquiry & Review Bd., 784 F.2d 467, 472-73 (3d Cir. 1986) (comparing judicial review and inquiry board to grand jury proceeding, rather than to criminal or civil trial).

317. Cf. *Branzburg*, 408 U.S. at 701-02; *Ctr. for Nat’l Sec. Studies v. United States Dep’t of Justice*, 331 F.3d 918, 936 (D.C. Cir. 2003) (discussing “crucial distinction between ‘investigatory information’ and ‘access to information relating to a governmental adjudicative process’”) (quoting *Detroit Free Press*, 303 F.3d at 699), *cert. denied*, 124 S. Ct. 1041 (2004).

318. *Houchins*, 438 U.S. at 12.

319. See, e.g., *id.* at 12-16; see also *Capital Cities Media, Inc. v. Chester*, 797 F.2d 1164, 1172-73 (3d Cir. 1986) (discussing the potentially broad scope of a claim of a right of access to agency records).

1. *Deportation Hearings and the Structural Goals of the First Amendment*

The events of September 11 have dramatically impacted public policy and debate over a range of issues, including national security, foreign affairs, immigration, and civil liberties. The government's imposition of sweeping measures to combat terrorism has principally targeted immigrants, especially men from Arab and Muslim nations, leading to detention without charges and other abuses.³²⁰ In this context, deportation hearings serve a critical role because they often represent the first and only opportunity for these immigrants to formally contest the allegations against them. The blanket closure of deportation hearings in a category of cases—a category determined by the executive branch without any judicial review—hides the adjudicative, outcome-determinative component of this process from public view and prevents the public from seeing how the war on terrorism is being waged. To deny a right of access to such proceedings, without ever requiring the government to demonstrate an individualized justification, would undercut the First Amendment's role in fostering informed public debate and checking the abuse of government power. While national security may indeed justify closure in individualized instances—a power previously granted to immigration judges under a general closure regulation³²¹ and now more explicitly authorized under an emergency interim regulation³²²—it does not support the closure of hearings in an entire category of cases based upon the unreviewable determination of executive branch officials.

By seeking to remove all information about the deportation process from the public domain, the Creppy Directive effectively transforms a previously open adjudicative proceeding to determine an individual's right to remain in the country into another stage in a secret law enforcement investigation. It enables the government to conduct the entire sweep of law enforcement operations, from investigation through adjudication and sanction, outside of public view. It effectively makes the deportation process into an extension of the country's national security policy, as though the hearing itself were a form of classified information.³²³ The war against terrorism thus obliterates the line between law enforcement and adjudication in immigration law. In the process, the blanket closure rule curtails public awareness of the government's attempt to deprive an individual of liberty through a trial-type proceeding, grants unchecked power to law enforcement officials, lim-

320. See *supra* notes 1-5.

321. 8 C.F.R. § 3.27, redesignated as 8 C.F.R. § 1003.27 (2003) (mandating the closure of certain hearings, such as those involving abused alien children, and permitting the closure of all other hearings to protect witnesses, parties, or the public interest).

322. 67 Fed. Reg. 36,799 (2002) (codified at 8 C.F.R. § 1003.46 (2003)) (authorizing immigration judges to issue protective orders, accept documents under oath, and close proceedings where protected information may be discussed).

323. Cf. generally Bruce E. Fein, *Access to Classified Information: Constitutional and Statutory Dimensions*, 26 WM. & MARY L. REV. 805 (1985).

its the public's knowledge about the war against terrorism, and undermines the sense of participation in the political process among targeted groups, in this case Muslims and those of Arab descent.

The Court's understanding of the First Amendment's structural role in *Richmond Newspapers* applies with equal force to deportation proceedings. Like criminal trials and ancillary proceedings, open deportation hearings serve a range of values, including guaranteeing the fairness of the proceedings, providing a therapeutic outlet for transgression of the nation's immigration laws, and educating the public about deportation proceedings themselves.³²⁴ Yet, in addition to these functional values, open deportation hearings also promote informed public debate about enforcement of the country's immigration laws, an important aspect of the war against terrorism. It is important to recognize that the government never disclosed the existence of its blanket closure policy and that many hearings were presumably closed before the policy came to light and could be challenged in court.³²⁵ While the closure of individual hearings may be merited upon a proper showing by the government (including a more particularized basis than a boilerplate affidavit),³²⁶ the wholesale conduct of secret hearings to remove individuals from the country violates the basic principles of an open democracy secured by the First Amendment.

Under *Richmond Newspapers*, the First Amendment's primary role is not to protect an individual's constitutional rights—a function served by the Sixth Amendment—but rather to serve a larger social purpose. If, for example, a long-term permanent resident is being detained and deported for an immigration violation, it is a matter of public importance, just like the trial of the defendants in *Richmond Newspapers* and its progeny. The principle would apply whether the immigration violation was minor or substantial, just as the public has a right of access to criminal trials whether they involve misdemeanors or felonies. In each instance, a trial-type proceeding is employed to adjudicate the state's use of its coercive power to impose a sanction that deprives an individual of liberty.

