

2003

## Press Rights in Peril: The Department of Justice Infringes Upon Press Liberties By Conducting "Special Interest" Removal Proceedings

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### Recommended Citation

Gabriel S. Oberfield, *Press Rights in Peril: The Department of Justice Infringes Upon Press Liberties By Conducting "Special Interest" Removal Proceedings*, 13 Fordham Intell. Prop. Media & Ent. L.J. 1209 (2003).  
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# Press Rights in Peril: The Department of Justice Infringes Upon Press Liberties By Conducting "Special Interest" Removal Proceedings

## **Cover Page Footnote**

David Heller, Esq. of the Media Law Resource Center; Professors Annette DePalma and Gemma Solimene; IPLJ editorial staff

# Press Rights in Peril: The Department of Justice Infringes Upon Press Liberties by Conducting “Special Interest” Removal Proceedings

Gabriel S. Oberfield\*

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\* J.D. expected, Fordham University School of Law, 2004. B.A., Brown University, 2000. The author would like to thank David Heller, Esq. of the Media Law Resource Center for inspiring this Note. The author also would like to acknowledge the valuable insights and guidance of Professors Annette DePalma and Gemma Solimene. Finally, the author owes a debt of gratitude to the editors and staff of the *Fordham Intellectual Property, Media & Entertainment Law Journal* who aided in this Note’s production.

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## INTRODUCTION: THE ATTORNEY GENERAL DISRUPTS THE BALANCE

In the aftermath of September 11, the Attorney General responded to attendant national security concerns by barring the press from all alien removal proceedings<sup>1</sup> that Department of Justice (DOJ) prosecutors categorize as “special interest.”<sup>2</sup> Prosecutors can affix special interest labels in any instance when they allege that a case poses national security concerns, but they are not required to justify such categorization to the immigration judges that preside over these matters.<sup>3</sup> Moreover, judges cannot easily challenge the prosecutors’ decisions,<sup>4</sup> and the directive bars

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<sup>1</sup> The Department of Justice [DOJ] and, until this year, the Immigration and Naturalization Service [INS] and the Executive Office for Immigration Review [EOIR], played significant roles in the oversight of those individuals without citizenship in the United States.

Traditionally, the INS initiated a removal proceeding by alleging that a non-citizen (“alien”) had committed acts that voided his privilege to remain in the United States. The INS could prosecute charges of removability against certain individuals who gained admission into the United States as legal aliens, and against others who either arrived without acquiring legal status or whose authorized period of stay expired. Immigration and Nationality Act [INA] § 240(e)(2), 8 U.S.C. § 1229a (2003).

The INS presented its allegations before the EOIR, a second division within the DOJ that oversaw litigation between the INS and the allegedly removable individuals. *See* 8 C.F.R. § 1003.0 (2003) (establishing the EOIR).

The EOIR utilized its immigration courts, administered by immigration judges, to adjudicate such cases. *See* 8 C.F.R. § 1003.10 (outlining the responsibilities of immigration judges). The EOIR’s Board of Immigration Appeals [BIA] processed appeals brought by the INS or by respondents. *See* 8 C.F.R. § 1003.1 (detailing the BIA’s structure).

Since the formation of the Department of Homeland Security [DHS], however, the INS has been replaced by the DHS’s Bureau of Immigration and Citizenship Services and two other DHS bureaus.

<sup>2</sup> The Attorney General issued the policy through Chief Immigration Judge Michael Creppy, the judge within EOIR who oversees the immigration courts. *See* Memorandum from Michael J. Creppy, Chief Immigration Judge, EOIR, to all Immigration Judges and Court Administrators (Sept. 21, 2002) (introducing this policy), <http://news.findlaw.com/hdocs/docs/aclu/creppy092101memo.pdf> [hereinafter *Creppy Directive*].

<sup>3</sup> *See Creppy Directive, supra* note 2 (outlining the new policy).

<sup>4</sup> *See* 8 C.F.R. §§ 1003.27, 1003.31, 1003.46. Under the *Creppy Directive*, the DOJ is not required to demonstrate to immigration judges why a case should fall within the special interest category. In May 2002, the Attorney General amended the CFR to allow the DOJ’s power to submit evidence liberally, which immigration judges must treat as pertinent to national security. The regulations then require immigration judges to seal this evidence, and close any hearing that concerns sealed evidence. *Id.*

judges from publicizing these cases.<sup>5</sup> Recent additions to the removal procedure also prohibit all parties from discussing such cases outside of court.<sup>6</sup>

Rather than implementing the new guidelines, the Attorney General could have maintained the previous policy that allowed immigration judges to decide whether to close their own courtrooms. Before the September 11 changes, these judges—whose courts are enveloped in the DOJ’s Executive Office for Immigration Review (EOIR)—closed their courtrooms only after determining whether a case’s particular circumstances warranted such action.<sup>7</sup> If the Attorney General had not installed the special interest procedures, immigration judges could have considered new security concerns while balancing press freedoms. The Attorney General’s policy diminishes the discretion of immigration judges, and it favors the prerogatives of the DOJ prosecutors by granting the prosecutors decision-making powers without the check of media supervision.

Two groups of media plaintiffs have sought to enjoin enforcement of the special interest procedures, but their actions have yielded mixed results. In cases appealed to the Third and Sixth Circuits, the plaintiffs contended that, by barring media from the selected hearings, the DOJ interfered with the press’s right to observe them on the public’s behalf.<sup>8</sup> The plaintiffs grounded their argument both in First Amendment principle and in the express

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<sup>5</sup> See *Creppy Directive*, *supra* note 2 (stating that immigration courts should not place information about special interest hearings on their public dockets, nor should they enter data into a telephone system that provides information to the public on immigration proceedings).

<sup>6</sup> 8 C.F.R. § 1003.46(f)(2)(i).

<sup>7</sup> Compare 8 C.F.R. § 3.27 (1997), with 8 C.F.R. § 1003.27 (2003).

<sup>8</sup> See Plaintiffs’ Complaint at 4–5, *N. Jersey Media Group, Inc. v. Ashcroft*, 205 F. Supp. 2d 288 (D.N.J.) (describing the causes of action), *rev’d*, 308 F.3d 198 (3d Cir. 2002), <http://archive.aclu.org/court/creppy.pdf> (last visited May 10, 2003) [hereinafter *North Jersey Complaint*]; Plaintiffs’ Complaint for Injunctive and Declarative Relief at 10–12, *Detroit Free Press v. Ashcroft*, 195 F. Supp. 2d 937 (E.D. Mich. 2002) (noting, likewise, the cause of action) (on file with the *Fordham Intellectual Property, Media & Entertainment Law Journal*) [hereinafter *Detroit Free Press Complaint*].

language of the Code of Federal Regulations (CFR).<sup>9</sup> In reply, the DOJ asserted that the nation's changed circumstances after September 11 compelled its actions.<sup>10</sup> Although the Sixth Circuit affirmed the U.S. District Court for the Eastern District of Michigan and sided with the media plaintiffs,<sup>11</sup> the Third Circuit overturned the U.S. District Court of New Jersey and supported the DOJ.<sup>12</sup> It seems likely that the Supreme Court will grant a writ of certiorari to resolve the circuit split.

It is important to note that on March 1, 2003, the United States shifted the Immigration and Naturalization Service (INS) into the new Cabinet-level Department of Homeland Security (DHS).<sup>13</sup> Three bureaus within the DHS assumed the INS's responsibilities. The Bureau of Citizenship and Immigration Services (BCIS) took on the INS's immigration benefit services,<sup>14</sup> the Bureau of Immigration and Customs Enforcement (BICE) assumed the INS's law enforcement functions,<sup>15</sup> and the Bureau of Customs and Border Protection (BCBP) shouldered aspects of border patrol formerly under the INS's purview.<sup>16</sup>

Despite the INS's dissolution, the EOIR will continue to operate as a DOJ agency and will retain its responsibility to

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<sup>9</sup> *North Jersey Complaint*, *supra* note 8, at 4–5; *Detroit Free Press Complaint*, *supra* note 8, at 10–12.

<sup>10</sup> *See* *Detroit Free Press v. Ashcroft*, 195 F. Supp. 2d 937, 940 (E.D. Mich.) (noting that “the subtext” of the government’s argument is its “right to suspend certain personal liberties in the pursuit of national security”), *aff’d*, 303 F.3d 681 (6th Cir. 2002).

<sup>11</sup> *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 683 (6th Cir. 2002).

<sup>12</sup> *N. Jersey Media Group v. Ashcroft*, 308 F.3d 198, 221 (3d Cir. 2002).

<sup>13</sup> *See* Philip Shenon, *Page Threats and Responses: Domestic Security—Ridge Discovers Size of Home Security Task*, N.Y. TIMES, Mar. 3, 2003, at A1 (noting that the government incorporated twenty-two agencies into the DHS).

<sup>14</sup> Such services include “the adjudication of family and employment-based petitions; issuance of employment authorization documents, asylum and refugee processing; naturalization; and implementation of special status programs such as Temporary Protected Status.” Press Release, U.S. Department of State, Immigration Service Transition Will Be Smooth, Agency Says: Offers Reassurances to Immigrants about Provision of Services (Feb. 26, 2003), <http://usinfo.state.gov/topical/global/immigration/03022601.htm>.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

adjudicate immigration cases.<sup>17</sup> After these changes, the BCIS will initiate these cases, just as the INS had done before.<sup>18</sup> The ramifications of the dissolution remain unclear since the full transition of responsibilities from the DOJ to the DHS will probably take over a year.<sup>19</sup> Evidence suggests that DOJ initiatives such as the special interest policy will remain binding until further notice.<sup>20</sup> In fact, the Attorney General signed an order on February 28, 2003, explicitly stating that the DHS will administer certain regulations formerly under the DOJ's purview, but that the scope of these responsibilities will not change.<sup>21</sup> For the sake of clarity, this Note will use the term "INS," wherever appropriate, when referring to the agency formerly known by that acronym.

This Note will track the conflict between media interests and the government, from its origins to its present state. It also will advocate for restoration of the access policy in place before September 11. Section I will reveal that before the September 11 attacks, the public enjoyed a presumptive right of public access to DOJ alien removal proceedings. Section II describes the genesis and implementation of the special interest procedure, and will assess the ramifications of an order that redefined the special interest policy and incorporated it formally into the CFR.<sup>22</sup> The section also chronicles the litigation challenging the procedure, from district courts to the benches of the Third and Sixth Circuits. Section III argues for the dissolution of "special interest" procedures and the restoration of the discretionary power once held by immigration judges to make case-by-case determinations regarding press access to their courtrooms. Finally, Section IV offers the commentary of scholars who have considered the

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<sup>17</sup> See Florangela Davila, *INS Sheds Its Name at Midnight; Agency to Be Under Homeland Umbrella*, SEATTLE TIMES, Feb. 28, 2003, at B1. See also 28 C.F.R. § 200.1 (2003) (stating that the DOJ will retain authority over the EOIR).

<sup>18</sup> See Davila, *supra* note 17.

<sup>19</sup> Marisa Taylor & Joe Cantlupe, *Homeland Security Nervously Springs to Life*, SAN DIEGO UNION-TRIB., Mar. 1, 2003, at A1.

<sup>20</sup> See *supra* note 14.

<sup>21</sup> Aliens and Nationality; Homeland Security, 68 Fed. Reg. 9824 (Feb. 28, 2003). This order shifted regulations formerly found in section 3 of 8 C.F.R. to section 1000. *Id.* For example, 8 C.F.R. § 3.27 is now 8 C.F.R. § 1003.27.

<sup>22</sup> 8 C.F.R. § 1003.27 (2003).



possible outcome of this debate. Most scholars agree that because the Supreme Court has not considered a press access case since the 1980s,<sup>23</sup> it will be difficult to accurately predict the Court's disposition.

#### I. BEFORE SEPTEMBER 11, THE PRESS ENJOYED A QUALIFIED RIGHT OF ACCESS TO REMOVAL PROCEEDINGS

The DOJ, a division of the executive branch, traditionally has overseen immigration matters for the United States that include the removal of aliens.<sup>24</sup> The Immigration and Nationality Act (INA) authorizes the DOJ, through its Attorney General, to conduct removal proceedings and to oversee immigration law.<sup>25</sup> Through the INA, Congress has employed its plenary power over immigration matters and has authorized the DOJ to restrict the movements of aliens in the United States and to remove them from America's shores.<sup>26</sup> Congress passed the first version of the INA in 1952, which consolidated the disparate strands of immigration and naturalization law then in existence.<sup>27</sup> Congress has since revised the INA, but the 1952 version remains the backbone of U.S. immigration law.<sup>28</sup>

Nevertheless, the INA changed rather dramatically<sup>29</sup> in 1996, when President Bill Clinton signed both the Illegal Immigration

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<sup>23</sup> See *Press-Enter. Co. v. Super. Ct.*, 478 U.S. 1, 13 (1986) (recognizing the press' qualified right of access to preliminary hearings, grounded in the First Amendment) [hereinafter *Press-Enterprise II*].

<sup>24</sup> See 8 U.S.C. § 1103(a)(1) (2000) (discussing the power of the Attorney General to enforce the INA and "all other laws relating to the immigration and naturalization of aliens").

<sup>25</sup> *Id.*

<sup>26</sup> See *Harisiades v. Shaughnessy*, 342 U.S. 580, 586–87 (1952) (stating that only as "a matter of permission and tolerance" can aliens remain in the United States, and that "the government's power to terminate its hospitality has been asserted and sustained by this Court").

<sup>27</sup> MARIAN L. SMITH, *Overview of INS History*, in *A HISTORICAL GUIDE TO THE U.S. GOVERNMENT* (George T. Kurian ed., 1998), available at <http://www.immigration.gov/graphics/aboutus/history/articles/OVIEW.htm> (last modified Feb. 28, 2003).

<sup>28</sup> *Id.*

<sup>29</sup> See Michael D. Patrick, *The Consequence of Criminal Behavior*, 220 N.Y.L.J. 18 (1998) (discussing the impact of IIRIRA and AEDPA on aliens).

Reform and Immigrant Responsibility Act of 1996 (IIRIRA)<sup>30</sup> and the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) into law.<sup>31</sup> IIRIRA merged formerly distinct deportation hearings and exclusion proceedings into the removal proceedings now in operation.<sup>32</sup> Deportation hearings dealt with the cases of those aliens who had gained entry into the United States, whether legally or illegally, whereas exclusion hearings concerned those who had not entered the country.<sup>33</sup> Today, the INA outlines a number of grounds under which individuals without citizenship can be removed from the United States, including: (1) inadmissibility into the United States;<sup>34</sup> (2) violation of the law,<sup>35</sup> (3) lack of adherence to a visa's terms,<sup>36</sup> or (4) actions that threaten national security.<sup>37</sup>

The EOIR, under the purview of the DOJ, administers removal proceedings.<sup>38</sup> Until the DOJ created the EOIR in 1983, immigration judges held removal proceedings in immigration courts within the INS.<sup>39</sup> Some questioned whether immigration judges could be objective within such a structure because the INS was also a DOJ agency that investigated and prosecuted INA violations by aliens.<sup>40</sup> The creation of the EOIR resolved the perceived conflict of interest by bringing the Board of Immigration Appeals (BIA)<sup>41</sup> and the immigration courts within a new quasi-

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<sup>30</sup> Pub L. No. 104-208 div. C, 110 Stat. 3009, 3555 (1996) (codified at 8 U.S.C. § 1101 (2000)).

<sup>31</sup> Pub L. No. 104-132, 110 Stat. 1217, 1220 (1996) (codified at 28 U.S.C. § 2244 (2000)).

<sup>32</sup> Pub L. No. 104-208, § 304, 110 Stat. 3009, 3596 (codified at 8 U.S.C. § 1229-30).

<sup>33</sup> *Id.*

<sup>34</sup> 8 U.S.C. § 1182.

<sup>35</sup> *Id.* § 1227.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> See 8 C.F.R. § 1003.0 (2003) (establishing the EOIR).

<sup>39</sup> *Id.*

<sup>40</sup> See *LeTourneur v. Immigration and Naturalization Serv.*, 538 F.2d 1368, 1371 (9th Cir. 1976) (holding that, despite *LeTourneur's* challenge, the former immigration court structure did not violate due process).

