AN ALTERNATIVE TO THE BLANKET CLOSURE OF "SPECIAL INTEREST" DEPORTATION HEARINGS: BALANCING THE PRESS'S RIGHT TO ACCESS AND THE GOVERNMENT'S NATIONAL SECURITY INTERESTS

I. INTRODUCTION

After the horrific terrorist attacks on the World Trade Center on September 11, 2001, the U.S. government took swift action to implement laws giving it broad powers to combat terrorism. As the government implemented executive and legislative policy to increase its ability to investigate suspected terrorist activity, it adversely affected the due process, liberty, privacy, and free speech rights of citizens and aliens alike. Some of the government's protective measures include the following: the deportation of more than 400 aliens during the September 11 sweeps,[1] most of whom were deported on charges unrelated to terrorist activity;[2] the closure of "special interest" deportation hearings pursuant to the Creppy Directive;[3] the detention of American citizens as "enemy combatants" at military camps without being formally charged with a crime;[4] and the passage of the USA Patriot Act, which significantly increases the government's authority to conduct extensive wiretapping surveillance on both lawful and suspected terrorist activity. [5]

On September 21, 2001, in an effort to prevent the release of information that could thwart the government's terrorist investigations, Chief Immigration Judge Michael Creppy, at the direction of Attorney General John Ashcroft, issued a memorandum ("Creppy Directive") directing all U.S. immigration judges to close all "special interest" deportation hearings to the public, friends, and family members of the alien-detainees.[6] The Creppy Directive cited heightened security measures as a reason for mandating closure of "special interest" deportation hearings.[7] Since its issuance, two federal appeals courts have reviewed the Creppy Directive and are split on its

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1. Matthew Brzezinski, *Hady Hassan Omar's Detention*, N.Y. TIMES, Oct. 27, 2002, at 50.

2. Recent Case, N. Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198 (3d Cir. 2002), 116 HARV. L. REV. 1193, 1193 (2003).

3. N. Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198, 202 (3d Cir. 2002) (holding the Creppy Directive constitutional and closing special interest deportation hearings).

4. *E.g.*, Hamdi v. Rumsfeld, 316 F.3d 450, 459 (4th Cir. 2003); Padilla *ex rel.* Newman v. Bush 233 F. Supp. 2d 564, 569 (S.D.N.Y. 2002).

5. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

6. *N. Jersey Media Group, Inc.*, 308 F.3d at 202-03. The memo directs immigration judges to close the cases to the public and to abstain from discussing the case with anyone outside of the immigration court. *Id.* at 203.

7. *Id.* at 202.

constitutionality.[8] The Sixth Circuit held the Creppy Directive unconstitutional, recognizing a right under the First Amendment to attend deportation hearings.[9] The Third Circuit disagreed, holding the Creppy Directive constitutional, and denied the press the right to access special interest deportation hearings.[10]

This Comment suggests that the Creppy Directive is unconstitutional and provides a novel solution that will strike a balance between honoring the press's First Amendment right to access and the government's right to safeguard national security. Part II provides an overview of Congress's plenary authority over immigration matters. Part III summarizes the federal courts' jurisprudence on the press's right to access, and Part IV discusses the circuit split. Part V analyzes the constitutionality of the Creppy Directive, and Part VI provides an alternative to the Creppy Directive.

II. CONGRESS'S POWER TO REGULATE IMMIGRATION AND DEPORTATION

As a matter of judicial construction, the Constitution is often interpreted as granting Congress plenary exercise of authority over immigration matters,[11] providing little room for judicial review.[12] Pursuant to this constitutional authority, in 1994 Congress delegated much of its power over immigration to the executive by passing the Immigration and Nationality Act.[13] This Act grants the attorney general the power of "administration and enforcement" of "all . . . laws relating to the immigration and naturalization of aliens."[14] Pursuant to this authority, Attorney General Ashcroft promulgated 8 C.F.R. § 240.48, which governs public access to deportation hearings.[15] Pursuant to this regulation, on September 21, 2001, at the direction of Attorney General Ashcroft, Chief Immigration Judge Creppy issued a directive instructing all U.S. immigration judges to close all "special interest" deportation hearings to the public, friends, and family members of the alien-detainees.[16] The Creppy Directive also cited heightened security measures as a reason for the mandatory blanket closure on deportation hearings.[17]