The government's argument that its plenary power over immigration supports a more deferential approach to its decision whether to allow access

324. Cf. *Richmond Newspapers*, 448 U.S. at 570-73 (plurality opinion).

325. See Reply Brief of Petitioner in Support of Petition for Writ of Certiorari at 3, North Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198 (3d Cir. 2002), cert. denied, 123 S. Ct. 2215 (2003).

326. See *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 707-10 (6th Cir. 2002) (rejecting the government's arguments for a blanket closure rule rather than consideration of the need for closure on a case-by-case basis based on particularized findings; suggesting that the government could keep confidential and sensitive information from the public domain as the need arose in individual cases); cf. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606-07 (1982) (holding that the attempt to deny a right of access to a portion of a criminal trial to inhibit disclosure of sensitive information must be necessitated by a compelling government interest and narrowly tailored to serve that interest); *Richmond Newspapers*, 448 U.S. at 580-81 (requiring particularized findings to support closure, including consideration of less restrictive alternative means).

to deportation hearings obscures the larger purpose of the First Amendment and seeks to transform a question about free speech into one about immigration regulation. An important dispute in *Detroit Free Press* and *North Jersey Media Group* was not simply between the government's power to regulate immigration and the constitutional rights of individual immigrants. When individuals, some of whom have lived in the United States for many years, are arrested, detained, and placed in a formal adversarial proceeding to determine their right to remain in this country, it implicates the interests not only of those persons, but also of the general public. The interests of the former may be rooted in notions of due process and equal protection,³²⁷ but those of the latter are guaranteed by the First Amendment. While deportation hearings may have an administrative label, the public's interest in preserving access to such proceedings bears a strong resemblance to its interest in access to criminal trials.

Moreover, it is precisely because of the government's extensive power over substantive decisions governing immigration policy that the public should have access to see how those policies are implemented.³²⁸ Congress has broad powers as to which noncitizens to admit and to establish the grounds for exclusion and deportation. Though these decisions might amount to unlawful discrimination in another context, they are reviewed by courts only for a rational basis.³²⁹ Similarly, while immigrants in deportation proceedings possess due process rights³³⁰ and are constitutionally guaranteed federal judicial review of deportation orders,³³¹ those rights have traditionally

327. Indeed, one post-September 11 immigrant detainee, a plaintiff in the *Detroit Free Press* litigation, also brought a separate Due Process challenge to his closed deportation proceedings. See *supra* note 211.

328. Cf. *Richmond Newspapers*, 448 U.S. at 583 (Stevens, J., concurring) (noting that the argument for a constitutional right of access may be stronger where, as in prisons, there is a vulnerable, otherwise unprotected segment of the population and a tradition of deference to governmental policy). A similar understanding is reflected by the distinction, recognized by the Sixth Circuit, between procedural and substantive immigration laws. See *supra* notes 222-23 and accompanying text; see also *Francis v. INS*, 532 F.2d 268, 273 (2d Cir. 1976) ("We do not dispute the power of Congress to create different standards of admission and deportation for different groups of aliens. However, once those choices are made, individuals within a particular group may not be subjected to disparate treatment on criteria wholly unrelated to any governmental interest."). Courts also do not exercise the usual degree of deference to immigration decisions when they raise separation of power concerns. See, e.g., *INS v. Chadha*, 462 U.S. 919, 940-41 (1983) (rejecting that "plenary authority over aliens" precludes review of whether "Congress has chosen a constitutionally permissible means of implementing that power"—in this case by establishing a one-House veto of the Attorney General's grant of suspension of deportation).

329. See, e.g., *Fiallo v. Bell*, 430 U.S. 787, 793 (1977) (noting "limited judicial responsibility" with respect to the power of Congress to regulate the admission and exclusion of aliens); see also *Mathews v. Diaz*, 426 U.S. 67, 79-80 (1976) ("In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.").

330. See, e.g., *Reno v. Flores*, 507 U.S. 292, 306 (1993); *Yamataya v. Fisher*, 189 U.S. 86 (1903) ("*The Japanese Immigrant Case*").

been considered against the background of the government's broad immigration powers. The First Amendment thus plays a particularly crucial role by ensuring that when this power is exercised through a trial-type proceeding to deprive an individual of liberty, that proceeding must remain open and subject to public scrutiny.³³² Indeed, as the Court itself has previously stated, the government's extraordinary power over immigration makes it even more important that such power be administered "not arbitrarily and secretly, but fairly and openly."³³³ Although the Court in that case was referring specifically to the due process violation in deporting a noncitizen based on evidence produced *in absentia* and not recorded or released to the deportee, the principle that there needs to be some check on such extensive governmental power—a point reinforced by the Court's recent decisions involving the indefinite detention of noncitizens³³⁴ and judicial review of deportation orders of criminal aliens³³⁵—applies equally to the First Amendment.

Although more modern scholarship discusses the First Amendment's checking value in post-Watergate terms of preventing the abuse of power by corrupt public officials³³⁶ and curbing the excesses of "big government,"³³⁷ Madison and other Framers envisioned a broader role for the First Amendment, as a way to check errors of judgment and illegal actions by government officials.³³⁸ Madison emphasized that it was essential for the public to have access to information about the government if a representative democracy was to function properly.³³⁹ He also believed it was critical that people

332. *Cf. Detroit Free Press v. Ashcroft*, 303 F.3d 681, 683 (6th Cir. 2002) (describing effects of Creppy Directive as "uproot[ing] people's lives, outside the public eye, and behind a closed door"); *cf. T. Alexander Aleinikoff, Non-Judicial Checks on Agency Actions*, 49 ADMIN. L. REV. 193, 194 (1997) ("[T]raditionally, the courts have been wary of stepping into the immigration area. Congress, well aware of such judicial hesitance, appears willing to make the most of it.").