<sup>41</sup> The Board of Immigration Appeals serves as the chief appellate body within the immigration system. U.S. Dep't of Justice, *Executive Office for Immigration Review*:

judicial division of the DOJ that operates autonomously from the former INS.<sup>42</sup> The EOIR structure remains in place today, and its immigration courts provide the forum for the BCIS to litigate cases it brings against individuals without citizenship. The immigration courts are scattered across the country, and the Office of the Chief Immigration Judge, also within the EOIR, administers them.<sup>43</sup>

All removal proceedings take place under a specific protocol. To initiate removal, a DOJ representative must file a Notice to Appear (hereinafter “Notice”)<sup>44</sup> to compel an alien’s appearance in immigration court.<sup>45</sup> The Notice must describe a removal proceeding, and it must list allegations, supported by fact, so that the accused individual is aware of the statutory provisions he may have breached.<sup>46</sup> After receipt of the Notice, the individual must stand before an immigration judge at a preliminary court appearance and affirm or deny the allegations raised by the government.<sup>47</sup> If the person admits to the charges in the Notice, thereby conceding an INA violation that allows for removal, the immigration judge accepts this plea and the government will remove the individual from the United States.<sup>48</sup>

If the individual intends to challenge the court’s finding of removability or request a form of relief from removal, the

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*Board of Immigration Appeals*, available at <http://www.usdoj.gov/eoir/biainfo.htm> (last visited May 10, 2003).

<sup>42</sup> 8 C.F.R. § 1003.0.

<sup>43</sup> The Office of the Chief Immigration Judge oversees the immigration court structure: The Office of the Chief Immigration Judge (OCIJ) provides overall program direction, articulates policies and procedures, and establishes priorities for more than 220 Immigration Judges located in 52 Immigration Courts throughout the Nation. The Chief Immigration Judge carries out these responsibilities with the assistance and support of two Deputy Chief Immigration Judges and nine Assistant Chief Immigration Judges.

U. S. Dep’t of Justice, *Executive Office for Immigration Review: Office of the Chief Immigration Judge*, available at <http://www.usdoj.gov/eoir/ocijinfo.htm> (last visited May 10, 2003).

<sup>44</sup> 8 U.S.C. § 1229(a)(1) (2003).

<sup>45</sup> *Id.* § (c)(1)(A) (stating that the INA instructs immigration judges to “decide whether an alien is removable from the United States”).

<sup>46</sup> 8 U.S.C. § 1229(a)(1).

<sup>47</sup> 8 C.F.R. § 1240.10(c).

<sup>48</sup> *Id.*

immigration judge must allow him to present his case formally in an individual hearing.<sup>49</sup> This hearing is analogous to a trial held within the judicial branch. Both parties have a right to representation, and the government's counsel is a BCIS-employed attorney.<sup>50</sup> The respondent can choose his own counsel. The government, however, will not provide an attorney for an indigent party.<sup>51</sup> Both the respondent and the government can present evidence and the immigration judge and respondent may cross-examine witnesses.<sup>52</sup> Under the INA, the former INS<sup>53</sup> carries the burden of proof and must demonstrate "reasonable, substantial, and probative" evidence that the respondent is removable.<sup>54</sup> After each side presents its case, the immigration judge renders a final decision.<sup>55</sup> Nevertheless, both parties may move for reopening or reconsideration, or may appeal the immigration judge's decision to the BIA.<sup>56</sup> After exhausting opportunities for administrative review, the parties can pursue certain appeals in the Federal Court of Appeals for the judicial circuit covering the same geographic region in which the immigration proceedings took place.<sup>57</sup>

Before the September 11 attacks, the press and the public enjoyed a qualified right to observe immigration court removal

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<sup>49</sup> § 240(c)(4), 8 U.S.C. § 1229a(c)(1).

<sup>50</sup> 8 C.F.R. § 1240.2(b).

<sup>51</sup> 8 U.S.C. § 1229a(b)(4)(A). *See also* 8 C.F.R. § 240.10(a)(2) (stating that aliens must be notified of pro-bono legal resources if they cannot afford representation).

<sup>52</sup> *Id.* § (b)(1), (b)(4)(B). *See also* 8 C.F.R. § 1240.2(a) (stating that "the duties of the Service counsel include, but are not limited to, the presentation of evidence and the interrogation, examination, and cross-examination of the respondent or other witnesses").

<sup>53</sup> Editor's note: At the time of publication, the INA's language has not yet been modified to reflect INS's incorporation into the DHS.

<sup>54</sup> 8 U.S.C. § 1229a(3)(c)(A).

<sup>55</sup> *Id.* § 1229a(c)(1)(A).

<sup>56</sup> *See* 8 C.F.R. § 1240.2(a) (discussing the procedure for reopening a removal proceeding). *See also id.* § 1003.23(b)(1) (noting that an alien or government counsel can call for reconsideration of an immigration judge's decision); *id.* § 1003.1(b)(3) (stating that the DOJ supervises the BIA, which has jurisdiction over appeals of immigration court judgments).

The BIA does not ordinarily hold hearings, but bases its decisions on the record of the immigration court and upon briefs submitted by counsel. *Id.* §§ 1003.1(e), 1003.3(c), 1003.5. The BIA hears oral arguments only if the petitioner requests such an opportunity. *Id.* § 1003.1(e)(7).

<sup>57</sup> 8 U.S.C. § 1252(b)(2) (2003).

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proceedings.<sup>58</sup> Although the CFR barred the public from exclusion hearings, it permitted public attendance at all deportation hearings.<sup>59</sup> It listed several exceptions, however, to this rule.<sup>60</sup> It allowed an immigration judge to limit access in cases of overcrowding (granting priority to the press) or to protect “witnesses, parties, or the public interest.”<sup>61</sup> The regulations also compelled an immigration judge to close her courtroom when handling a case of spousal abuse, unless the allegedly abused spouse consented to public access, and to close all cases pertaining to alleged child abuse.<sup>62</sup>

II.        IN RESPONSE TO SEPTEMBER 11, THE DOJ BARRED PRESS ACCESS TO SPECIAL INTEREST REMOVAL PROCEEDINGS, BUT PRESS INTERESTS HAVE VEHEMENTLY CHALLENGED THIS POLICY CHANGE

A. *The DOJ Initiated the Special Interest Procedure in Reaction to the Events of September 11*

In response to the tragic loss of life on September 11, various branches of the government have pursued a War on Terror.<sup>63</sup> Among the measures taken, Congress passed the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT

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<sup>58</sup> 8 C.F.R. § 3.27 (1997) (current version at 8 C.F.R. § 1003.27 (2003)). The C.F.R. still distinguishes between exclusion and deportation even though the INA no longer does so in the aftermath of IIRIRA.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* The presumed right of public access did not extend to the BIA before September 11, and does not do so today. The BIA fields its appeals without oral argument unless the petitioner requests otherwise and the BIA grants this request. 8 C.F.R. § 1003.1(e)(7).

<sup>63</sup> See John Yaukey, *Ridge Faces Tough Challenges as Nation's First Homeland Security Chief*, N.Y. NEWSDAY, Nov. 26, 2002, at 8 (quoting President George W. Bush, “We’re fighting a war against terror with all our resources, and we’re determined to win.”).

Act), an omnibus anti-terrorism bill, on October 26, 2001.<sup>64</sup> “The Act makes many changes to criminal, immigration, banking, and intelligence law” in an effort to streamline investigations related to terrorism.<sup>65</sup> A number of organizations, including the American Civil Liberties Union (ACLU), have strongly criticized the measure as an affront to basic freedoms.<sup>66</sup> Nevertheless, working drafts of legislation known as the PATRIOT Act II have begun to circulate, and, if approved, would further expand law enforcement powers.<sup>67</sup> Other governmental actions have included the military’s

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<sup>64</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001) [hereinafter PATRIOT Act].

<sup>65</sup> David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 966 (2002).

<sup>66</sup> See, e.g., Am. Civil Liberties Union, *USA Patriot Act Boosts Government Powers While Cutting Back on Traditional Checks and Balances: An ACLU Legislative Analysis* (Nov. 1, 2001) (alleging that the Act erodes the rights of aliens, grants unchecked surveillance powers to Federal investigators, allows for secret searches, grants the Federal Bureau of Investigation [FBI] broad powers to seize business records, and permits investigations of citizens merely for undefined “intelligence” purposes) (on file with the *Fordham Intellectual Property, Media & Entertainment Law Journal*).

<sup>67</sup> On February 7, 2003, the Center for Public Integrity acquired an unpublished draft copy of the Domestic Security Enhancement Act of 2003 [hereinafter PATRIOT Act II] and posted it on its Web site. See Charles Lewis & Adam Mayle, *Justice Dept. Drafts Sweeping Expansion of Anti-Terrorism Act: Center Publishes Secret Draft of ‘Patriot II’ Legislation*, Center for Public Integrity (Feb. 7, 2003), available at <http://www.publicintegrity.org/dtaweb/report.asp?ReportID=502&L1=10&L2=10&L3=0&L4=0&L5=0>.

According to Professor Jack M. Balkin of the Yale Law School, PATRIOT Act II: would remove existing protections under the Freedom of Information Act, making it easier for the government to hide whom it is holding and why, and preventing the public from ever obtaining embarrassing information about government overreaching.

Another section would nullify existing consent decrees against state law enforcement agencies that prevent the agencies from spying on individuals and organizations. . . .

Perhaps the most troubling section would strip U.S. citizenship from anyone who gives “material support” to any group that the [A]ttorney [G]eneral designates as a terrorist organization. . . . Under our Constitution, Americans can’t be deprived of their citizenship, and the rights that go with it, unless they voluntarily give it up.

The measure would get around that constitutional guarantee through a legal loophole. It presumes that anyone who provides “material support” to an organization on the [A]ttorney [G]eneral’s blacklist—even if that support is

detention of alleged “enemy combatants” at the United States Naval Base in Guantanamo Bay, Cuba,<sup>68</sup> battles with Afghanistan’s Taliban regime,<sup>69</sup> war with Iraq,<sup>70</sup> and the creation of the Cabinet-level Department of Homeland Security.<sup>71</sup>

As an executive branch agency, the DOJ also joined in efforts to prosecute the War on Terror, and, to this end, established new procedures for special interest removal proceedings. At the request of Attorney General John Ashcroft, Chief Immigration Judge Michael Creppy released a notice (hereinafter the “Creppy Directive”) to all immigration judges on September 21, 2001.<sup>72</sup> The Creppy Directive informed immigration judges that the DOJ

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otherwise lawful—has intended to relinquish citizenship and therefore may be immediately expatriated.

Jack M. Balkin, Editorial, *Commentary: A Dreadful Act II: Secret Proposals in Ashcroft’s Anti-Terror War Strike Yet Another Blow at Fundamental Rights*, L.A. TIMES, Feb. 13, 2003, at B23.

<sup>68</sup> See Mary Jacoby, *Safety and Rights in the Balance*, ST. PETERSBURG TIMES (Fla.), Sept. 16, 2002, at 1A.

<sup>69</sup> See Warren P. Strobel, *U.S., Iran Exchange Ideas over Iraq*, MIAMI HERALD, Dec. 1, 2002, at 3.

<sup>70</sup> *Id.*

<sup>71</sup> Richard W. Stevenson, *Threats and Responses: The President; Signing Homeland Security Bill, Bush Appoints Ridge as Secretary*, N.Y. TIMES, Nov. 26, 2002, at A1.

<sup>72</sup> The document states, in pertinent part:

Immigration Courts are beginning to receive cases for which the [DOJ] is requiring special arrangements.

The following procedures are being followed for these cases: . . .

3. Each of these cases is to be heard separately from all other cases on the docket. The courtroom must be closed for these cases—no visitors, no family, and no press.
4. The Record of Proceeding is not to be released to anyone except an attorney or representative who has . . . [EOIR clearance] on file for the case (assuming the file does not contain classified information). . . .
5. This restriction on information includes confirming or denying whether such a case is on the docket or scheduled for a hearing. . . .
6. [I]nformation about the case [shall not be] provided on the 1-800 number and the case [shall not be] listed on the court calendars posted outside the courtrooms

. . . .

8. Finally, you should instruct all courtroom personnel, including both court employees and contract interpreters, that they are not to discuss the case with anyone.

*Creppy Directive, supra note 2.*

would label certain removal proceedings as special interest, by alleging that the individuals facing removal possessed ties to terrorist activities.<sup>73</sup> The Creppy Directive also advised immigration judges that the DOJ prohibited the press and public's attendance at such special interest proceedings, and it prevented immigration judges from publicizing the proceedings.<sup>74</sup> By closing special interest hearings without first allowing immigration judges to weigh evidence and make determinations on a case-by-case basis, media interests have argued that the Creppy Directive directly infringes on their rights to attend such proceedings as the eyes and ears of the public.

*B. The Attorney General Reinforced the Creppy Directive with an Order*

Despite criticism brought by media interests against the Creppy Directive, Attorney General Ashcroft codified and expanded its principles by crafting an order that amended 8 C.F.R. § 3.27 and 8 C.F.R. §§ 3.31(d) and added 3.46.<sup>75</sup> Because of the Attorney General's order that relocates portions of the CFR to accommodate the DHS,<sup>76</sup> these regulations now are found in section 1000, as 8 C.F.R. §§ 1003.27, 1003.31, and 1003.46. The immediately enforceable changes both codified the Creppy Directive's provisions and expanded upon them.<sup>77</sup>

The addition to section 1003.31 permits the government to present documents of its choosing to an immigration judge, under

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<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> Protection Orders in Immigration Administrative Proceedings, 67 Fed. Reg. 36799, 36799 (May 28, 2002) (amending 8 C.F.R. §§ 3.27, 3.31 and adding 3.46 (2002)).

<sup>76</sup> 8 C.F.R. § 200.1.

<sup>77</sup> See Protection Orders in Immigration Administrative Proceedings, 67 Fed. Reg. 36799, 36799 (May 28, 2002) (amending 8 C.F.R. §§ 3.27, 3.31 and adding 3.46 (2002)). On July 16, 2002, Chief Immigration Judge Creppy released a second memorandum for those affiliated with immigration courts. It provided instructions regarding enforcement of the new regulatory language, and it clarified the manner in which the new language bolstered his memorandum of September 21, 2001. See Memorandum from Michael J. Creppy, Chief Immigration Judge, EOIR, to All Immigration Judge[s], All Court Administrators, All Judicial Law Clerks, and All Immigration Court Staff (July 16, 2002), <http://www.usdoj.gov/eoir/efoia/ocij/oppm02/OPPM02-02.pdf>.



seal.<sup>78</sup> Section 1003.46 gives that judge little leeway to bar admittance of such documents. Its language compels the judge to defer to the government's contentions that the information it seals is both relevant and potentially injurious to national security.<sup>79</sup> Section 1003.46 also allows the government to preclude the respondent and her counsel from viewing such documents.<sup>80</sup> As a result, immigration judges may receive one-sided arguments, which could lead them to bar the press from hearings that should have remained open.

Once an immigration judge admits sealed information, section 1003.46 compels her to release a protective order, which can prohibit respondents and their attorneys from sharing protected information without the permission of the government or the immigration judge. If a respondent or her counselor breaches a protective order, the immigration judge must deny all forms of discretionary relief to the respondent, except bond, and may bar the counselor from appearing before the EOIR or before other government agencies handling immigration claims.<sup>81</sup>

Protective orders implicate press interests because the revised section 1003.27 bars the press and public from any hearings with protected evidence.<sup>82</sup> Moreover, because section 1003.46 renders protective orders permanently enforceable unless immigration judges vacate them, members of the media may be barred from ever reporting on cases that involved sealed documents.<sup>83</sup> Previously, if the press had been prohibited from a courtroom handling a special interest matter, reporters could contact respondents or their attorneys to learn about the events within the

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<sup>78</sup> 8 C.F.R. § 1003.31(d).

<sup>79</sup> *Id.* § 1003.46.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* § 1003.46(i).

<sup>82</sup> *Id.* § 1003.27(d).