333. *Kwock Jan Fat v. White*, 253 U.S. 454, 464 (1920).

334. *Zadvydas v. Davis*, 533 U.S. 678 (2001).

335. *INS v. St. Cyr*, 533 U.S. 289 (2001). A number of commentators have observed that decisions such as *Zadvydas* signaled a possible decline of the plenary power doctrine itself, though also cautioning that September 11 could prompt its revival. *E.g.*, Peter J. Spiro, *Explaining the End of Plenary Power*, 16 GEO. IMMIG. L.J. 339, 344, 357 (2002).

336. *E.g.*, Blasi, *supra* note 28, at 540-41. Blasi describes, for example, the checking value's emphasis on information from "undisclosed, unverified sources." *Id.* at 603 (internal quotation marks omitted); *see also Branzburg v. Hayes*, 408 U.S. 665, 731 (1972) (Stewart, J., dissenting) ("A public-spirited person inside government, who is not implicated in any crime, will now be fearful of revealing corruption or other governmental wrongdoing, because he will now know he can subsequently be identified by use of compulsory process.").

337. Blasi also emphasized the need for well-organized, well-financed professional critics to scrutinize the activities of an increasingly large and complex government bureaucracy. *See* Blasi, *supra* note 28, at 541.

338. THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 211 (Marvin Meyers ed., 1973), *cited in* Blasi, *supra* note 28, at 535.

339. Letter from James Madison to W.T. Barry (Aug. 4, 1822), *in* THE COMPLETE MADISON 337 (Saul K. Padover ed., 1953) ("A popular Government without popular information, or the means of acquiring it, is but a prologue to a Farce or a Tragedy; or perhaps both.

retain the right to criticize government officials—a proposition that depended on their being informed about the actions of those officials.³⁴⁰ The power to arrest, detain, and deport immigrants, all in secret, invites precisely the type of abuse against which Madison and others cautioned. It helps prevent any criticism of how the government is conducting the “war against terrorism” and employing its vast power against immigrants, including many long-time residents—a power the government itself points to as proof of its progress.³⁴¹ Given law enforcement’s targeting of Arab and Muslim communities after September 11,³⁴² its expanded power to detain and deport noncitizens under the Patriot Act,³⁴³ and the erosion of procedural rights,³⁴⁴ the First Amendment’s checking role assumes an even greater importance. It becomes critical that the final stage of this law enforcement process—the formal adjudication of the right to remain in the country—remain open to the public. Indeed, the argument for a constitutional right of access to the deportation hearings that occurred in the wake of September 11 was in many ways closer to the Framers’ vision of the First Amendment as a check against abuse by government officials than is a right of access to “sensational” criminal trials.³⁴⁵

nors, must arm themselves with the power which knowledge gives.”). At the same time, Madison supported making the Constitutional Convention’s deliberations confidential, suggesting that the principle had limits based on context. 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, 15-17 (Max Farrand ed., 1966).

340. See Alex Kozinski & Stuart Banner, *Who’s Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 632 (1990) (citing 1 ANNALS OF CONG. 434-36, 440-43 (Joseph Gales ed., 1789), reprinted in 5 THE FOUNDERS’ CONSTITUTION 141, 145 (Philip B. Kurland & Ralph Lerner eds., 1987)); *Capital Cites Media, Inc. v. Chester*, 797 F.2d 1164, 1183-84 (3d Cir. 1986) (Gibbons, J., dissenting) (“[T]he earliest and certainly the most widely-accepted explanation of the animating purpose of the speech-press clause is that enunciated by its author, James Madison; namely, its value in serving as a restraint upon the abuse of power by public officials.”). This understanding of the checking value also forms the Freedom of Information Act’s core goal of agency disclosure. See, e.g., *United States Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989) (members of the public have a right to know “what their government is up to”) (internal quotation marks omitted); *Dep’t of Air Force v. Rose*, 425 U.S. 352, 372 (1976) (“basic purpose of [Freedom Of Information Act] is] to open agency action to the light of public scrutiny”).

341. Dan Eggen & Susan Schmidt, *Count of Released Detainees Is Hard to Pin Down*, WASH. POST, Nov. 6, 2001, at A10.

342. Sameer M. Ashar, *Immigration Enforcement, and Subordination: The Consequences of Racial Profiling After September 11*, 34 CONN. L. REV. 1185, 1193-94 (2002).

343. See *supra* note 2; see also Cole, *supra* note 1, at 966-67 (“[The Patriot Act] makes aliens deportable for wholly innocent associational activity with a ‘terrorist organization,’ whether or not there is any connection between the alien’s associational conduct and any act of violence, much less terrorism.”) (quoting USA PATRIOT Act, § 411, Pub. L. No. 107-56, 115 Stat. 272 (2001)); Cole, *supra* note 1, at 971 (“The [Patriot Act] gives the Attorney General unprecedented power to detain aliens without a hearing and without a showing that they pose a threat to national security or a flight risk.”).