<sup>83</sup> *Id.* § 1003.46(f). *See also* Jim Edwards, *As Judge Enjoins Blanket Secrecy, U.S. Adopts Rules for Closed Deport Hearings—Provides for Protective Orders and Sanctions for Lawyers Who Flout Them*, 168 N.J.L.J. 828 (2002) ("There is no time limit or expiration date once a protective order sealing a case is handed down. . . . [A] journalist wanting to research the story of Sept. 11 decades from now would have to go back to court to get the order lifted.").

courtroom.<sup>84</sup> Such contact provided the press with some insight into the nature of these proceedings and the press could share this information with the public.<sup>85</sup> As a result of the changes to the CFR, reporters can no longer consult any participant in a special interest case without subjecting such persons to stiff penalties.<sup>86</sup>

Attorney General Ashcroft offered a number of reasons for codifying the expanded special interest procedure despite its restrictions on the press. Among them, he stressed that while particular disclosures in the hearings might seem innocuous on their own, individuals seeking to harm the United States can cluster such fragments of intelligence into a mosaic of dangerous information.<sup>87</sup> Ashcroft then argued that the changes passed constitutional muster because he believes they are no greater “than is necessary or essential to protect” the “important and substantial governmental interest in safeguarding the public, and national security and law enforcement concerns.”<sup>88</sup> Thus, the Attorney General asserted that the restrictions were designed to protect national security interests and that they did not unnecessarily interfere with First Amendment principles.<sup>89</sup>

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<sup>84</sup> See Edwards, *supra* note 83.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> Protective Orders in Immigration Administrative Proceedings, 67 Fed. Reg. 36799, 36799–36800 (May 28, 2002) (amending 8 C.F.R. §§ 3.27, 3.31 and adding 3.46).

<sup>88</sup> *Id.* at 36800.

<sup>89</sup> The Attorney General chose language evocative of the content neutrality test developed by the Supreme Court in *United States v. O’Brien* 391 U.S. 367 (1968), for determining when a regulation intended to control conduct can interfere permissibly with protected speech:

A government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

*Id.* at 377.

*C. Since the DOJ Implemented the Creppy Directive, It Has Sought to Remove Hundreds of Aliens by Using Special Interest Procedures*

Since the Creppy Directive established special interest procedures on September 21, 2001, the DOJ has relied on them with regularity. Recently, the DOJ revealed that more than 600 removal proceedings have been conducted under special interest guidelines.<sup>90</sup> The DOJ also confirmed that it had detained many more aliens than previously publicized.<sup>91</sup> Despite the DOJ's attempts to curtail public knowledge of special interest proceedings and related arrests, numerous stories have surfaced in recent months of aliens who have been detained by the DOJ for months at a time, without formal charges,<sup>92</sup> and who have then faced special interest proceedings once the DOJ charged them with removable offenses. Some aliens have discussed their experiences openly,<sup>93</sup>

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<sup>90</sup> On July 3, 2002, Assistant Attorney General Daniel Bryant crafted a letter in response to an inquiry by Senator Carl Levin, Democrat-Michigan, chair of the Senate's permanent subcommittee on investigations, regarding specifics of the special interest practice. Bryant noted that, as of May 29, 2002, 611 of 752 people detained by the INS as part of the DOJ's investigations on terrorism had been the subjects of special interest hearings. Bryant added that the INS had retained custody of eighty-one individuals. See Tamara Audi, *U.S. Held 600 for Secret Rulings*, DETROIT FREE PRESS, July 18, 2002.

To contextualize the prevalence of the special interest proceedings, immigration judges handled more than 127,000 matters during the 1984 fiscal year, and more than 284,000 matters during the 2001 fiscal year. *Executive Office for Immigration Review Oversight: Hearing Before the Subcomm. on Immigration and Claims of the House Comm. on the Judiciary*, 107th Cong. (Feb. 6, 2002) (statement of Kevin D. Rooney, Director, Executive Office for Immigration Review).

<sup>91</sup> See Matthew Brzezinski, *Hady Hassan Omar's Detention*, N.Y. TIMES, Oct. 27, 2002, § 6 (Magazine), at 50 (noting that the DOJ regularly concealed the identities and locations of those individuals it detained during round-ups following the September 11 attacks).

<sup>92</sup> See 8 U.S.C. § 1226(a) ("On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States."); Brzezinski, *supra* note 91, at 50 (citing Bill Strassberger, a spokesperson for the former INS, stating that the government may enforce such detentions for "reasonable" periods in cases it labels "emergencies"). See also *Custody Procedures*, 66 Fed. Reg. 48334 (Sept. 20, 2001) (amending 8 C.F.R. § 287.3(d) and codifying the language that Strassberger describes). In practice, however, the policy "has been to lock up first, ask questions later." Cole, *supra* note 65, at 964.

<sup>93</sup> See, e.g., Brzezinski, *supra* note 91, at 50 (detailing Hady Hassan Omar's experiences while being investigated for alleged ties to terrorists).

while the stories of others surfaced when members of the press and public discovered specific removal proceedings.<sup>94</sup>

The story of Hady Hassan Omar may be typical of the experiences faced by aliens who were detained without formal charges, but then faced closed special interest proceedings. Omar, an Egyptian national with an American wife and daughter, lives in Fort Smith, Arkansas.<sup>95</sup> On September 12, 2001, Federal Bureau of Investigation (FBI) agents came to his home and took him in for questioning.<sup>96</sup> Although they did not disclose it initially, they wanted to know why Omar had used a Kinko's computer in Florida to purchase an airline ticket.<sup>97</sup> Mohammed Atta, the alleged leader of the September 11 hijackers, used the same computer within hours of Omar to purchase a ticket of his own.<sup>98</sup> Although the FBI did not charge Omar with a crime, its agents transferred custody of Omar to the INS, which then held Omar temporarily at one of its detention centers.<sup>99</sup> Shortly thereafter, the INS moved him to a New Orleans prison.<sup>100</sup> Omar says he remained in solitary confinement for months, often shackled, and that he faced numerous interrogations pertaining to his alleged involvement in terrorist activities.<sup>101</sup> The government never charged Omar with a crime during this period of detention. Nevertheless, the government levied immigration charges; Omar received a Notice, in which the DOJ accused him of arranging his first marriage merely to secure residency in the United States.<sup>102</sup>

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<sup>94</sup> See *Detroit Free Press Complaint*, *supra* note 8, at 4–6 (describing the substantial publicity surrounding the arrest of Rabih Haddad and the failed attempts of the press and public to attend his removal hearings); *North Jersey Complaint*, *supra* note 8, at 2–4 (mentioning that immigration judges had barred numerous reporters from immigration courts to enforce the special interest policy).

<sup>95</sup> Brzezinski, *supra* note 91, at 50.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

These accusations led to a closed special interest hearing before an immigration judge.<sup>103</sup> The immigration judge freed Omar on a \$5,000 bond, but government counsel appealed,<sup>104</sup> forcing Omar back into custody.<sup>105</sup> After more than two months of imprisonment, and Omar's threats of suicide, the INS finally released Omar on November 20, 2001, but the INS is pursuing Omar's removal based on the alleged impropriety of his first marriage.<sup>106</sup>

A second well-publicized special interest case involves Rabih Haddad, a Lebanese national who is a community and religious leader in Ann Arbor, Michigan.<sup>107</sup> Haddad also co-founded the Global Relief Foundation (hereinafter the "Foundation"), an Islamic charity.<sup>108</sup> He has lived in Ann Arbor for various periods since 1988 and resides with his Kuwaiti wife and their four children.<sup>109</sup> On December 14, 2001, INS officers arrested Haddad at his home for overstaying the six-month tourist visa that had allowed him legal entry into the United States, but which had lapsed in August 1999.<sup>110</sup> On that same day, under the authority of

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<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> Under a new regulation promulgated by an Executive Order, the INS "can keep the alien locked up simply by filing an appeal of the release order." Cole, *supra* note 65, at 965 (citing Review of Custody Determinations, Interim Rule, 66 Fed. Reg. 54,909 (Oct. 31, 2001) (to be codified at 8 C.F.R. pt. 3)).

<sup>106</sup> Other Muslim aliens have endured similar treatment, such as Shakir Baloch, a Canadian citizen of Pakistani origin. He was detained for more than six months before his return to Canada. Anser Mehmood was arrested in September 2001, but not formally charged until March 2002. He was detained in an isolation cell with 24-hour lighting. See Brzezinski, *supra* note 91, at 50.

<sup>107</sup> See *Detroit Free Press Complaint*, *supra* note 8, at 4.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* See Nat'l Pub. Radio, *NPR Special Report: Muslims in America-Part Three: Middle East Heritage in America's Heartland* (Nov. 5, 2001), available at [http://www.npr.org/news/specials/response/home\\_front/features/2001/nov/muslim/011105.muslim.html](http://www.npr.org/news/specials/response/home_front/features/2001/nov/muslim/011105.muslim.html). Haddad's family contributes to the population of more than 250,000 people of Arab descent who live in southeastern Michigan, comprising the world's third largest Arab community. Many of these individuals are American citizens, but a number, like Haddad, are resident aliens. *Id.*

<sup>110</sup> See David Ashenfelter & Niraj Warikoo, *Free Press Files Suit in Haddad Case: Newspaper Sues to Open Hearing*, BRADENTON HERALD (Fla.), Oct. 3, 2002, at 9. See also *Detroit Free Press Complaint*, *supra* note 8, at 4 (noting that in April 2001, Haddad

the PATRIOT Act, the Treasury Department froze the Foundation's assets.<sup>111</sup> The DOJ alleges that the Foundation covertly funded activities of the Al Qaeda terrorist network, yet Haddad has not been formally charged with a crime.<sup>112</sup> The DOJ initiated closed special interest removal proceedings against Haddad for violating his immigration status and has detained him since his arrest.<sup>113</sup> An immigration judge recently denied Haddad the asylum he sought in order to reacquire legal status in the United States.<sup>114</sup> He remains imprisoned, pending the outcome of his appeal to the BIA regarding his asylum application.<sup>115</sup>

Although the stories of Hady Hassan Omar and Rabih Haddad exemplify the dramatic impact of special interest procedures on certain individuals, the special interest policy has also affected press interests. Members of the press have been forced to rely primarily on incomplete information to chronicle the experiences of special interest respondents.<sup>116</sup> Thus, the press asserts that the policy has impinged upon the protected freedoms that its members enjoy in the United States, rendering it unable to fulfill its mission to inform the public effectively about the substance of these hearings.<sup>117</sup> As a result, two groups of newspaper plaintiffs sought to enjoin the DOJ's use of special interest procedures.<sup>118</sup> They did

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had applied for full-time residency status). Haddad's lapsed visa placed him in violation of the INA. 8 U.S.C. § 1227(a)(1)(C) (2003).

<sup>111</sup> See Kim Kozlowski & David Shepardson, *Ramadan Donors Struggle to Find Approved Charities; Some Groups Have Assets Frozen in Terrorism Probe*, DETROIT NEWS, Nov. 7, 2002, at 1E.

<sup>112</sup> See Sarah Freeman, *Man Denies Aiding Al-Qaeda and Asks for U.S. Asylum*, PHILA. INQUIRER, Oct. 24, 2002, at A16.

<sup>113</sup> *Id.*

<sup>114</sup> Matt O'Connor & Rudolph Bush, *2 Court Rulings Go Against Leaders of Muslim Charities*, CHI. TRIB., Nov. 23, 2002, at N15.

<sup>115</sup> See *id.*

<sup>116</sup> See, e.g., *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 684-85 (6th Cir. 2002) (noting the obstacles that media entities faced when trying to gather facts on Haddad's case).

<sup>117</sup> See *id.*

<sup>118</sup> *Id.*; see also *N. Jersey Media Group v. Ashcroft*, 308 F.3d 198, 203-04 (3d Cir. 2002) (describing the press's collective preference for case-by-case determinations).

not argue for blanket access to immigration courtrooms.<sup>119</sup> Instead, the press sought to restore the power of immigration judges to make case-by-case determinations regarding press attendance at such proceedings, thus reestablishing a qualified right of press access predicated on a balancing of interests.<sup>120</sup>

*D. Media Plaintiffs Have Sought to Enjoin Enforcement of the DOJ's Special Interest Policy by Securing Injunctions from Judicial Branch Courts*

1. Two Federal Cases Have Challenged the Special Interest Policy

Press plaintiffs in Michigan and New Jersey filed suit to reinstitute the qualified right of press access to removal proceedings restricted by the Creppy Directive.<sup>121</sup> In each case, the plaintiffs argued that both federal regulations and the First Amendment guaranteed press the right to observe such matters, unless an immigration judge could find case-specific reasons to close a removal proceeding.<sup>122</sup>

In *North Jersey Media Group v. Ashcroft*, the publisher of two northern New Jersey daily newspapers joined the *New Jersey Law Journal* in a suit filed with the U.S. District Court for the District of New Jersey.<sup>123</sup> The plaintiffs sought a nationwide injunction to bar implementation of the special interest procedures.<sup>124</sup> Although

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<sup>119</sup> *Detroit Free Press*, 303 F.3d at 684, 692–93; *N. Jersey Media Group*, 308 F.3d at 203–04.

<sup>120</sup> *Detroit Free Press*, 303 F.3d at 684, 692–93; *N. Jersey Media Group*, 308 F.3d at 203–04.

<sup>121</sup> *Detroit Free Press v. Ashcroft*, 195 F. Supp. 2d 937, 941–42 (E.D. Mich.), *aff'd*, 303 F.3d 681 (6th Cir. 2002); *N. Jersey Media Group v. Ashcroft*, 205 F. Supp. 2d 288 (D.N.J.), *rev'd*, 308 F.3d 198 (3d Cir. 2002). The two cases commenced before the Attorney General issued his order that revised the CFR. As a result, they do not comport with these changes. On appeal, the Sixth Circuit considered the new provision, whereas the Third Circuit ignored it. *See Detroit Free Press*, 303 F.3d 681; *N. Jersey Media Group*, 308 F.3d 198.

<sup>122</sup> *See Detroit Free Press Complaint*, *supra* note 8, at 11–12 (describing the causes of action); *North Jersey Complaint*, *supra* note 8, at 4–5 (describing the causes of action).

<sup>123</sup> *N. Jersey Media Group*, 205 F. Supp. 2d at 290.

<sup>124</sup> *North Jersey Complaint*, *supra* note 8, at 5.

the District Court held for the plaintiffs and granted the injunction,<sup>125</sup> the Third Circuit reversed and held for the DOJ.<sup>126</sup> Plaintiffs in *Detroit Free Press v. Ashcroft*<sup>127</sup> sought collectively to enjoin enforcement of the Creppy Directive strictly as it related to Rabih Haddad's proceedings; each of the media plaintiffs had been barred from Haddad's removal proceedings because of special interest considerations.<sup>128</sup> Both the U.S. District Court of the Eastern District of Michigan<sup>129</sup> and the Sixth Circuit<sup>130</sup> sided with the plaintiffs, enjoining the closure of Haddad's hearings through use of special interest procedures. Nevertheless, the immigration judge currently presiding over Haddad's hearings has continued to block public access.<sup>131</sup>

## 2. Press Interests Have Relied Both on Regulatory Language and the *Richmond Newspapers* Test to Ground their Arguments

The plaintiffs relied on two different sources of law to pursue their claims. They argued that neither the CFR, nor the First Amendment allowed for special interest procedures. To support their CFR argument, the media plaintiffs contended that the special interest procedures of the Creppy Directive were incompatible with the qualified right of access outlined in the regulation.<sup>132</sup> To

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<sup>125</sup> *N. Jersey Media Group*, 205 F. Supp. 2d at 305–06.

<sup>126</sup> *N. Jersey Media Group*, 308 F.3d at 221.

<sup>127</sup> The plaintiffs were the Detroit Free Press, Inc. and Herald Co., Inc., Detroit News, Inc., and Metro Times, Inc. See *Detroit Free Press*, 303 F.3d at 684 n.3.