344. See Ashar, *supra* note 342, at 1197-98.

345. Cf. Kate Zernike, *Everything Else but the Name*, N.Y. TIMES, Aug. 3, 2003, § 4, at 4 (discussing media lawyers’ First Amendment arguments against a decorum order in opening habeas corpus and law clerk’s act, *supra* note 140, at 202 (Bryant and noting the observation of a

Furthermore, any blanket closure rule like the Creppy Directive creates a troubling dichotomy between noncitizen “special interest” cases and the prosecution of terrorism-related offenses in criminal courts. In the wake of September 11, the government has increasingly avoided combating terrorism through traditional criminal law enforcement, relying instead on “softer-spots” like immigration law, which provides increased maneuverability, leverage, and judicial deference.³⁴⁶ From a First Amendment perspective, this means a danger of greater secrecy and less public debate. A blanket closure rule in deportation hearings thus provides an additional incentive for the government to charge individuals with immigration violations in order to wage the war against terrorism beneath the radar and outside the public eye.

In addition, the question of access to deportation hearings has a particularly significant impact on this country’s various immigrant communities. The secret deportation proceedings of the September 11 detainees focused almost exclusively on adult males from Arab or Muslim countries and had wide reverberations in Arab and Muslim communities throughout the country, as the case of Rabih Haddad, the individual facing deportation in *Detroit Free Press*, demonstrates. Haddad, a locally prominent Muslim cleric, was living with his family in Ann Arbor, Michigan.³⁴⁷ He was the co-founder of the second-largest U.S.-based Islamic aid organization and also served as a leading fund-raiser for mosques in the Ann Arbor area.³⁴⁸ He was arrested and detained by the INS in December 2001 on a minor immigration visa violation,³⁴⁹ and placed in removal hearings. Until it was enjoined by the district court, the government attempted to conduct in secret all of Haddad’s immigration proceedings, including his bail and deportation hearings.³⁵⁰

Haddad’s treatment engendered substantial opposition among the Muslim-American community and prompted a federal lawsuit by media organizations, joined by the district’s federal congressional representative.³⁵¹ As a

professor of culture and communications that “[t]his is not what our founders were talking about when they were talking about the First Amendment. . . . The First Amendment was supposed to make the government vulnerable to constant oversight by a vigorous press”).

346. A similar but more dramatic dynamic helps explain the government’s increasing use of the “enemy combatant” designation to remove individuals, citizens and noncitizens alike, from the criminal process and subject them to military detention, where it opposes not only access to the press but also to counsel, and possibly a military trial that would be closed to the public. *See, e.g.,* Padilla v. Rumsfeld, 352 F.3d 695 (2d Cir. 2003), cert. granted, 124 S. Ct. 1353 (2004); *see also* Erich Lichtblau, *Threats and Responses: Terror; U.S. Cites Al Qaeda in Plot to Destroy Brooklyn Bridge*, N.Y. TIMES, June 20, 2003, at A1 (noting examples of individuals threatened with the “enemy combatant” designation to pressure them to plead guilty to criminal charges).

347. *See* Dan Eggen & Kari Lydersen, *In Michigan, Anti-Terrorism Effort Goes Public: Haddad Case Forces Rare Glimpse of Secret U.S. Campaign*, WASH. POST, May 6, 2002, at A3.

348. *Id.*

349. *Id.*

350. *Detroit Free Press v. Ashcroft*, 195 F. Supp. 2d 937, 941-42 (E.D. Mich. 2002).

351. *Id.*

result, Haddad's case attracted national attention. The government never supplied any particularized evidence to justify the closure of his deportation proceedings,³⁵² nor was Haddad ever charged with any terrorist crime.³⁵³ Rather, Haddad was ultimately deported based on a routine immigration violation (overstaying his visa) and then denied asylum and other relief.³⁵⁴ Like hundreds of other September 11 detainees, Haddad's case demonstrates how the deportation process can become a matter of significant concern to large segments of the population, particularly members of the United States' sizable Muslim and Arab communities.³⁵⁵ As with any other ethnic or religious group, maintaining an open adjudicative process is critical to these communities' faith in the institutions on which the success of a pluralistic democracy like the United States depends. The negative impact of closed proceedings on the participation of such groups in larger society further demonstrates the structural importance of access rights in this context.

2. Another Look at the "Experience" and "Logic" Test

This section reexamines *Richmond Newspapers*' "logic" and "experience" test. It looks critically at the Court's reliance on history in *Richmond Newspapers* and its progeny, and then explains why this prong should be applied more flexibly in light of the First Amendment's broader structural goals. It next briefly examines *Richmond Newspapers*' "logic" or function prong in light of its application to deportation proceedings.

a. History and the Tradition of Openness

Although the Court's post-*Richmond Newspapers* right of access decisions suggest that varying lengths of openness can satisfy the so-called "experience" prong,³⁵⁶ the Court has never entirely dispensed with the history

352. Danny Hakim, *Transcripts Offer First Look at Secret Federal Hearings*, N.Y. TIMES, Apr. 22, 2002, at A15 (noting that based on newly opened records, the main suspicion against Haddad involves his prior travel to Pakistan as part of his humanitarian work).