<sup>128</sup> *Id.* (stating that the three media plaintiffs filed separate suits that were consolidated before trial). Joining them, as well, were Haddad and Representative John Conyers, Democrat-Michigan, ranking member of the Judiciary Committee in the House of Representatives, who was barred from attending Haddad's immigration court hearings. *Id.* at 684.

<sup>129</sup> *Detroit Free Press v. Ashcroft*, 195 F. Supp. 2d 937, 948 (E.D. Mich.), *aff'd*, 303 F.3d 681 (6th Cir. 2002).

<sup>130</sup> *Detroit Free Press*, 303 F.3d at 710.

<sup>131</sup> *Detroit Free Press v. Ashcroft*, No. 02-70339, 2002 WL 31317398, at \*1 (E.D. Mich. Oct. 7, 2002). The same immigration judge recently denied Haddad's asylum claim, thus making him eligible for removal under the INA because he has overstayed his visa.

<sup>132</sup> Plaintiffs turned specifically to the language of 8 C.F.R. § 3.27 (1997)—the version in place before the Attorney General's 2002 revisions. *Detroit Free Press*, 195 F. Supp.



pursue the constitutional portion of their arguments, both plaintiffs relied on the same collection of case law, *Richmond Newspapers, Inc. v. Virginia* and its progeny.<sup>133</sup>

In *Richmond Newspapers*, the Supreme Court first articulated a generalized test to determine whether the First Amendment grants the press presumed rights to observe particular court proceedings.<sup>134</sup> Since then, the Court has granted such rights to media in a number of contexts.<sup>135</sup> Six years after *Richmond Newspapers*, in the second of two significant cases entitled *Press-Enterprise Co. v. Superior Court* (“*Press-Enterprise II*”), Chief Justice Warren Burger consolidated the measures relied upon in the previous press access cases and established the two-pronged “experience and logic” test.<sup>136</sup> The experience prong calls on a court to consider whether “the place and process have historically been open to the press and general public.”<sup>137</sup> Under the logic prong, a court must examine

whether public access plays a significant positive role in the functioning of the particular process in question. . . . Although many governmental processes operate best under public scrutiny, it takes little imagination to recognize that there are some kinds of government operations that would be totally frustrated if conducted openly.<sup>138</sup>

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2d at 941; *N. Jersey Media Group v. Ashcroft*, 205 F. Supp. 2d 288, 290 (D.N.J.), *rev'd*, 308 F.3d 198 (3d Cir. 2002).

<sup>133</sup> See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980). See also *Press-Enterprise Co. v. Sup. Ct.*, 464 U.S. 501 (1984) [hereinafter *Press-Enterprise I*]; *Press-Enterprise II*, 478 U.S. 1 (1986); *Globe Newspaper Co. v. Sup. Ct.*, 457 U.S. 596 (1982).

<sup>134</sup> *Richmond Newspapers*, 448 U.S. at 581.

<sup>135</sup> In *Richmond Newspapers*, the Court confirmed the qualified public access right to attend criminal trials. 448 U.S. at 581. In *Globe Newspaper*, the Court held statutes calling for automatic closure of courtrooms unconstitutional. 457 U.S. at 610–11. In *Press-Enterprise I*, the Court held that the voir dire portion of jury selection must be presumptively open. *Press-Enterprise I*, 464 U.S. at 513. Finally, in *Press-Enterprise II*, the Court extended the qualified press access right to preliminary trial proceedings. *Press-Enterprise II*, 478 U.S. at 15.

<sup>136</sup> *Press-Enterprise II*, 478 U.S. at 9.

<sup>137</sup> *Id.* at 8.

<sup>138</sup> *Id.* at 8–9 (citations omitted).

Press access can arise only if a given proceeding passes both of the test's prongs.<sup>139</sup> The Supreme Court limits the access test, noting that even if a proceeding fulfills both of the prongs, the rights of the accused or other parties could be "undermined by publicity" in certain circumstances.<sup>140</sup> In such individual cases, Chief Justice Burger notes, the trial court must "determine whether the situation is such that the rights . . . override the qualified First Amendment right of access."<sup>141</sup>

In the cases before the district courts in Michigan and New Jersey, the plaintiffs asserted that the *Richmond Newspapers* test was the appropriate measure to assess access rights to removal proceedings.<sup>142</sup> Further, they implied that the government's special interest procedures failed to overcome a presumption of access because they could not satisfy the traditional test of strict scrutiny,<sup>143</sup> lacking a narrowly tailored compelling governmental objective.<sup>144</sup>

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<sup>139</sup> See *id.* at 9 ("If the particular proceeding in question passes these tests of experience and logic, a qualified First Amendment right of public access attaches.")

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* The Court specified:

[T]he presumption of [access] may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.

*Id.* at 9–10.

<sup>142</sup> See *Detroit Free Press v. Ashcroft*, 195 F. Supp. 2d 937, 941–42 (E.D. Mich.), *aff'd*, 303 F.3d 681 (6th Cir. 2002); *N. Jersey Media Group v. Ashcroft*, 205 F. Supp. 2d 288, 298 (D.N.J.), *rev'd*, 308 F.3d 198 (3d Cir. 2002).

<sup>143</sup> Courts apply traditional strict scrutiny when employing the *Richmond Newspapers* test because of the Supreme Court's indication in *Globe Newspaper* that such an approach is appropriate. See *N. Jersey Media Group*, 205 F. Supp. 2d at 301 (citing *Globe Newspaper*, 457 U.S. at 606–07).

The U.S. District Court for the District of Michigan also distinguished the application of strict scrutiny from application of the standard used in *U.S. v. O'Brien*, 391 U.S. 367 (1968), in cases that implicate the *Richmond Newspapers* test:

As the Sixth Circuit explained in *Brown & Williamson Tobacco Corp.*, 710 F.2d at 1179, there are two broad categories of exceptions to the practice of openness in the courtroom: those based on the need to keep order and dignity in the courtroom and those which center on the content of the information to be disclosed to the public. The first category may only need to pass the *O'Brien*

### 3. Media Plaintiffs Win the First Legal Challenge

In Michigan, media plaintiffs secured their first victory in the battle to restore qualified access to special interest removal proceedings. On April 3, 2002, the U.S. District Court for the Eastern District of Michigan granted a preliminary injunction to enjoin the DOJ from closing Rabih Haddad's hearings via enforcement of the Creppy Directive.<sup>145</sup> The court first determined that the *Richmond Newspapers* line of cases applied to removal proceedings,<sup>146</sup> and also found that removal proceedings pass the experience and logic test.<sup>147</sup> Thereafter, it determined that the Creppy Directive was not narrowly tailored as a legitimate exception to the expectation of openness.<sup>148</sup> As such, the court found that closure of Haddad's hearings violated the First Amendment, and the court ordered Haddad's hearings reopened.<sup>149</sup>

In making the initial determination to use the *Richmond Newspapers* test, the Michigan court considered it important that the Sixth Circuit applied the test to analyze a separate press access claim.<sup>150</sup> Once committed to the *Richmond Newspapers* test, the

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test; however, as to the second category, "only the most compelling reasons" can justify closure.

*Detroit Free Press*, 195 F. Supp. 2d at 945 n.8 (citation omitted).

<sup>144</sup> See *Detroit Free Press*, 195 F. Supp. 2d at 946–47 (detailing the court's application of the strict scrutiny standard to the facts). See also *N. Jersey Media Group*, 205 F. Supp. 2d at 301–02 (providing similar analysis).

<sup>145</sup> *Detroit Free Press*, 195 F. Supp. 2d at 948. The court considered the following four factors when deciding to apply a preliminary injunction: "(1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether public interest would be served by issuance of the injunction." *Id.* at 942 (citing *Bonnell v. Lorenzo*, 241 F.3d 800, 809 (6th Cir. 2001)).

<sup>146</sup> *Id.* at 942. The court opted to separate the plaintiff's claim under the CFR from its First Amendment analysis; instead, the court incorporated the CFR's language into its analysis of the *Richmond Newspapers*' experience prong. *Id.* at 943.

<sup>147</sup> *Id.* at 943–44.

<sup>148</sup> *Id.* at 946–47.

<sup>149</sup> *Id.* at 947–48.

<sup>150</sup> *Id.* at 942. The Sixth Circuit used the test when assessing whether newspapers could challenge closure of a summary jury proceeding. "First the proceeding must be one for which there has been a 'tradition of accessibility'" and "[s]econd, public access must play a 'significant positive role' in the function of the particular process in question." *Id.*

court then established that removal proceedings historically operated under a clear presumption of openness.<sup>151</sup> The court remarked that while exclusion hearings have been closed expressly by statute and regulation, deportation hearings have never been addressed in federal statute and that “INS regulations for almost fifty years have mandated that deportation proceedings be presumptively open.”<sup>152</sup>

The court then turned to the logic prong of the *Richmond Newspapers* test, noting that, “when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process.”<sup>153</sup> The court added that open removal 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 lax prosecution.”<sup>154</sup> Because Haddad’s right to remain in the United States would be decided in the removal proceedings, the court found it logically imperative to keep immigration courts presumptively open.<sup>155</sup>

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at 942 (citations omitted) (quoting *Cincinnati Gas and Elec. Co. v. Gen. Elec. Co.*, 854 F.2d 900, 903 (6th Cir 1988)).

<sup>151</sup> *Detroit Free Press*, 195 F. Supp. 2d at 942.

<sup>152</sup> See *Detroit Free Press*, 195 F. Supp. 2d at 943. Although Haddad’s case has unfolded in the aftermath of the IIRIRA, courts have continued to distinguish between those cases that would have fit within the deportation category and those that would have been exclusion hearings. Haddad’s hearing clearly falls into the deportation category because Haddad had acquired legal status in the United States by way of the visa that he overstayed, and he had established residency.

<sup>153</sup> *Id.* at 943–44 (quoting *Fitzgerald v. Hampton*, 467 F.2d 755, 765 (D.C. Cir. 1972)).

<sup>154</sup> *Id.* at 944 (quoting *Pechter v. Lyons*, 441 F. Supp. 115, 117–18 (S.D.N.Y. 1977)).

<sup>155</sup> See *Detroit Free Press v. Ashcroft*, 195 F. Supp. 2d 937, 947 (E.D. Mich.), *aff’d*, 303 F.3d 681 (6th Cir. 2002). The court noted:

It is important for the public . . . to know that even during these sensitive times the Government is adhering to immigration procedures and respecting individuals’ rights. . . . [S]ecrecy only breeds suspicion as to why the government is proceeding against Haddad and aliens like him. And if in fact the Government determines that Haddad is connected to terrorist activity or organizations, a decision made openly concerning his deportation may assure the public that justice has been done.

*Id.* at 944.

After determining that removal proceedings satisfied both prongs of the *Richmond Newspapers* test, the court then decided that the government could not fit the Creppy Directive within the test's exception that allows for narrowly tailored measures that fulfill compelling governmental objectives.<sup>156</sup> The court first found that the government failed to demonstrate a compelling governmental objective because it spoke only in generalities about the potential terror threats that would arise by opening Haddad's hearing.<sup>157</sup> The court then concluded that the government's effort to protect the courtroom was ineffective because attorneys and clients could discuss matters outside of the courtroom,<sup>158</sup> and because the press already had reported extensively upon the case.<sup>159</sup> Therefore, the Creppy Directive failed the narrow tailoring requirement.<sup>160</sup> As a result, the Michigan court held that the immigration court must open Haddad's hearings.<sup>161</sup>

#### 4. The U.S. District Court for the District of New Jersey Grants the Media Plaintiffs a Second Significant Victory

Shortly after the Michigan court issued its injunction, the U.S. District Court for the District of New Jersey also enjoined implementation of the Creppy Directive,<sup>162</sup> but its analysis differed

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<sup>156</sup> *Id.* at 947. The government did not concede that the Creppy Directive could apply only if it was narrowly tailored to fulfill a compelling governmental interest (the strict scrutiny measure). *Id.* at 944–47. The court, however, did not support this stance. *Id.* at 947.

<sup>157</sup> *Id.* at 946–47.

<sup>158</sup> *Id.* at 947. The Attorney General incorporated language into 8 C.F.R. § 3.46 (1997) (current version at 8 C.F.R. § 1003.46 (2003)) to close this loophole.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 947–48. After the District Court denied reconsideration on April 3, 2002, the government appealed to the Sixth Circuit for a stay, pending appeal. *Id.* at 948. It granted a temporary stay, but dissolved it shortly thereafter while denying the government's motion for stay pending appeal. *Detroit Free Press v. Ashcroft*, No. 02-CV-1437 (6th Cir. Apr. 10, 2002), at 2002 WL 1332827; *Detroit Free Press v. Ashcroft*, No. 02-CV-1437 (6th Cir. Apr. 18, 2002), at 2002 WL 1332836.

<sup>162</sup> *N. Jersey Media Group v. Ashcroft*, 205 F. Supp. 2d 288, 305 (D.N.J.), *rev'd*, 308 F.3d 198 (3d Cir. 2002). The court required that the plaintiffs meet a slightly different standard for an injunction than that employed in *Detroit Free Press*:

(1) whether the movant has shown a reasonable probability of success on the merits; (2) whether the movant will be irreparably injured by denial of the

significantly from that of the Michigan court. In New Jersey, the court dealt separately with the plaintiffs' causes of action under the First Amendment and the CFR,<sup>163</sup> whereas Michigan's court combined the two issues.

As in *Detroit Free Press*, the court first concluded that the *Richmond Newspapers* test applied to this case, and then used the test to determine that a First Amendment right of access had been infringed upon by the special interest policy.<sup>164</sup> The New Jersey court found it significant that other courts had used the test in non-criminal contexts.<sup>165</sup> The court then considered the facts before it in terms of experience and logic. As for the experience prong, the court traced qualified openness in removal proceedings to *Yamataya v. Fisher*,<sup>166</sup> which guaranteed non-citizens due process

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relief; (3) whether granting preliminary relief will result in even greater harm to the nonmoving party; and (4) whether granting the preliminary relief will be in the public interest.

*Id.* at 296 (citing *Allegheny Energy, Inc. v. DQE, Inc.*, 171 F.3d 153, 158 (3d Cir. 1999)). The court will issue an injunction only if all four prongs are met. *See id.* (citing *Merchant Evans, Inc. v. Roosevelt Bldg. Prods.*, 963 F.2d 628, 632–33 (3d Cir. 1992) (quoting *Opticians Ass'n v. Indep. Opticians*, 920 F.2d 187, 192 (3d Cir. 1990))).

<sup>163</sup> *See id.* at 302–04. Still, as in the Michigan case, the court also used the CFR to bolster its experience prong analysis under the *Richmond Newspapers* test. *Id.* at 300.

<sup>164</sup> *Id.* at 298–302.

<sup>165</sup> *Id.* at 299–300. In deciding that the *Richmond Newspapers* line applied, the court also stressed that the experience and logic test has been employed in settings other than criminal court:

*Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059 (3d Cir. 1984) (extending *Richmond Newspapers* rationale to civil trials); *Whiteland Woods, L.P. v. W. Whiteland*, 193 F.3d 177, 181 (3d Cir. 1999) (applying test to find right of access to municipal planning meeting); *Cal-Almond, Inc. v. U.S. Dept. of Agric.*, 960 F.2d 105, 109 (9th Cir. 1992) (applying test to administrative voter list); *Soc'y of Prof. Journalists v. Sec'y of Labor*, 616 F. Supp. 569, 574 (D. Utah 1985) (applying test to administrative hearing).

*Id.* at 300.

Nevertheless, the government suggested that the “facially legitimate and bona fide” standard of *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972), provided the proper measure because Congress has plenary power over immigration matters. Yet, the New Jersey court distinguished *Kleindienst* because it pertained to an individual who had not yet entered the United States, and thus was not afforded the due process rights granted to those already in the United States. *N. Jersey Media Group*, 205 F. Supp. 2d at 296–98.

<sup>166</sup> 189 U.S. 86 (1903).

when facing removal.<sup>167</sup> As for the logic prong, the court noted that:

deportation proceedings inherently involve a governmental process that affects a person's liberty interest[.] . . . Thus, the ultimate individual stake in these proceedings is the same as or greater than in criminal proceedings or civil actions[, and] . . . the same functional goals served by openness in the civil and criminal judicial contexts would be equally served in the context of deportation hearings.<sup>168</sup>

After concluding that the *Richmond Newspapers* test applies to removal proceedings that pertain to deportation, the court concluded that the Creppy Directive lacked the narrow tailoring necessary to fulfill a compelling governmental interest.<sup>169</sup> As such, the government could not overcome the presumption of openness tied to the proceedings.<sup>170</sup> The court divided the government's interests into two pools: "(1) avoidance of setbacks to its terrorism investigation caused by open hearings; and (2) prevention of stigma or harm to detainees that might result if hearings were open."<sup>171</sup> The court did not directly assess whether these interests met the compelling interest standard,<sup>172</sup> but focused instead on the narrow tailoring requirement.<sup>173</sup> Echoing the Michigan court's analysis in *Detroit Free Press*, the court found

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<sup>167</sup> See *N. Jersey Media Group*, 205 F. Supp. 2d at 300 (highlighting that the CFR's consistent call for presumptively open removal proceedings since 1964, added further substance to the experience analysis).

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 301–02.

<sup>171</sup> *Id.* at 301.

<sup>172</sup> *Id.* at 301–02. Essentially, the court merged its analysis of the government's objectives and the Creppy Directive's tailoring. As such, the court neglected to weigh the first prong of the government's burden at all, and only alluded to the flaws of the government's attempt to meet their second prong burden within its commentary on tailoring. *Id.*

<sup>173</sup> *Id.* The court implied that if the government had allowed for case-by-case in camera review of allegedly sensitive information, the government would have fulfilled the narrow tailoring requirement. Nevertheless, because the court does not make clear whether both of the government's interests were compelling, one cannot discern whether the government could have satisfied the strict scrutiny test if it had adopted the case-by-case approach. *Id.*

that because the respondents and lawyers could speak openly about removal proceedings outside the court, the Creppy Directive lacked sufficient narrowness.<sup>174</sup> The court further noted that, “to the extent that the Creppy [Directive] is said to serve the interest of insulating the individual detainee from humiliation or stigma,” it exhibits excessive breadth because it prohibits respondents from keeping their proceedings open if that is what they would prefer.<sup>175</sup>

Nevertheless, after the court dismissed the government’s special interest policy on First Amendment grounds, it held that the plaintiffs failed to demonstrate an access right through strict reliance on the CFR.<sup>176</sup> The court stated that, “neither the regulations themselves nor their enabling statutes expressly provide a right of enforcement through a civil action for perceived violations.”<sup>177</sup> Specifically, the court deferred to *Alexander v. Sandoval*,<sup>178</sup> where the Supreme Court disallowed third parties from enforcing regulations when Congress has not created such a right.<sup>179</sup> Without a “freestanding” cause of action” drafted for their use, the plaintiffs stood powerless to enforce the qualified access right that the regulations permitted.<sup>180</sup> Therefore, even though the court thought it appropriate to refer to the CFR in its *Richmond Newspapers* analysis, it would not affirm a right of access grounded in the public’s enforcement of regulatory language.<sup>181</sup>

Yet the court granted the plaintiffs the injunction they sought because it concluded that a First Amendment calculus requires presumptive openness for removal proceedings, and that the

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<sup>174</sup> *Id.* at 301 (noting accord with *Detroit Free Press v. Ashcroft*, 195 F. Supp. 2d 937 (E.D. Mich.), *aff’d*, 303 F.3d 681 (6th Cir. 2002)).

<sup>175</sup> *Id.* at 302.

<sup>176</sup> *Id.* at 303–04. The court specifically referred to 8 C.F.R. § 3.27 (1997) (currently codified at 8 C.F.R. § 1003.27 (2003)) in its analysis.

<sup>177</sup> *See N. Jersey Media Group*, 205 F. Supp. 2d at 303.

<sup>178</sup> 532 U.S. 275 (2001).

<sup>179</sup> *See N. Jersey Media Group*, 205 F. Supp. 2d at 303 (“Without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute.”) (quoting *Alexander*, 532 U.S. at 290–91).

<sup>180</sup> *Id.* (citing *Alexander*, 532 U.S. at 286–87).

<sup>181</sup> *See id.* at 304.



Creppy Directive is not narrowly tailored to overcome that presumption.<sup>182</sup> Significantly, in *N. Jersey Media* the court's holding expanded upon the *Detroit Free Press* court's holding because it imposed an injunction nationally, rather than on a specific special interest proceeding.

The optimism of the media plaintiffs waned after the victory in New Jersey because the Supreme Court stayed the district court's decision, pending a decision in the Third Circuit.<sup>183</sup> Although the Court provided no rationale for its stay,<sup>184</sup> it seems likely that Attorney General Ashcroft's order that altered the CFR, issued on May 28, 2002,<sup>185</sup> played an influential role. The U.S. District Court for the District of New Jersey published its opinion on the same day that the order was issued, but the Attorney General retroactively dated the order to May 21.<sup>186</sup>

#### 5. The Sixth Circuit Affirms, Bestowing upon the Public a Qualified Right to Access Haddad's Hearings

Despite the setback for media plaintiffs in the *North Jersey Media* case, the Sixth Circuit soon affirmed the earlier decision of the U.S. District Court for the Eastern District of Michigan in *Detroit Free Press*. Although the court looked anew at the questions of law,<sup>187</sup> it enjoined use of special interest procedures as

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<sup>182</sup> The court assessed each of the four factors required for an injunction, based upon *Allegheny Energy Inc. v. DQE, Inc.*, 171 F.3d 153, 158 (3d Cir. 1999), and found that the plaintiffs' claim satisfied all of them. *Id.* at 304-05.

<sup>183</sup> Ashcroft v. N. Jersey Media Group, 536 U.S. 954 (2002) (mem.).

<sup>184</sup> The Supreme Court issued a brief statement in issuing its stay of the injunction, pending the outcome of the appeal to the Third Circuit:

Application for stay presented to Justice SOUTER and by him referred to the Court granted, and it is ordered that the preliminary injunction entered by the United States District Court for the District of New Jersey on May 28, 2002, is stayed pending the final disposition of the government's appeal of that injunction to the United States Court of Appeals for the Third Circuit.

*Id.*

<sup>185</sup> Att'y Gen. Order No. 2585-2002, 67 Fed. Reg. 36,799 (May 28, 2002).

<sup>186</sup> *Id.*

<sup>187</sup> *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 685 (6th Cir. 2002) ("We review the grant of a preliminary injunction for an abuse of discretion, but questions of law are reviewed de novo.") (quoting *Gonzales v. Nat'l Bd. of Med. Exam'rs*, 225 F.3d 620, 625 (6th Cir. 2000)).

they applied to Haddad.<sup>188</sup> Like the district court, the Sixth Circuit framed its analysis on the plaintiffs' First Amendment query and decided first that the *Richmond Newspapers* test applied.<sup>189</sup> The Sixth Circuit next employed the experience and logic analysis in which the court established the existence of a qualified public access right.<sup>190</sup> Finally, the Sixth Circuit determined that the Creppy Directive lacked the narrow tailoring necessary to overcome the access right.<sup>191</sup> This analysis is distinguished from the analysis used in *Detroit Free Press*, which granted equal weight to the First Amendment query and the express language of the CFR.

In structuring its analysis, the Sixth Circuit initially determined that access to removal proceedings should be evaluated under *Richmond Newspapers*, and that such proceedings must operate under presumptive openness if they satisfy the experience and logic prongs.<sup>192</sup> After considering the government's contention that the *Richmond Newspapers* test pertains only to judicial branch criminal proceedings,<sup>193</sup> the court concluded that *Richmond Newspapers* applied because courts have applied the test in other contexts<sup>194</sup> and because the government produced no case law

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<sup>188</sup> *Id.* at 681.

<sup>189</sup> *Id.* at 696.

<sup>190</sup> *Id.* at 700.

<sup>191</sup> *Id.* at 711.

<sup>192</sup> *Id.* at 696, 700.

<sup>193</sup> The court initially considered the government's contention that the *Kleindienst* standard should apply to removal proceedings generally because of the government's plenary powers. Yet the Sixth Circuit followed its own district court and the U.S. District Court for the District of New Jersey in declaring that *Kleindienst* did not apply to removal proceedings because of due process implications. The court noted, "It would be ironic, indeed, to allow the government's assertion of plenary power to transform the First Amendment from the great instrument of open democracy to a safe harbor from public scrutiny." *Id.* at 686.

<sup>194</sup> Like the U.S. District Court for the District of New Jersey, the Sixth Circuit cited examples of cases outside of the criminal context in which courts applied the *Richmond Newspapers* test. They include:

*United States v. Miami Univ.*, 294 F.3d 797, 824 (6th Cir. 2002) (university's student disciplinary board proceedings); *Brown & Williamson Tobacco Corp. v. Fed. Trade Comm'n*, 710 F.2d 1165, 1177-79 (6th Cir. 1983) (civil action against administrative agency); *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059 (3d Cir. 1984) (civil trial); *Whiteland Woods, L.P. v. W. Whiteland*, 193 F.3d

supporting its premise.<sup>195</sup> Moreover, the court highlighted close similarities between removal proceedings and criminal proceedings—the latter representing the context in which the Supreme Court applied the *Richmond Newspapers* test.<sup>196</sup> Specifically, the court emphasized the quasi-judicial structure of removal proceedings, including the Notice that initiates proceedings and the government’s burden of presenting clear and convincing evidence.<sup>197</sup>

After determining that the *Richmond Newspapers* test applied, the Sixth Circuit turned its attention to the experience prong, finding that removal proceedings historically have operated under a presumption of openness.<sup>198</sup> The court observed that the Supreme Court requires a period of established routine to fulfill the experience criterion, but does not require centuries of tradition.<sup>199</sup> Turning to the specific history of removal proceedings, the court decided that the CFR has “explicitly required deportation proceedings to be presumptively open” for more than thirty years, and that Congress has revised the INA more than fifty times without “indicating that [the executive branch] had judged their intent incorrectly.”<sup>200</sup> Moreover, Congress has enacted statutes

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177, 181 (3d Cir. 1999) (municipal planning meeting); *Cal-Almond, Inc. v. U.S. Dept. of Agric.*, 960 F.2d 105, 109 (9th Cir. 1992) (agriculture department’s voters list); *Soc’y of Prof. Journalists v. Sec’y of Labor*, 616 F. Supp. 569, 574 (D. Utah 1985) (administrative hearing), *vacated as moot*, 832 F.2d 1180 (10th Cir. 1987).

*Id.* at 695.

The court also added that in a *Richmond Newspapers* concurring opinion, Justice Stevens wrote, “[t]he First Amendment protects the public and the press from abridgement of their rights of access to information about the operation of *their government, including the Judicial Branch.*” (emphasis added). *Id.*

<sup>195</sup> *Id.* at 695.

<sup>196</sup> *Id.* at 698.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* at 700–03.

<sup>199</sup> *Id.* at 700. The court stated that in *Press-Enterprise II*, the Supreme Court strictly relied on “post-Bill of Rights history in determining that preliminary hearings in criminal cases were historically open.” *Id.* The court also mentioned that several circuit courts have labeled procedures as presumptively open even if they lack the historical openness that would satisfy the *Richmond Newspapers* experience prong. *Id.* at 700.

<sup>200</sup> *Id.* at 701.

that have kept exclusion hearings closed.<sup>201</sup> The court also noted that while removal proceedings have operated openly for approximately thirty years within the modern administrative state, open proceedings also existed in the common law's closest analog.<sup>202</sup>

The Sixth Circuit next examined the *Richmond Newspapers* logic prong and found that removal proceedings satisfied this requirement as well. The court asserted that "public access acts as a check on the actions of the Executive by assuring us that proceedings are conducted fairly and properly,"<sup>203</sup> and that it encourages scrutiny so that government "does not make mistakes."<sup>204</sup> The court added that because the government does not guarantee counsel for respondents in removal proceedings, the press and public "may be [the aliens'] only guardian[s]."<sup>205</sup> The court also found that open hearings "may assure the public that justice has been done," and that they enhance the likelihood that the government will abide by established procedures.<sup>206</sup> Finally, the court asserted that public access keeps the American citizenry informed about the affairs of its government so that it can "affirm or protest" its efforts.<sup>207</sup>

After determining that the removal proceedings satisfied the two prongs of the *Richmond Newspapers* test, the court concluded that the Creppy Directive, and the order that modified it, collectively lacked narrow tailoring to fulfill a compelling governmental interest.<sup>208</sup> In turn, this prevented the government from overcoming the presumption of openness that *Richmond Newspapers* mandates.<sup>209</sup> Unlike the U.S. District Court for the

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<sup>201</sup> See *id.* (discussing statutory enactments from the Nineteenth Century).

<sup>202</sup> *Id.* at 702. In a procedure dating to the Eighteenth Century, England's open criminal courts banished individuals to the American Colonies, among other destinations. *Id.*

<sup>203</sup> *Id.* at 703–04.

<sup>204</sup> *Id.* at 704.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* at 707–10.

<sup>209</sup> *Id.* at 710. The court also argued that, irrespective of strict scrutiny concerns, the Creppy Directive could not fit within an exception to the *Richmond Newspapers* test because it does not require the immigration judge to make specific, on-the-record

Eastern District of Michigan, the Sixth Circuit held that the government presented a compelling governmental interest “sufficient to justify closure.”<sup>210</sup>

Despite this, the court found that the Creppy Directive failed to exhibit narrow tailoring because of both under-breadth and over-breadth. This means that parts of Creppy Directive allowed the government more latitude than necessary to fulfill its compelling objective, while other aspects of it were not sufficiently inclusive in this regard.<sup>211</sup> As for under-breadth, the Sixth Circuit echoed the lower court by underscoring the ability of respondents and attorneys to comment on their trials outside the courtroom.<sup>212</sup> The court acknowledged that the Attorney General had crafted his order to solve this matter, but argued that the proposed solution impermissibly restrained speech.<sup>213</sup> The court stated that, “these prohibitions are impermissible to the extent that they indefinitely restrain a deportee’s ability to divulge all information, including information obtained independently from the deportation proceedings.”<sup>214</sup> As a result, the court construed the regulations as binding on attorneys and respondents only during the duration of their removal proceedings.<sup>215</sup>

Regarding the Creppy Directive’s over-breadth, the court stated that an immigration judge could make case-by-case determinations to avoid the blanket closure that the Creppy Directive mandates.<sup>216</sup>

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findings to justify the closure of an immigration court—and the court determined that *Press-Enterprise II* insists on such procedure. *See id.* at 707 (citing *Press-Enterprise II*, 478 U.S. 1 (1986)).

<sup>210</sup> *Id.* at 705–06. The court cited, among other issues, the mosaic theory that the Attorney General had emphasized in the order that codified the Creppy Directive. *Id.*

<sup>211</sup> *Id.* at 710.

<sup>212</sup> *Id.* at 707–08.

<sup>213</sup> *Id.*

<sup>214</sup> *See id.* at 708 (noting that it violates the First Amendment to bar a witness from revealing his own testimony after a grand jury concludes) (citing *Butterworth v. Smith*, 494 U.S. 624, 632 (1990)). The court also found the order improper because it restricts dissemination of respondents’ names, the locations of their arrests, and dates of their arrests—information unrelated to their actual proceedings. *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> *Id.* Although the Court does not directly address the ways in which 8 C.F.R. § 1003.46 (2003) affects the discretion of immigration judges to close their own courts on

The court also observed that, to remove an alien, the government typically does not require presentation of evidence related to national security.<sup>217</sup> In Haddad's case, the government sought removal merely because Haddad overstayed his tourist visa.<sup>218</sup> The court added that, just because the mosaic theory provided the government with a compelling interest, logic required an immigration judge to make specific findings. To do otherwise could lead the government to close any public hearing, including criminal judicial proceedings protected by *Richmond Newspapers*.<sup>219</sup> As a result, the court proscribed enforcement of the special interest procedures that barred the press from Haddad's removal hearings.<sup>220</sup>

#### 6. Despite the Sixth Circuit's Decision in Favor of Media Interests, Haddad's Hearings Have Remained Closed

Press plaintiffs secured another victory for public access because the government did not convince the Sixth Circuit that the Creppy Directive fit the strict scrutiny exception under the *Richmond Newspapers* test; nevertheless, they celebrated only briefly because Haddad's hearings were closed again. Following the Sixth Circuit's affirmation of the district court's injunction, Haddad sought and secured a preliminary injunction requiring a new removal hearing that would be presumptively open to the

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case-by-case bases, it seems evident that the court approves only of a case-by-case model that fully empowers immigration judges.