353. *In re Haddad*, 27 Immig. Rptr. B1-47 (2003). Indeed, virtually none of the September 11 detainees were charged with any crime relating to terrorism. See, e.g., Curt Anderson, *Most of the Post-September 11 Detainees Deported, Released or Guilty of Nonterror Offenses*, ASSOCIATED PRESS, Dec. 11, 2002, <http://customwire.ap.org> (last visited Apr. 6, 2004) (on file with author).

354. *In re Haddad*, 27 Immig. Rptr. B1-47 (2003).

355. *Detroit Free Press v. Ashcroft*, 195 F. Supp. 2d 937, 944 (E.D. Mich. 2002) ("It is important for the public, particularly individuals who feel that they are being targeted by the Government as a result of the terrorist attacks of September 11, to know that even during these sensitive times the Government is adhering to immigration procedures and respecting individuals' rights. Openness is necessary for the public to maintain confidence in the value and soundness of the Government's actions, as secrecy only breeds suspicion as to why the Government is proceeding against Haddad and aliens like him.")

356. *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 10-11 (1986) ("*Press-Enterprise I*"); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 505-10 (1984) ("*Press-Enterprise II*"); *Press-Enterprise Co. v. Superior Court*, 457 U.S. 623, 596, 605 (1982).

requirement or found that evidence of functional value could alone support a constitutional right of access. At the same time, the Court has never explicitly stated that a lengthy tradition of openness is essential to a right of access in all circumstances.

Requiring some tradition of openness has appealed to the Court because it seems to invoke objectivity and judicial restraint, offering the promise of a principled limit on the Court's power to fashion new First Amendment rights out of the fabric of constitutional structure. Yet, making a constitutional right of access turn on this type of historical analysis potentially raises a number of difficult issues.

While evidence of a long tradition of openness appeared to provide the basis in *Richmond Newspapers* for distinguishing criminal trials from other forms of government-controlled information, documents, and facilities highlighted in cases such as *Houchins*,³⁵⁷ the Court never clearly articulated the principle underlying this distinction. Neither Chief Justice Burger nor Justice Brennan persuasively related the descriptive fact of a tradition of open criminal trials to an underlying theory of the First Amendment.³⁵⁸ As Justice Stevens noted, the absence of a tradition of access, as in the prison context, should make the need for access more, not less, compelling in terms of the First Amendment's structural purpose in promoting informed public debate and checking the abuse of government power.³⁵⁹

Chief Justice Burger's plurality opinion in *Richmond Newspapers* never explicitly links history to what he describes as the First Amendment's guarantee of the freedom of communication on matters relating to the functioning of government.³⁶⁰ Nor does it describe why the functional value of openness depends upon the existence of a long tradition of access.³⁶¹ Indeed, the actual reasons underlying a tradition of openness may sometimes be more a matter of circumstance than design. In *Press-Enterprise I*, for example, Chief Justice Burger observed that at common law the presence of bystanders helped ensure a supply of potential additional jurors if challenges kept a sufficient number of qualified jurors from appearing at the trial³⁶²—hardly

357. See *Richmond Newspapers v. Virginia*, 448 U.S. 555, 576 n.11 (1980); cf. *id.* at 583 (Stevens, J., concurring) (noting the apparent inconsistency between the Court's decisions in *Richmond Newspapers* and prison right of access cases such as *Houchins*); Cox, *supra* note 98, at 22 (discussing the inconsistent treatment of the prison right of access cases in *Richmond Newspapers*).

358. See, e.g., BeVier, *supra* note 168, at 325 (criticizing Chief Justice Burger's approach for its lack of coherence).

359. *Richmond Newspapers*, 448 U.S. at 583 (Stevens, J., concurring).

360. See BeVier, *supra* note 168, at 325-26 (citing *Richmond Newspapers*, 448 U.S. at 575). Nor, as Professor BeVier observed, does Chief Justice Burger's opinion explain why a tradition of historical practice is linked to a constitutional mandate of openness under the First Amendment, but merely evidence of "a common-law rule" under the Sixth Amendment, as it had been in *Gannett Newspapers*. See *id.* (quoting *Gannett Newspapers Co. v. Depasquale*, 443 U.S. 368, 384 (1979)).

361. See *id.*

362. 464 U.S. 501, 508 (1984).

the purpose open voir dire hearings can be said to serve today under *Richmond Newspapers*. At the same time, other stages of criminal proceedings such as pretrial hearings may not boast such a long history of openness—the Court dated public access to such proceedings to around the mid-nineteenth century³⁶³—but have increased so much in importance over time that denying access would be tantamount to denying access to a trial itself.³⁶⁴

Justice Brennan's concurring opinion in *Richmond Newspapers* similarly fails to explain conclusively how a tradition of openness is related to the First Amendment's underlying purpose of preserving representative self-government—the structural goal he otherwise relies upon so heavily.³⁶⁵ Although Justice Brennan describes a tradition of openness as implying “the favorable judgment of experience,”³⁶⁶ he does not explain why the absence of such tradition necessarily signaled the incompatibility of access rights with the broader goals of the First Amendment. Instead, Justice Brennan refers—presumably prudentially—to history, along with functional value, as a bulwark against the “theoretically endless” expansion of a constitutional right of access.³⁶⁷