<sup>217</sup> *Id.* at 709.

<sup>218</sup> *Id.* (“To deport an overstay, the INS must convince the immigration judge by clear and convincing evidence that the alien was admitted as a non-immigrant for a specific period, that the period has elapsed, and that the alien is still in this country.”) (citing *Shahla v. Immigration and Nationalization Serv.*, 749 F.2d 561, 563 (9th Cir. 1984)).

<sup>219</sup> *Id.* at 709–10. The court observed that logical extension of the mosaic theory argument would lead even to closed criminal proceedings in judicial courts, which would result in “wholesale suspension of First Amendment rights.” *Id.*

<sup>220</sup> *Id.* at 683. The court suggested that the special interest policy would “uproot people's lives, outside the public eye, and behind a closed door. Democracies die behind closed doors.” Moreover, it emphasized that the public “deputiz[es] the press as the guardians of their liberty.” *Id.*

public.<sup>221</sup> Immigration Judge Robert Newberry replaced Immigration Judge Elizabeth Hacker, Haddad's former immigration judge in subsequent proceedings.<sup>222</sup>

Yet, when Judge Newberry commenced Haddad's proceeding on October 1, 2002, he closed the doors of his immigration court without providing an on-the-record rationale.<sup>223</sup> During a closed meeting held the morning before the hearing, Judge Newberry reviewed the information the government had sought to introduce and opted for closure at that time.<sup>224</sup> Media plaintiffs immediately sought relief from the U.S. District Court for the Eastern District of Michigan.<sup>225</sup> The court held that Judge Newberry had the right to close the proceeding, but that he had violated the procedure designated by the Sixth Circuit because he did not allow Haddad's counsel to challenge the closure, nor did he render particularized on-the-record findings.<sup>226</sup> As a result, the district court held that the immigration court must follow the Sixth Circuit's procedure in the future, but that Judge Newberry had properly closed the courtroom on October 1, because of the sensitive evidence that the government had introduced.<sup>227</sup>

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<sup>221</sup> See Haddad v. Ashcroft, 221 F. Supp. 2d 799 (E.D. Mich.) (holding that denial of a hearing before a new immigration judge would undermine Haddad's due process rights), *aff'd sub nom.* Detroit Free Press v. Ashcroft, 303 F.3d 681 (6th Cir. 2002).

<sup>222</sup> Steve Fainaru, *Detainee to Get Open Immigration Hearing; Justice Department Still Plans Appeal of Ruling for Muslim Activist Held 9 Months*, WASH. POST, Sept. 26, 2002, at A13.

<sup>223</sup> Detroit Free Press v. Ashcroft, No. 02-CV-70339, 2002 WL 31317398, at \*1 (E.D. Mich. Oct. 7, 2002).

<sup>224</sup> *Id.* The parties' briefs do not make clear whether Haddad's counsel also attended this meeting. *Id.* at \*1 n.1.

<sup>225</sup> Detroit Free Press, 2002 WL 31317398, at \*1.

<sup>226</sup> *Id.*

<sup>227</sup> *Id.* at \*1-\*2. The prohibition on special interest tactics remains intact in the Sixth Circuit. In January, the Sixth Circuit denied the government's request for a rehearing of its case, as well as its request for a rehearing en banc. See O'Connor & Bush, *supra* note 115, at N15.

Despite the Sixth Circuit's clear opposition to the special interest procedures, Haddad's case apparently is not the only one in the Sixth Circuit that has been categorically closed to the public in spite of the court's decision last August. Ziad Anton Hatter, a 31-year-old Jordanian, was detained in Ohio last year, at the request of the INS, without being charged. Hatter entered the country using false travel documents, and all of his immigration proceedings, as of Jan. 21, 2003, have been closed to the public.

As of this publication, Haddad's case remains unresolved. Judge Newberry recently denied Haddad's asylum request and ordered the removal of Haddad, his wife, and three of his four children.<sup>228</sup> Haddad is appealing the decision to the BIA,<sup>229</sup> but has remained jailed during this process.<sup>230</sup>

#### 7. The Third Circuit Deals the Media Plaintiffs Another Defeat

The Third Circuit also considered the question of access to removal proceedings, but, unlike the Sixth Circuit, the court declined to follow its lower court and instead permitted enforcement of the Creppy Directive.<sup>231</sup> The court concluded that while the *Richmond Newspapers* test applies to removal proceedings as a means of determining rights of public access,<sup>232</sup> removal proceedings fail the test's experience and logic prongs.<sup>233</sup> As a result, the court did not find a presumptive right of access, which led it to determine that First Amendment considerations would play no role in its decision to overturn the nationwide injunction on the Creppy Directive.<sup>234</sup>

First, the Third Circuit followed the U.S. District Court for the District of New Jersey and found that the *Richmond Newspapers* test extends beyond criminal proceedings to include removal proceedings. Significantly, the court cited use of *Richmond*

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Hatter remained in INS custody as of Jan. 21, 2003. See Bill Sloat, *Detained; Jordanian at Center of Dispute—Case Is Now a Fight on Post-9/11 Policy*, CLEVELAND PLAIN DEALER, Jan 22, 2003, at A6.

<sup>228</sup> David Shepardson, *Islamic Charity Founder Pleads for Political Asylum; U.S. Has Yet to Charge Haddad in Terror Link*, DETROIT NEWS, Oct. 21, 2002, at 1C. Orders of removal can extend, as in Haddad's case, to alien family members. Three of Haddad's children are aliens, while the fourth is American and cannot be removed. *Id.*

<sup>229</sup> See Associated Press, *Islamic Charity Chief Fights Deportation; Lebanese Citizen Is Being Held on Visa Violation*, Dec. 27, 2002, at 7.

<sup>230</sup> See *id.*

<sup>231</sup> See *N. Jersey Media Group v. Ashcroft*, 308 F.3d 198, 204–09 (3d Cir. 2002). Unlike the Sixth Circuit, the Third Circuit majority failed to address the Attorney General's order. Thus, the opinion dealt only with the Creppy Directive.

<sup>232</sup> *Id.*

<sup>233</sup> *Id.* at 202.

<sup>234</sup> *Id.* at 220–21.



*Newspapers* in civil proceedings,<sup>235</sup> and in the administrative context.<sup>236</sup> The Third Circuit concluded that, these “precedents demonstrate that in this [c]ourt, *Richmond Newspapers* is a test broadly applicable to issues of access to government proceedings, including removal.”<sup>237</sup>

Once the Third Circuit committed to a *Richmond Newspapers* analysis, the court concluded that removal proceedings failed the history prong because they have not been traditionally accessible to the public.<sup>238</sup> The court emphasized that Congress never passed statutory language requiring public access to removal proceedings,<sup>239</sup> even if executive branch regulations have afforded a rebuttable presumption of access since 1964.<sup>240</sup> The court stated that, “by insisting on a strong tradition of public access in the *Richmond Newspapers* test, we preserve administrative flexibility and avoid constitutionalizing ambiguous, and potentially unconsidered, executive decisions.”<sup>241</sup>

The court also concluded that removal proceedings failed to satisfy the standards of the *Richmond Newspapers* logic prong because of the risks in publicizing information that the government deems special interest.<sup>242</sup> The court pronounced that the logic prong required it “to consider whether public access plays a

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<sup>235</sup> The court cited *Publicker Indus. Inc. v. Cohen*, 733 F.2d 1059 (3d Cir. 1984), in which the Third Circuit extended the First Amendment right of access to civil trials. *Id.* at 207–08.

<sup>236</sup> *Id.* at 208. As an example, the court illustrated that in *Capital Cities Media, Inc. v. Chester*, 797 F.2d 1164 (3d Cir. 1986), the Third Circuit had applied the *Richmond Newspapers* test to determine whether the press could access an administrative agency’s records. *Id.*

<sup>237</sup> *Id.* at 208–09.

<sup>238</sup> *Id.* at 211 (“[T]he tradition of open deportation hearings is too recent and inconsistent to support a First Amendment right of access.”).

<sup>239</sup> *Id.* at 213 (stating that “we are unwilling effectively to craft a constitutional right from mere Congressional silence”).

<sup>240</sup> *Id.* at 201. The court argued further that, even if a rebuttable presumption alone were sufficient to fulfill the *Richmond Newspapers* history prong, the rebuttable presumption in removal proceedings has not always been maintained. Removal proceedings have taken place frequently in closed settings such as prisons, hospitals and private homes, without an initial expectation of public access. *Id.* at 212.

<sup>241</sup> *Id.* at 216.

<sup>242</sup> *Id.* at 216–20.

significant *positive* role in the functioning of the particular process in question.”<sup>243</sup> Although the circuit court recognized that the district court had addressed safety concerns within its strict scrutiny analysis, the circuit court found it more appropriate to incorporate such issues in a logic prong analysis.<sup>244</sup>

The Third Circuit found that the mosaic theory, on its own, provided a significant reason to close removal proceedings.<sup>245</sup> As a result, the “Third Circuit concluded that it was in the government’s best interest *not* to know what was happening in the closed proceedings due to the national security concerns.”<sup>246</sup> Moreover, although the court acknowledged that it could only speculate that closure would prevent terrorist attacks, the court asserted that “courts have traditionally extended great deference to Executive expertise” when handling national security matters.<sup>247</sup> Because the circuit court concluded that removal proceedings failed to satisfy the *Richmond Newspapers* test, it overturned the injunction instituted by the district court.<sup>248</sup>

#### 8. The Dissent Argued that *Richmond Newspapers* Dictates a Qualified Right of Public Access to Removal Proceedings

Although the Third Circuit confirmed that the government could employ the Creppy Directive, Judge Anthony J. Scirica dissented from his two colleagues in the majority because he thought they mishandled the *Richmond Newspapers* test.<sup>249</sup> In his dissent, Judge Scirica found that removal proceedings satisfied the

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<sup>243</sup> *Id.* at 216 (citing *Press-Enterprise II*, 478 U.S. 1, 8 (1986)) (emphasis added).

<sup>244</sup> *Id.* at 216–17.

<sup>245</sup> *Id.* at 217–19.

<sup>246</sup> Eve Burton, *Access to Special Interest Deportation Proceedings*, MEDIA L. RES. CENT. BULL., Jan. 2003, at 55, 64.

<sup>247</sup> *N. Jersey Media Group*, 308 F.3d at 219.

<sup>248</sup> *Id.* at 221 (Scirica, J., dissenting). Significantly, the court confined application of its decision to those cases the DOJ labels as special interest, although its analysis under the *Richmond Newspapers* test pertained to removal proceedings generally. *Id.* at 220 (Scirica, J., dissenting). Because the court did not find an access right, it saw no reason to consider whether the Creppy Directive satisfied strict scrutiny, or whether the lower court had overstepped its bounds by instituting a nationwide injunction.

<sup>249</sup> *Id.* at 221 (Scirica, J., dissenting).

*Richmond Newspapers* test,<sup>250</sup> and that the Creppy Directive lacked the required narrow tailoring to overcome the existing presumption of public access.<sup>251</sup>

First, Judge Scirica insisted that his colleagues had been too demanding in their application of the *Richmond Newspapers* experience prong, and that in reality, open removal proceedings have strong roots.<sup>252</sup> Like his colleagues, Judge Scirica conceded that Congress had not explicitly opened deportation proceedings.<sup>253</sup> Nevertheless, Judge Scirica stated that deportation hearings have been presumptively open for a century<sup>254</sup> and that the DOJ incorporated this presumption of openness into the CFR in 1964.<sup>255</sup> He added that because *Richmond Newspapers* only demanded “a qualified right of access . . . which may be restricted by a countervailing public interest,”<sup>256</sup> the history of removal proceedings has demonstrated openness sufficient to satisfy the *Richmond Newspapers* experience prong.<sup>257</sup>

Judge Scirica distinguished his analysis of the logic prong from that of his colleagues because he thought they had unreasonably limited their consideration to special interest circumstances, rather than those that pertain to removal proceedings generally.<sup>258</sup> “The logic analysis set forth by the Supreme Court is directed at a particular structural type of proceeding—in this case, deportation hearings—not a subset based on specific designations such as terrorism.”<sup>259</sup> Judge Scirica conceded that if the logic prong focused solely on special interest cases, then security concerns

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<sup>250</sup> *Id.* (Scirica, J., dissenting).

<sup>251</sup> *Id.* at 228 (Scirica, J., dissenting). Like the majority, Judge Scirica failed to consider the impact of the Attorney General’s order in his analysis.

<sup>252</sup> *Id.* at 222 (Scirica, J., dissenting).

<sup>253</sup> *Id.* (Scirica, J., dissenting).

<sup>254</sup> *Id.* (Scirica, J., dissenting).

<sup>255</sup> *Id.* (Scirica, J., dissenting).

<sup>256</sup> *Id.* (Scirica, J., dissenting).

<sup>257</sup> *Id.* at 224 (Scirica, J., dissenting). Judge Scirica noted that “this century of unbroken openness, especially within the nascent tradition of the administrative state, ‘implies the favorable judgment of experience’ under the *Richmond Newspapers* test.” *Id.* (Scirica, J., dissenting) (citation omitted).

<sup>258</sup> *Id.* (Scirica, J., dissenting).

<sup>259</sup> *Id.* (Scirica, J., dissenting).

would outweigh public access rights.<sup>260</sup> He argued, however, that the *Richmond Newspapers* test requires a court to consider the whole proceeding when contemplating logic, and in this broader light, removal proceedings satisfied the logic prong.<sup>261</sup>

After concluding that removal proceedings operated under a qualified First Amendment right of access, Judge Scirica followed the district court and would have overturned the Creppy Directive.<sup>262</sup> Like the majority, Judge Scirica found that the district court had unreasonably dismissed the compelling governmental objective of national security.<sup>263</sup> Nevertheless, he determined that the Creppy Directive's "blanket closure rule" removed decision-making powers from immigration judges who could make case-by-case judgments instead—even on issues pertinent to national security.<sup>264</sup>

Although Judge Scirica could not convince his fellow panelists to follow his logic in the Third Circuit's holding, media plaintiffs had hoped that, upon reevaluation, the court would reinstitute the injunction imposed by the U.S. District Court for the District of New Jersey.<sup>265</sup> The ACLU, representing the North Jersey Media Group and the *New Jersey Law Journal*, filed a petition on

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<sup>260</sup> *Id.* (Scirica, J., dissenting). Judge Scirica clarified:

At this stage, we must consider the value of openness in deportation hearings generally, not its benefits and detriments in "special interest" deportation cases in particular. If a qualified right of access is found to attach to deportation hearings generally, the analysis *then* turns to whether particular issues raised in individual cases override the general limited right of access.

*Id.* at 225 (Scirica, J., dissenting).

<sup>261</sup> *Id.* (Scirica, J., dissenting).

<sup>262</sup> *Id.* at 228–29 (Scirica, J., dissenting). Judge Scirica remarked, however, that he would have limited the injunction to the newspaper plaintiffs rather than follow the lower court and apply it nationwide, and that expanding it more broadly constituted an abuse of discretion.

<sup>263</sup> *Id.* at 226 (Scirica, J., dissenting).

<sup>264</sup> *Id.* at 228 (Scirica, J., dissenting). Judge Scirica asserted that if immigration judges afford due deference to INS counsel, immigration judges still can close proceedings that involve sensitive information. To convince immigration judges that they should close proceedings, government counselors are free to raise the mosaic theory or any other arguments they might consider persuasive. *Id.* (Scirica, J., dissenting).

<sup>265</sup> See Kibret Markos, *U.S. Court Asked to Reconsider Secret Deportation Hearings*, RECORD (Bergen County, N.J.), Nov. 23, 2002, at A6.