Yet, history may provide limited guidance because those historical traditions may themselves be indeterminate.³⁶⁸ The Court, for example, has never said precisely how long the tradition of openness must be, though its decision in *Press-Enterprise II* strongly suggests that a common law tradition of openness need not be established. Similarly, the Court has not indicated whether the tradition of openness must be completely unbroken and uniform, or whether a different standard might apply when the specific proceeding in issue—in this case, a deportation hearing—is itself of much more recent origin than criminal trials.³⁶⁹ This imprecision gives lower courts little

363. See *supra* note 189 and accompanying text.

364. See Hayes, *supra* note 165, at 1132; see also *Capital Cities Media, Inc. v. Chester*, 797 F.2d 1164, 1186-87 (3d Cir. 1986) (Gibbons, J., dissenting) (describing how refusing access to information in the possession of public officials can represent the “ultimate prior restraint of imposed ignorance about [the government's] affairs”).

365. 448 U.S. at 589 (Brennan, J., concurring).

366. *Id.*

367. *Id.* at 588.

368. See Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1087 (1990).

369. In fact, historical evidence suggests that formal court proceedings in early analogues to deportation, such as appeals of orders removing transient indigents from communities under the poor laws, were historically open to the public. See *R. v. Hartfield*, 90 Eng. Rep. 733 (K.B. 1692) (right of poor person to appeal removal order to Quarter Sessions); THOMAS SKYRME, *HISTORY OF THE JUSTICES OF THE PEACE* 202 (2d ed. 1994) (proceedings before justices of the peace at the Quarter Sessions open to the public); see also Gerald Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833, 1846-59 (1993) (discussing nineteenth century analogues to deportation). While most such removal disputes under the poor laws centered on suits between towns over obligations to support the poor rather than challenges by the individuals facing removal, see R. CRANSTON, *LEGAL FOUNDATIONS OF THE WELFARE STATE* 23-24 (1995), the inter-town litigation was also

guidance and can lead to widely varying results or to attempts to avoid the history prong or the “logic” and “experience” test altogether.³⁷⁰

In *North Jersey Media Group*, for example, the court noted that while it had never framed a bright-line test for determining when a historical tradition of openness was lengthy enough to support a right of access, circuit precedents suggest “that a more than one hundred year history of openness is sufficient.”³⁷¹ The court arrived at this conclusion through a rough process of induction based on the length of a tradition of openness in four cases,³⁷² which not only involved different issues and concerns, but do not uniformly support the proposition for which they were cited in *North Jersey Media Group*.³⁷³ The court never explained why a “hundred year minimum” was the appropriate length of time, nor considered why, depending on the other factors involved, a lesser (or greater) period might be justified.

Furthermore, this type of historical inquiry cuts against the Court’s practice of interpreting the First Amendment in light of current values and conditions—an approach that has enabled First Amendment law to develop beyond its early scope of preventing prior restraints on speech or publication.³⁷⁴

community. Cf. JOSIAH H. BENTON, WARNING OUT IN NEW ENGLAND, 1656-1817, at 18, 38-39 (1911) (discussing practice of applying for “settlement,” or legal residence, at public town meetings); RUTH W. HERNDON, UNWELCOME AMERICANS: LIVING ON THE MARGIN IN EARLY NEW ENGLAND 23 (2001) (examinations to enforce settlement laws held at town meetings and recorded in town records); D.L. Jones, *The Transformation of the Law of Poverty in Eighteenth Century Massachusetts*, in LAW IN COLONIAL MASSACHUSETTS, 1630-1800, at 175-76 (1984) (application for membership in Massachusetts towns decided at public town meeting).

370. See *supra* notes 201-02 and accompanying text.

371. *North Jersey Media Group v. Ashcroft*, 308 F.3d 198, 222 n.4 (3d Cir. 2002), cert. denied, 123 S. Ct. 2215 (2003).

372. See *id.* The cases cited are: *Whiteland Woods, L.P. v. Township of W. Whiteland*, 193 F.3d 177 (3d Cir. 1999); *United States v. Simone*, 14 F.3d 833 (3d Cir. 1994); *United States v. Smith*, 776 F.2d 1104 (3d Cir. 1985); and *Publicker Indus., Inc., v. Cohen*, 733 F.2d 1059 (3d Cir. 1984).

373. *Whiteland Woods*, 193 F.3d at 180-81 (rejecting a First Amendment claim of a right to videotape a town planning commission meeting, but also finding that such meetings are “precisely the type of public proceeding to which the First Amendment guarantees a public right of access” notwithstanding the evidence of a relatively recent tradition of access); *Simone*, 14 F.3d at 837-41 (finding a First Amendment right of access to post-trial proceedings to investigate juror misconduct; relying primarily on *Richmond Newspapers’* “logic” prong because the evidence of a tradition of access to this type of post-trial proceeding dated no earlier than 1980 and provided “little guidance”); *Smith*, 776 F.2d at 1111-12 (finding a First Amendment right of access to bills of particulars despite their “brief history” because of their close analogy to indictments, which have traditionally been public). Only in *Publicker Industries*, which involved access to civil trials, did the court directly base the First Amendment right upon a tradition of access that dated back one hundred years or more. 733 F.2d at 1067-69.

374. See *BeVier, supra* note 168, at 328 n.115; see also *Near v. Minnesota*, 283 U.S. 697 (1931) (rejecting that the First Amendment protects only the prevention of prior restraints on speech and publication); *NAACP v. Button*, 371 U.S. 415, 430 (1963) (describing the Court’s long rejection of a “narrow, literal conception” of the First Amendment’s terms); cf. *Bridges v. California*, 314 U.S. 252, 265 (1941) (“No purpose in ratifying the Bill of Rights was clearer than that of securing for the people of the United States much greater freedom of religion, expression, assembly, and petition than the people of Great Britain had ever enjoyed.”).

It also seems to conflict with the Court's approach to historical evidence involving administrative agencies, as demonstrated in its recent decision in *Federal Maritime Commission v. South Carolina State Ports Authority* ("*Ports Authority*").³⁷⁵ In *Ports Authority*, the Court held that state sovereign immunity bars an administrative agency from adjudicating a private party's complaint against a non-consenting state.³⁷⁶ While *Ports Authority* recognized that formalized administrative adjudications essentially did not exist during the Framers' time, it nonetheless found that state sovereign immunity applied to administrative proceedings because the particular proceeding was almost functionally indistinguishable from a civil lawsuit.³⁷⁷

Similarly, in Seventh Amendment cases the Court has never adopted a strict historical interpretation, which would have limited the right to a jury trial to those actions at common law recognized by the English courts of 1791.³⁷⁸ Rather, the Court has looked to the common law of 1791 for guidance, while holding the Seventh Amendment's jury trial guarantee applicable "if the new action involves the rights and remedies traditionally enforced" at common law.³⁷⁹ This more functionally oriented approach to history suggests that the present focus should be principally on the nature of deportation proceedings themselves, particularly their close analogy to criminal proceedings.

There also may be other ways of looking at history that do not fall under *Richmond Newspapers*' "logic" and "experience" test, but that are more closely related to underlying theories of the First Amendment. Rather than focus solely on the length of time deportation hearings have been open to the public—an issue upon which two circuit courts have recently divided³⁸⁰—the First Amendment analysis should also acknowledge other historical evidence, such as the mistreatment of immigrants during various periods of American history. Since the late eighteenth century, the government has consistently curtailed immigrants' rights during periods of war or insecurity,

375. 535 U.S. 743, 755 (2002).

376. *Id.* at 769.

377. *Id.* at 755-60; *cf.* *Capital Cities Media v. Chester*, 797 F.2d 1164, 1190 n.12 (3d Cir. 1986) (Gibbons, J., dissenting) (rejecting attempt to base access to agency records on existence of "functional analogue" of access to those records dating back to colonial times; emphasizing that "[m]any if not most governmental agencies and activities of the Twentieth Century did not exist at that time or for 100 years thereafter" and that "this country has experienced an enormous growth in governmental activity over the past 250 years").

378. Paul K. Sun, Note, *Congressional Delegation of Adjudicatory Power to Federal Agencies and the Right to Trial by Jury*, 1988 DUKE L.J. 539, 542.

379. *Id.* (citing *Pernell v. Southall Realty*, 416 U.S. 363, 375-76 (1974)).

380. *Compare* *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 701 (6th Cir. 2002) ("[D]eportation proceedings historically have been open. Although exceptions may have been allowed, the general policy has been one of openness."), *with* *North Jersey Media Group v. Ashcroft*, 308 F.3d 198, 212 (3d Cir. 2002) (noting evidence that "in practice, deportation hearings have frequently been closed to the general public"), *cert. denied*, 123 S. Ct. 2215

such as the Alien and Sedition Acts of the 1790s,³⁸¹ the Palmer Raids and Red Scare following World War I,³⁸² the internment of over 120,000 Japanese Americans (a majority of whom were U.S. citizens) during World War II,³⁸³ and the deportation and exclusion of aliens on ideological grounds during the Cold War.³⁸⁴ These measures have been repudiated with the passage of time,³⁸⁵ and serve as stark reminders of democracy's limitations in protecting individual rights in times of fear and uncertainty. Numerous commentators have already observed the parallels between these past reactions and the country's response to terrorism after September 11.³⁸⁶ While the First Amendment should not be transformed into a vehicle for asserting individual rights or substantive limitations on the government's power to regulate immigration, its structural role in promoting informed public debate and checking the abuse of power should be considered against the background of this history. This role is at its zenith when the government seeks to deprive an individual of liberty in a trial-type proceeding because of the public's inter-

381. Alien Enemy Act of July 6, 1798, ch. 66, 1 Stat. 577 (codified as amended at 50 U.S.C. §§ 21-24) (authorizing detention and removal of alien enemies during times of declared war); Sedition Act of June 25, 1798, ch. 58, § 1, 1 Stat. 570 (expired 1800) (permitting executive to deport "all such aliens as he shall judge dangerous to the peace and safety of the United States").