November 22, 2002 with the Third Circuit, seeking reconsideration.<sup>266</sup> The ACLU claimed that the Third Circuit's decision conflicted with previous holdings of the Supreme Court, as well as with the Sixth Circuit's decision.<sup>267</sup> On December 4, 2002, however, the Third Circuit denied the plaintiffs' motion.<sup>268</sup>

### III. THE ATTORNEY GENERAL'S SPECIAL INTEREST POLICY MUST BE OVERTURNED IN FAVOR OF A CASE-BY-CASE APPROACH

#### A. *The Fairest Solution*

The restoration of case-by-case decision-making powers to immigration judges would most equitably resolve the dispute between the government and the press concerning the special interest policy.<sup>269</sup> The government should be compelled to demonstrate that there are specific reasons for its actions, rather than relying on "conclusory, vague and general" statements.<sup>270</sup> The special interest policy deeply undermines the balance between the constitutionally guaranteed rights of the press to disseminate information on the public's behalf<sup>271</sup> and the government's interest

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<sup>266</sup> See *id.*

<sup>267</sup> See Scott Fallon, *Court Snubs ACLU on Secret Hearings; Rejects Petition for Sept. 11 Detainees*, RECORD (Bergen County, N.J.), Dec. 5, 2002, at A10.

<sup>268</sup> *Id.* According to Deborah Jacobs, executive director of the ACLU of New Jersey, "It wasn't the outcome we asked for, but we still have the high court." *Id.*

<sup>269</sup> Eve Burton, *supra* note 246, at 55. Ms. Burton has supported this outcome, as well, noting that "while [it] may be tedious for the government and resource intensive for the press, it is the right mandate for a country that has respect for both national security and the right of the press and public to know about its government's activities." *Id.*

Attorney Paul Smith of Jenner & Block echoed Burton's sentiment, noting that:

Some guy in Washington just is checking cases on a list and . . . we don't get to have any inquiry into how that decision was made. . . . [W]e ought to insist on the principle that the government has to make a case to some person who looks like a judge in each individual case—not just come in and have a blanket closure policy for hundreds of different proceedings.

Symposium, *MLRC Roundtable—Defending Access Post 9/11: Responding to the National Security Challenge*, MEDIA L. RES. CENT. BULL., Jan. 2003, at 1 [hereinafter *MLRC Roundtable*].

<sup>270</sup> See *id.* at 25 (quoting Lee Gelernt, Esq., of the ACLU).

<sup>271</sup> *MLRC Roundtable*, *supra* note 269, at 26 (stating that "this is an important public event that ought to be visible to people"). Attorney Floyd Abrams of Cahill Gordon and

in protecting the nation from security threats. The special interest measures skewed this relationship impermissibly in favor of the government by creating a categorical policy that intentionally excludes the press from courtrooms handling special interest respondents.<sup>272</sup> The case-by-case approach clearly finds constitutional support<sup>273</sup> by meeting the demands of the *Richmond Newspapers* test.<sup>274</sup> When the test applies to a given proceeding, it affords the press with qualified courtroom access that cannot be undermined unless the government exhibits a compelling objective that it can fulfill through a narrowly tailored policy.<sup>275</sup>

*B. The Media Enjoys a Constitutionally Supported Qualified Access Right to Removal Proceedings*

Crucially, each of the courts that considered press access to removal proceedings supported employment of the *Richmond Newspapers* test to evaluate the press plaintiffs' contentions.<sup>276</sup> The courts disagreed only in their analysis of the experience and logic prongs, with three of the four siding in favor of the plaintiffs.<sup>277</sup> There is little doubt, however, that the Third Circuit

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Reindel added that, "one needs to press this theme of the press as a sort of lonely check on governmental abuse." *Id.*

<sup>272</sup> See *Creppy Directive*, *supra* note 2, with its specific bar on press attendance in courtrooms employing special interest procedures.

<sup>273</sup> See *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 692–93 (6th Cir. 2002); *N. Jersey Media Group v. Ashcroft*, 205 F. Supp. 2d 288, 301–02 (D.N.J.) (finding constitutional support for an outcome that preserves the right of immigration judges to make case-by-case determinations), *rev'd*, 308 F.3d 198 (3d Cir. 2002).

<sup>274</sup> *Detroit Free Press*, 303 F.3d at 692–93; *N. Jersey Media Group*, 205 F. Supp. 2d at 301–02.

<sup>275</sup> See *Press-Enterprise II*, 478 U.S. 1, 9–10 (1986) (formalizing the parameters of the *Richmond Newspapers* experience and logic test and the accompanying presumption of access if a proceeding satisfies each of the prongs).

<sup>276</sup> See *Detroit Free Press v. Ashcroft*, 195 F. Supp. 2d 937, 942 (E.D. Mich.), *aff'd*, 303 F.3d 681 (6th Cir. 2002); *Detroit Free Press*, 303 F.3d at 696; *N. Jersey Media Group*, 205 F. Supp. 2d at 300; *N. Jersey Media Group*, 308 F.3d 198, 208–09 (3d Cir. 2002) (confirming that press access to courtrooms is a First Amendment question decided under the *Richmond Newspapers* standard).

<sup>277</sup> See *Detroit Free Press*, 195 F. Supp. 2d at 947; *Detroit Free Press*, 303 F.3d at 710; *N. Jersey Media Group*, 205 F. Supp. 2d at 305 (siding with press plaintiffs). *But see N. Jersey Media Group*, 308 F.3d 220–21 (siding in favor of the government's special interest policy).

misapplied the *Richmond Newspapers* standard to the facts before it.<sup>278</sup> As Judge Scirica articulated in his opinion dissenting from the Third Circuit majority,<sup>279</sup> the majority unevenly applied both the experience and logic prongs. Judge Scirica noted that the majority undersold an established history of openness that satisfied the experience prong,<sup>280</sup> and mistreated perceived risks to national security, when it evaluated the logic and barred qualified access to a removal proceeding.<sup>281</sup>

To support his contention that removal proceedings satisfied the *Richmond Newspapers* experience prong, Judge Scirica questioned whether the majority had inappropriately distinguished between judicial branch criminal proceedings and matters such as social security hearings. The latter, he stated, had a long-standing tradition of closure.<sup>282</sup> Judge Scirica asserted that removal proceedings possess great similarity to judicial branch proceedings because they are adjudicatory; social security hearings, on the other hand, adopt an inquisitorial model.<sup>283</sup>

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<sup>278</sup> As ACLU attorney Lee Gelernt stated:

I agree that the Third Circuit's approach on the logic prong was wrong because the logic prong looks at whether openness would be beneficial to the general process at issue, here the deportation proceeding, and not at whether there may be reasons to close portions of hearings in particular cases or subsets of cases, such as national security cases, to protect against the disclosure of substantive information.

*Id.* at 25.

<sup>279</sup> *N. Jersey Media Group*, 308 F.3d at 221.

<sup>280</sup> *Id.* at 222–24 (Scirica, J., dissenting).

<sup>281</sup> *See id.* at 219 (“To the extent that the Attorney General’s national security concerns seem credible, we [the majority] will not lightly second-guess them.”).

<sup>282</sup> *Id.* at 223–34 (Scirica, J., dissenting).

<sup>283</sup> *Id.* (Scirica, J., dissenting). According to Judge Scirica:

Social Security benefits claim proceedings are distinguishable. They “are inquisitorial rather than adversarial,” in that the Administrative Law Judge undertakes multiple roles as the investigator, counselor, and adjudicator. *Sims v. Apfel*, 530 U.S. 103, 110–11 (2000). The Supreme Court has identified the differences between Social Security claims and other administrative proceedings:

The differences between courts and agencies are nowhere more pronounced than in Social Security proceedings. Although many agency systems of adjudication are based to a significant extent on the judicial model of decisionmaking, the SSA is perhaps the best example of an agency that is not. *Id.* at 110 (internal quotations omitted).

Judge Scirica emphasized that the majority's logic calculus should not have been limited to an examination of special interest removal proceedings, but instead should have evaluated removal proceedings generally.<sup>284</sup> Once Judge Scirica made this distinction, he found logic in maintaining a qualified openness for removal proceedings. He said that if removal proceedings pertained only to potential national security concerns, he would close them as well.<sup>285</sup> Yet, because they typically do not implicate security concerns, and instead address issues such as a respondent's alleged "marriage fraud, moral turpitude convictions, and aggravated felonies," Judge Scirica thought logic compelled qualified openness.<sup>286</sup> Thus, Judge Scirica implicitly acknowledged the liberty interests at stake in removal proceedings, and the consequent importance of the press's observational role.

*C. A Case-by-Case Approach to Courtroom Access, Rather Than the Special Interest Policy, Satisfies Strict Scrutiny*

1. No Compelling Governmental Objective

Because little doubt exists that removal proceedings meet the experience and logic prongs, the government can overcome the press's presumed access right only if it satisfies strict scrutiny by presenting a compelling objective and a matching narrowly tailored provision.<sup>287</sup> Blanket closure of removal proceedings fails both portions of this test.

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*Id.* (Scirica, J., dissenting).

<sup>284</sup> *Id.* at 225 (Scirica, J., dissenting).

<sup>285</sup> *Id.* (Scirica, J., dissenting).

<sup>286</sup> *Id.* (Scirica, J., dissenting). Mr. Gelernt echoed, "What the Third Circuit did, I think, was impermissibly side-step strict scrutiny. It may be that there are reasons to close particular cases but that should not negate a general right of access to a particular type of proceeding." *MLRC Roundtable, supra* note 269, at 25.

<sup>287</sup> According to Mr. Gelernt, "once there is a general right of access to a type of proceeding, the government should have to meet strict scrutiny to overcome the qualified First Amendment right." Professor Cole added, "strict scrutiny almost implies it's got to be done in an individual case by case basis, rather than the categorical cases." *MLRC Roundtable, supra* note 269, at 25.



If the government's interest is framed as an effort to prevent acts of terror within its borders—the generalized approach adopted by the Sixth Circuit<sup>288</sup>—it seems unreasonable to question whether the government's interests rises to a compelling level.<sup>289</sup> If one follows the U.S. District Court for the District of New Jersey's approach, however, and divides the compelling interest into more specific components, the government's interest lacks the same forcefulness. In the New Jersey case, the court separated the government's compelling interest in two subcategories: "(1) avoidance of setbacks to its terrorism investigation caused by open hearings; and (2) prevention of stigma or harm to detainees that might result if hearings were open."<sup>290</sup> Although the New Jersey district court did not state definitively whether either prong should be categorized as compelling,<sup>291</sup> its commentary implied distrust of both of them.<sup>292</sup> Moreover, the U.S. District Court for the Eastern District of Michigan<sup>293</sup> and various scholars have explicitly echoed such sentiment.

Those who question that open hearings alone constitute a reason for closure often point to the purely speculative nature of the mosaic theory.<sup>294</sup> Numerous measures to prevent disclosure of information have, over time, proven misguided, including America's now-derided decision<sup>295</sup> to control Japanese Americans

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<sup>288</sup> See *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 706 (6th Cir. 2002) (noting that "the Government certainly has a compelling interest in preventing terrorism").

<sup>289</sup> See *Detroit Free Press v. Ashcroft*, 195 F. Supp. 2d 937, 946–47 (E.D. Mich.), *aff'd*, 303 F.3d 681 (6th Cir. 2002) (questioning whether the government's interest was compelling).

<sup>290</sup> *N. Jersey Media Group v. Ashcroft*, 205 F. Supp. 2d 288, 301 (D.N.J.), *rev'd*, 308 F.3d 198 (3d Cir. 2002). The first prong the court highlighted pertains to the mosaic theory, and the government's fear that information publicized from the hearings could unwittingly aid terrorists. The second prong refers to the government's argument that open hearings would harm respondents by stigmatizing them unnecessarily.

<sup>291</sup> *Id.* at 301–02.

<sup>292</sup> *Id.*

<sup>293</sup> *Detroit Free Press*, 195 F. Supp. 2d at 946–47.

<sup>294</sup> *MLRC Roundtable*, *supra* note 269, at 39 ("While yes, we definitely have to protect national security," said Attorney Laura Handman of Davis Wright Tremaine, "we need to have some evidence that disclosure will harm national security.").

<sup>295</sup> See *id.* (quoting Professor Cole).

during World War II by placing them in internment camps.<sup>296</sup> The Palmer Raids of 1920 serve as another cautionary tale.<sup>297</sup> There, the government arrested nearly 4,000 individuals with alleged anti-American affiliations,<sup>298</sup> relying on tactics considered constitutionally inappropriate in retrospect.<sup>299</sup> Similarly, despite the glowing praise that most historians bestow on President Abraham Lincoln, there exists widespread disapproval of Lincoln's decision to suspend habeas corpus during the Civil War in order to silence critics of the tottering Union.<sup>300</sup>

Others have stressed that efforts to prevent disclosure by closing hearings undermine the press freedoms that America's Founding Fathers codified in the Bill of Rights.<sup>301</sup> They argue that as a direct consequence of the limitations on press access, detained aliens have lacked their constitutionally-protected vehicle to share stories about the special interest process.<sup>302</sup> As such, these critics have questioned whether other detainees have been treated like Hady Hassan Omar, without public knowledge.<sup>303</sup>

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<sup>296</sup> See *Korematsu v. United States*, 323 U.S. 214 (1944) (confirming the constitutionality of this policy).

<sup>297</sup> *MLRC Roundtable*, *supra* note 269, at 51.

<sup>298</sup> According to historian Allan Levine:

[O]n the evening of Jan. 2, 1920, hundreds of agents from the U.S. Bureau of Investigation (it became the FBI in 1935), assisted by local police and volunteers from the American Legion, swarmed across much of the United States to arrest nearly 4,000 suspected radicals, Communists, Bolsheviks, anarchists and "aliens." Without proper arrest or search warrants in their possession, the agents invaded political party headquarters, private homes, even bowling alleys. Many of those arrested were beaten, herded into crowded, unsanitary detention centres, and not allowed to communicate with their families or lawyers for weeks.

Allan Levine, *Return of the Red Scare*, GLOBE & MAIL (Toronto), Jan. 2, 2003, at A15.

<sup>299</sup> *Id.*

<sup>300</sup> *MLRC Roundtable*, *supra* note 269, at 22. Intriguingly, Handman indicates that Congress compelled President Lincoln to publicize the names of those individuals being detained during the suspension of habeas corpus. *Id.* at 22. The special interest policy, on the other hand, makes no such concession. See *Creppy Directive*, *supra* note 2.

<sup>301</sup> *Id.* at 22.

<sup>302</sup> See *id.* (referring to Hady Hassan Omar's plight, as chronicled in Brzezinski, *supra* note 91, at 50).

<sup>303</sup> *MLRC Roundtable*, *supra* note 269, at 38. According to Handman, "[w]hen they are detaining people and depriving them of their liberty, the public needs to know, has a right

As for the second governmental interest identified by the U.S. District Court for the District of New Jersey—the protection of respondents’ identities<sup>304</sup>—the government’s mandate “does not permit the individual to elect such protective treatment.”<sup>305</sup> The district court added that, “this interest is coextensive with the individual’s preference to see it invoked, given that closure may be seen by some detainees as having a negative impact upon them and their interests.”<sup>306</sup> In other words, the court argued that if a respondent prefers to have press observing a proceeding, she should have the personal liberty to make that choice.

## 2. No Narrow Tailoring

Even if one construes the government’s objectives as compelling, the measures employed to fulfill them fail the narrow tailoring requirement.<sup>307</sup> Most of the arguments questioning the tailoring—both from courts and from commentators—have cited the Creppy Directive’s inability to prevent information with mosaic theory implications from leaving the courtroom. As the Sixth Circuit noted, even the Attorney General’s order cannot constitutionally remedy this flaw.<sup>308</sup> The order improperly limits participants in special interest cases from speaking about matters

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to know something about these important investigations done in their name. . . . Are these detentions worth the price—the price in liberty?” *Id.*

Professor Cole believes the government had an interest other than the spread of information in mind. “[I] think they wanted to use immigration authority to detain people. . . . The fact that someone has overstayed his visa generally doesn’t authorize detaining the person. It authorizes deporting them if [they are] not eligible for some sort of benefit.” *Id.* at 40.