382. The Palmer Raids were a series of mass arrests conducted under the direction of U.S. Attorney General A. Mitchell Palmer, leading to the deportation of alleged subversives. Many of those deported were active in labor organizations, and it was never established that any of those deported were terrorists. See generally EDWIN P. HOYT, *THE PALMER RAIDS 1919-20: AN ATTEMPT TO SUPPRESS DISSENT* (1969); WILLIAM PRESTON, JR., *ALIENS AND DISSENTERS* 208-37 (1963). By the early 1920s, the anti-radicalism and xenophobia that triggered the Palmer Raids helped give rise to the racially discriminatory national origins immigration quotas of the early 1920s. See Irene Scharf, *Tired of your Masses: A History of and Judicial Responses to Early 20th Century Anti-Immigrant Legislation*, 21 HAW. L. REV. 131, 144-46 (1999).

383. *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding internment program).

384. See Kevin R. Johnson, *The Antiterrorism Act, The Immigration Reform Act, and Ideological Regulation in the Immigration Laws: Important Lessons for Citizens and Noncitizens*, 28 ST. MARY'S L.J. 833, 856 (1997).

385. For example, the United States has formally apologized to the former prisoners interned during World War II and their families, while Congress has attempted to make reparations. See, e.g., PAUL BOYER ET AL., *THE ENDURING VISION, A HISTORY OF THE AMERICAN PEOPLE* 886-87 (1996); 50 U.S.C.A. app. § 1989b-4 (1988) (authorizing payment of reparations); GEORGE MILLER, *COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS*, 102D CONG., *PERSONAL JUSTICE DENIED* 88-92 (Comm. Print 1992) (concluding that the internment was not justified by military necessity); *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984) (overturning the criminal conviction of Fred Korematsu). Later considerations of the Palmer Raids have been similarly harsh. See Cole, *supra* note 278 ("The Palmer raids are now viewed as a tragic mistake, another in a long line of government overreactions in times of crisis.").

386. See, e.g., G. Robert Blakey & Brian J. Murray, *Threats, Free Speech, and the Jurisprudence of Federal Criminal Law*, 2002 BYU L. REV. 829, 1087-88 & n.791 (2002); Susan M. Akram & Kevin R. Johnson, "Migration Regulation Goes Local: The Role of States in U.S. Immigration Policy": *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295, 298-99 (2002).

est in knowing and observing this use of government power. This is not to say history is irrelevant in determining whether there is a constitutional right of access under *Richmond Newspapers*, but rather that historical evidence of openness must be read against the background of the structural concerns that underlie the First Amendment.

b. Constitutional Structure and Functional Value

The “logic” prong has understandably not generated the same degree of criticism as the “experience” prong. The Court has consistently found that openness serves an important functional value in terms of the particular proceeding in question. To begin with, the Court’s description of the functional value of open criminal trials seems to incorporate both functional and structural concerns and examines openness in terms relevant to the First Amendment’s broader goals.

Like criminal trials, deportation hearings, which involve fact-finding and law-making (albeit by an administrative agency), are a matter of public concern. Access would promote both fairness and the perception of fairness. It would also serve an educative function and act as a check on abuse of power by executive branch officials. As in criminal proceedings, the press can “bring to bear the beneficial effects of public scrutiny upon the administration of justice.”³⁸⁷

Both the Sixth and Third Circuits recognized the value of open deportation hearings. The Third Circuit, however, concluded that open hearings were not, on balance, beneficial after considering the negative effects of access in terrorism-related cases. While *Richmond Newspapers* requires courts to consider the negative effects of access, it also requires that they examine the proceeding generally and not just the particular type of proceeding—in other words, deportation hearings generally, rather than just “special interest” deportation cases—in determining the threshold issue of whether a First Amendment right of access exists. Moreover, the recent report by the Office of the Inspector General³⁸⁸ undermines the Third Circuit’s description of the dangers of access and confirms the need for case-by case review requiring the government to provide a particularized basis for closure. Ultimately, access to these formal, trial-type proceedings has a functional value very similar to the well-recognized value of access to criminal trials and satisfies the concerns embodied in *Richmond Newspapers*’ “logic” prong.³⁸⁹

387. *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 492 (1975).

388. See *supra* notes 273-79 and accompanying text.

389. Structural importance and functional value do not necessarily go hand-in-hand. In some instances access could undermine the functioning of the proceeding and yet still promote the structural goals of facilitating informed public debate and checking abuses of power. Grand jury proceedings, which depend on secrecy, provide one such example where openness would undermine their functional value, but still serve a structural purpose of the First Amendment in enhancing public knowledge and debate. See *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) (“*Press-Enterprise II*”).

V. CONCLUSION

The government's attempt to close an entire category of deportation hearings without any particularized findings raises fundamental questions about *Richmond Newspapers* and the role of the First Amendment in fulfilling its historic functions of promoting informed public debate and checking the abuse of government power. While deportation hearings cannot boast the thousand-year history of openness like criminal trials, in many respects they implicate the First Amendment's structural goals even more than criminal trials. Indeed, the government's otherwise extensive powers over immigration suggest that when it seeks to deprive an individual of liberty through formal, adjudicatory proceedings like deportation hearings, the public and press should be guaranteed a constitutional right of access. The question of access rights remains important not only in light of the hundreds of closed hearings conducted in the wake of September 11, but also in terms of the government's potential response to terrorist attacks in the future.