<sup>304</sup> *N. Jersey Media Group v. Ashcroft*, 205 F. Supp. 2d 288, 301 (D.N.J.), *rev’d*, 308 F.3d 198 (3d. Cir 2002).

<sup>305</sup> *Id.* at 301–02. The court addressed this second prong as part of its tailoring analysis, but the question should have been assessed independently within an analysis of the government’s interests. *Id.* The court, however, undertook no such effort. *Id.*

<sup>306</sup> *Id.* at 302.

<sup>307</sup> *See, e.g., Detroit Free Press v. Ashcroft*, 303 F.3d 681, 709–10 (6th Cir. 2002) (agreeing that the government’s efforts failed to meet the narrow tailoring requirement); *Detroit Free Press*, 195 F. Supp. 2d 937, 947 (E.D. Mich.) (agreeing that the government’s efforts failed to meet the narrow tailoring requirement), *aff’d*, 303 F.3d 681 (6th Cir. 2002); *N. Jersey Media Group*, 205 F. Supp. 2d at 301 (agreeing that the government’s efforts failed to meet the narrow tailoring requirement).

<sup>308</sup> *Detroit Free Press*, 303 F.3d at 708.

that are external to the proceedings, such as a respondent's date and place of arrest, as well as his name.<sup>309</sup>

The government's efforts also lack narrow tailoring because they would impact upon press rights at criminal proceedings, even though *Richmond Newspapers* granted the press a qualified right of access to such courtrooms.<sup>310</sup> Specifically, if the government fully applied the measures in the Creppy Directive intended to prevent the spread of an information mosaic, the government would have to utilize them in the cases of those held on purely criminal charges after September 11.<sup>311</sup> Because *Richmond Newspapers* protected a qualified access right to criminal proceedings, however, employment of the blanket policy to this extent would directly contradict Supreme Court precedent.<sup>312</sup> As a result, the Creppy Directive exhibits constitutionally impermissible over-breadth.<sup>313</sup> Others have critiqued the policy as overbroad because it may lead to more questionable detentions like that of Hady Hassan Omar's—where the government eventually decided that it lacked sufficient grounds to employ special interest tactics.<sup>314</sup>

#### *D. Press as the Public's Seeker of Truth*

Because the government failed to define compelling interests or a policy that exhibits suitably narrow tailoring, the special interest process clearly fails the strict scrutiny test and lacks constitutionality. As such, there was no reason to deviate from the previously employed system of case-by-case closure, as compelled by the *Richmond Newspapers* test. The case-by-case method more evenly balances the concerns of the government and the press than the special interest policy ever could. America differentiates itself from more oppressive regimes by constitutionalizing the press's duty to observe matters of all sorts on the public's behalf. Of

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<sup>309</sup> *Id.*

<sup>310</sup> See *MLRC Roundtable*, *supra* note 269, at 23 (drawing from Professor Cole's commentary).

<sup>311</sup> *Id.*

<sup>312</sup> See *id.*

<sup>313</sup> Cole noted that "[t]heir arguments prove too much." *Id.* at 23.

<sup>314</sup> See *MLRC Roundtable*, *supra* note 269, at 36; Brzezinski, *supra* note 91, at 50.

course, certain instances may exist when the government has concretized reasons to fear that disclosure of information will directly compromise the nation's safety. Rather than deciding arbitrarily that the government interests trump those equally weighty concerns of the press, it is more appropriate for a judge to balance the competing interests in each case and to make specific determinations on closure as she sees fit.

It is possible, however, that an EOIR judge without a clear understanding of the government's national security scheme could make an uninformed decision on closure. That is precisely why, in each case, the government must present facts to such a judge in order to make such a judge aware of special circumstances. At the same time, the judge should have the opportunity to hear from press representatives who can make First Amendment arguments of their own. This system may lead to perceived inconsistency, of course, as one case might remain open while another with superficially similar facts would close. But that inconsistency is only an illusion because each case presents unique circumstances. A judge should rely on the discretion entrusted to her to make fair and just decisions.

#### CONCLUSION: THE COURSE TO THE SUPREME COURT HAS BEEN SET

"The last chapter of this issue and these cases has yet to be written."<sup>315</sup> Media interests have opted to challenge the Third Circuit's decision,<sup>316</sup> and in May 2003, Supreme Court began to consider whether to grant a writ of certiorari in order to determine the constitutionality of the special interest policy.<sup>317</sup> Although it seems likely that the Supreme Court will grant a writ of certiorari to resolve the split between the Third and Sixth Circuits, there remains an "aura of unpredictability"<sup>318</sup> regarding the case's

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<sup>315</sup> Eve Burton, *supra* note 246, at 65.

<sup>316</sup> Tony Mauro, *Weighing Security Against Public Access: Justices to Consider Newspapers' Petition Challenging Closed Deportation Proceedings for 'Special Interest' Aliens*, LEGAL TIMES, May 19, 2003, at 11.

<sup>317</sup> *Id.*

<sup>318</sup> Marcia Coyle, *Immigration Issue Splits U.S. Courts: It's Media v. U.S. on Closed Hearings*, NAT'L L.J., Oct. 14, 2002, at A1. Ms. Burton cautions both the government

outcome. Therefore, “It’s going to take some very serious thinking about how to count to five on this case in this court,”<sup>319</sup> and observers remain uncertain whether the special interest policy will survive the Court’s scrutiny.<sup>320</sup>

The Court last evaluated a press access matter when it sharpened the experience and logic test in its June 1986 *Press-Enterprise II* decision.<sup>321</sup> In that case, the Court held in favor of press interests that had sought access to preliminary trial proceedings.<sup>322</sup> Since then, the Court’s membership has changed dramatically: only Chief Justice William Rehnquist, Justice John Paul Stevens and Justice Sandra Day O’Connor remain.<sup>323</sup>

Unfortunately, examination of the justices’ decisions in these cases fails to make clear how these justices will respond to the current press issue. Justice Stevens wrote in *Richmond Newspapers* that, “the First Amendment protects the public and press from abridgement of their rights of access to information about the operation of their government, *including* the judicial branch.”<sup>324</sup> This indicates that Justice Stevens might support the application of First Amendment rights to the administrative proceedings that have been closed by the special interest policy. Nevertheless, Justice Stevens dissented in both *Globe Newspaper v. Superior Court for the County of Norfolk*<sup>325</sup> and *Press-Enterprise II*,<sup>326</sup> even though he concurred with the majority in *Press-Enterprise I*.<sup>327</sup> Chief Justice Rehnquist exhibited inconsistency because he dissented in *Richmond Newspapers, Inc.*

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and press interests to “proceed carefully” because “both sides face uncertainties.” Eve Burton, *supra* note 246, at 65.

<sup>319</sup> *MLRC Roundtable*, *supra* note 269, at 32 (quoting Lee Levine, Esq., of Levine, Sullivan, and Koch).

<sup>320</sup> See Coyle, *supra* note 318, at A1.

<sup>321</sup> See *Press-Enterprise II*, 478 U.S. 1 (1986).

<sup>322</sup> *Id.* at 2.

<sup>323</sup> See Supreme Court of the United States, *Biographies of Current Members of the Supreme Court*, available at <http://www.supremecourtus.gov/about/about.html> (last visited May 13, 2003).

<sup>324</sup> *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 584 (1980) (emphasis added).

<sup>325</sup> 457 U.S. 596, 620 (1982).

<sup>326</sup> 478 U.S. at 15.

<sup>327</sup> 464 U.S. at 516 (Stevens, J., concurring).

*v. Virginia*,<sup>328</sup> *Globe Newspaper*<sup>329</sup> and *Press-Enterprise II*,<sup>330</sup> but he sided with the *Press-Enterprise I* majority.<sup>331</sup> It seems possible that Justice O'Connor would side with the current media plaintiffs because she supported the media in *Globe Newspaper*,<sup>332</sup> *Press-Enterprise I*,<sup>333</sup> and *Press-Enterprise II*.<sup>334</sup> Still, Justice O'Connor had not yet assumed her seat on the Court when it decided *Richmond Newspapers*,<sup>335</sup> so her record may not clearly indicate how she will evaluate the current circuit split.

Some of the Court's justices also might be swayed to alter the *Richmond Newspapers* test because nearly twenty years have elapsed since the last holding in the *Richmond Newspapers* line. Justice Stephen Breyer and Justice O'Connor tend to avoid bright-line tests like the *Richmond Newspapers* standard so they may opt for a standard that reflects their preferred principles.<sup>336</sup> Justice Breyer, for one,<sup>337</sup> might be more inclined to adopt a flexible measure similar to the one he employed in his *Bartnicki v. Vopper*<sup>338</sup> concurring opinion.<sup>339</sup>

If the Court maintains the *Richmond Newspapers* standard in its current form, however, the experience prong may be important to Justice Clarence Thomas,<sup>340</sup> who emphasized the importance of

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<sup>328</sup> 448 U.S. at 604.

<sup>329</sup> 457 U.S. at 612.

<sup>330</sup> 478 U.S. at 15.

<sup>331</sup> 464 U.S. at 503.

<sup>332</sup> 457 U.S. at 611 (O'Connor, J., concurring).

<sup>333</sup> 464 U.S. at 503.

<sup>334</sup> 478 U.S. at 3.

<sup>335</sup> 448 U.S. 555, 584 (1980); see also *supra* note 323.

<sup>336</sup> *MLRC Roundtable*, *supra* note 269, at 18 ("You have a number of justices on this Court, Justice Breyer and Justice O'Connor foremost among them, who don't like bright-line tests.").

<sup>337</sup> See *id.* (highlighting Mr. Levine's thoughts on Justice Breyer).

<sup>338</sup> 532 U.S. 514 (2001).

<sup>339</sup> See *id.* at 535 (Breyer, J., concurring). *Bartnicki* pertained to statutory language that affected the public broadcast of intercepted cellular telephone communication. In his concurrence, Justice Breyer said that he "would ask whether the statutes strike a reasonable balance between their speech-restricting and speech-enhancing consequences." *Id.* at 536 (Breyer, J., concurring).

<sup>340</sup> See *MLRC Roundtable*, *supra* note 269, at 32 (quoting Mr. Levine's statement that Justice Thomas has a preference for history).

historical context in *McIntyre v. Ohio Elections Commission*.<sup>341</sup> Justice Breyer might treat the experience prong less rigidly.<sup>342</sup> When Justice Breyer sat on the First Circuit, he signed onto a majority decision<sup>343</sup> that involved the *Richmond Newspapers* test involving access to a bail hearing.<sup>344</sup> “Essentially, the opinion said, even though there is no history of access to bail proceedings, that’s no problem.”<sup>345</sup> Another case from his tenure on the First Circuit, however, exposes an inconsistency in Breyer’s stance toward the *Richmond Newspapers* test. Justice Breyer signed onto a majority decision<sup>346</sup> that questioned whether *Richmond Newspapers* and its progeny extend beyond the criminal court context.<sup>347</sup>

An argument that emphasizes the plenary power of Congress over the executive branch also might play well before Justice O’Connor, as well as Justice Anthony Kennedy. Because the court cannot easily conduct substantive review of executive branch activities in immigration and national security, it becomes “all the more important” to allow journalists to observe removal proceedings so that they can detail the procedures for the public’s benefit.<sup>348</sup> Otherwise, the executive branch would operate without checks on its conduct.<sup>349</sup> Nevertheless, the Court may refrain from this approach for fear of interfering at all with Congress’s plenary authority.<sup>350</sup>

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<sup>341</sup> 514 U.S. 334, 358 (1995) (Thomas, J., concurring). The Court allowed a petitioner to distribute anonymous leaflets regarding a proposed school tax, even though the action violated Ohio state law. Justice Thomas asserted that the chief question in the case was “whether the phrase ‘freedom of speech, or of the press,’ as originally understood, protected anonymous political leafletting.” *Id.* at 359.

<sup>342</sup> See *MLRC Roundtable*, *supra* note 269, at 19 (noting comments of David Schulz, Esq., of Clifford Chance).

<sup>343</sup> *In re Globe Newspaper Co.*, 729 F.2d 47 (1st Cir. 1984).

<sup>344</sup> *MLRC Roundtable*, *supra* note 269, at 19.

<sup>345</sup> *Id.* (quoting David Schulz).

<sup>346</sup> *El Dia, Inc. v. Hernandez-Colon*, 963 F.2d 488 (1st Cir. 1992).

<sup>347</sup> *MLRC Roundtable*, *supra* note 269, at 19.

<sup>348</sup> See *generally id.* (referring to the comments of Professor Cole and Floyd Abrams, Esq.).

<sup>349</sup> *Id.*

<sup>350</sup> See Coyle, *supra* note 318, at A1 (quoting Peter Shane, a legal scholar at Carnegie-Mellon University).



Access to removal proceedings also may raise questions of law that might not fit neatly into the *Richmond Newspapers* line because the issue presents a rare juxtaposition of administrative and First Amendment law.<sup>351</sup> Because the Court has dealt only with judicial branch proceedings in its previous holdings in the *Richmond Newspapers* line<sup>352</sup> rather than administrative proceedings or other functions of the executive branch, the Court might permit the special interest policy to continue.<sup>353</sup> “If the [C]ourt should be persuaded that there is a pervasive national security problem with every single immigration case in this area, we are going to lose the case and they will find the words for us to lose it.”<sup>354</sup>

In the end, the Court may consider the security risks too great to permit qualified public access.<sup>355</sup> Such arguments convinced the Third Circuit’s majority, and may continue to hold sway.<sup>356</sup> History does not offer further guidance because the Court has inconsistently treated challenges to executive branch tactics during times of war. Will the Court follow the logic of *Korematsu*<sup>357</sup> and support the government’s contention that times of war require limitations on liberty?<sup>358</sup> Or will the Court follow the media-

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<sup>351</sup> According to Jan Ting, a professor of immigration and tax law at the Temple University School of Law, “[m]y own feeling is this is almost unprecedented. . . . I’m just unaware of a prior First Amendment access claim being made successfully in an immigration case. I was very surprised by the 6th Circuit decision.” *Id.*

<sup>352</sup> Expansion of the *Richmond Newspapers* test to contexts outside of judicial branch proceedings has occurred only in Circuit and District Court decisions.

<sup>353</sup> Professor Ting asked, “[i]f you’re going to allow a First Amendment right, where do you draw a line? Why shouldn’t the New York Times be able to send a reporter into cabinet meetings?” Coyle, *supra* note 318, at A1.

<sup>354</sup> See *MLRC Roundtable*, *supra* note 269, at 26 (quoting Abrams).

<sup>355</sup> Author Roger Parloff wrote, “[f]rom a judge’s perspective, the argument is horrifyingly difficult to reject. The executive branch is saying to the judiciary: We can’t be specific, and we know you may not understand, but you must trust us—otherwise, the blood will be on your hands.” Roger Parloff, *Dicta: Closed Doors*, AM. LAW. 130 (2002).

<sup>356</sup> Parloff then noted the effect of the government’s argument on Judge Morton Greenberg, one of the two judges on the Third Circuit who comprised the majority in *N. Jersey Media Group*. In oral arguments on Sept. 17, 2002, Judge Greenberg stated that, “[w]e could make a decision here and people could die. Lots of people.” *Id.*

<sup>357</sup> 323 U.S. 214 (1944).

<sup>358</sup> *Id.* at 219–220. In the case that confirmed the constitutionality of Japanese American internment during World War II, the Court opined:

supportive approach of *New York Times v. United States*,<sup>359</sup> which asserted the rights of the press to serve as the public's sentry? In due time, the Justices will let us know.

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[H]ardships are part of war, and war is an aggregation of hardships. All citizens alike, both in and out of uniform, feel the impact of war in greater or lesser measure. Citizenship has its responsibilities as well as its privileges, and in time of war the burden is always heavier. Compulsory exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions. But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.

*Id.* Although never overturned, *Korematsu* was denounced as an ill-advised venture “into the ugly abyss of racism.” *Id.* at 233 (Murphy, J., dissenting).

<sup>359</sup> 403 U.S. 713 (1971) (preventing the government from imposing a prior restraint on the press's publication of confidential government documents it had secured from a third party).