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8. *See* discussion *infra* Part IV.
9. Detroit Free Press v. Ashcroft, 303 F.3d 681, 683 (6th Cir. 2002).
10. *N. Jersey Media Group, Inc.*, 308 F.3d at 202.
11. *See* U.S. CONST. art. I, § 8, cl. 4. "'[O]ver no conceivable subject [immigration] is the legislative power of Congress more complete than it is over' the admission of aliens." Fiallo v. Bell, 430 U.S. 787, 792 (1977) (quoting Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909)).
12. *See Detroit Free Press*, 303 F.3d. at 687.
13. 8 U.S.C. § 1103(a) (1994).
14. *Id.*
15. 8 C.F.R. § 240.48 (2003).
16. N. Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198, 202-03 & n.1 (3d Cir. 2002). The memo directs the immigration judges to close the cases to the public and to abstain from discussing the case with anyone outside of the immigration court. *Id.* at 203.
17. *Id.*

III. THE PRESS'S RIGHT TO ACCESS

A. Historical Principles of the First Amendment

A historical examination of the Supreme Court's First Amendment jurisprudence reveals that protection of free thought and expression from governmental control is an ideal of recent vintage.[18] The Court's earlier interpretations of the First Amendment were not as broad as they are today.[19] In the 1920s, federal courts commonly held individuals in contempt of court for speech that criticized judicial decisions and questioned the integrity of the court.[20] Courts also sanctioned government control over the content of speech by upholding convictions that punished individuals for advocating political change and criticizing the government,[21] especially during times of war.[22]

Not until 1957 did the Supreme Court first acknowledge that it is unconstitutional for the government to proscribe the advocacy and teaching of forcible overthrow of government without the speaker's effort to "instigate action."[23] Since then, the Supreme Court in *Brandenburg v. Ohio*[24] made it clear that the constitutional guarantees of free speech forbid the government from proscribing the "advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." [25] Since *Brandenburg*, the Court has closely guarded First Amendment rights from governmental regulation that is overly broad, [26] vague,[27]or that effectively works as a presumptively unconstitutional prior restraint.[28]

B. Backdrop of the Press's Right to Access

The Sixth Amendment guarantees criminal defendants the right to a public trial.[29] The Supreme Court perfected this implicit right of access in *Richmond Newspapers, Inc. v. Virginia*.[30] In *Richmond Newspapers*, the

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18. *See* WILLIAM COHEN, CONSTITUTIONAL LAW, CASES AND MATERIALS 1204 (11th ed. 2001).
19. *Compare* Gitlow v. New York, 268 U.S. 652, 666-71 (1925), *with* Brandenburg v. Ohio, 395 U.S. 444, 447-48 (1969).
20. *See* Walter Nelles & Carol Weiss King, *Contempt by Publication in the United States*, 28 COLUM. L. REV. 401, 407-08 (1928).
21. *See* Whitney v. California, 274 U.S. 357, 372 (1927); *Gitlow*, 268 U.S. at 667.
22. *See* Schenck v. United States, 249 U.S. 47, 52-53 (1919).
23. Yates v. United States, 354 U.S. 298, 318 (1957).
24. 395 U.S. 444 (1969).
25. *Id.* at 447.
26. Coates v. Cincinnati, 402 U.S. 611, 614 (1971).
27. *Id.*; Herndon v. Lowry, 301 U.S. 242, 259 (1937).
28. Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 716 (1931).
29. U.S. CONST. amend. VI.
30. 448 U.S. 555 (1980). In *Richmond Newspapers*, the issue was whether the press had a First Amendment right to attend criminal trials. *Id.* at 558. The Supreme Court looked to both experience and logic in determining whether the press enjoyed a right to attend criminal trials. *Id.* at 564-81. A history of openness will often satisfy the experience prong. *Id.* at 567-69. For the logic prong, the Court looked

Court held that the First Amendment guarantees the press a right to attend criminal trials.[31] By contrast, the same is not true for civil proceedings. The First Amendment does not expressly guarantee the press a right to access civil proceedings, particularly deportation hearings.[32] Nor has the Supreme Court expressly held that the press has a First Amendment right to attend civil proceedings.[33] Moreover, legal commentary posits that historically under the First Amendment there is no right to attend civil proceedings.[34]

The fact that history evidences little support for the right to access civil proceedings is of little consequence when one examines courts' prevailing practice of granting access to civil hearings and the similarities between deportation hearings and criminal trials.[35]

1. Courts' Prevailing Practice of Granting Access to Civil Proceedings

First, in *Richmond Newspapers*,[36] Chief Justice Burger noted that "important but unarticulated rights have nonetheless been found to share constitutional protection in common with explicit guarantees."[37] Lower federal courts have acknowledged Burger's observation, and in practice, courts frequently extend this right of access to civil proceedings.[38] However, history also shows that certain civil proceedings are held in private, such as juvenile proceedings[39] and other hearings where openness would violate a

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to the positive impact of opening trials to the public. *Id.* at 569-73.

31. *Id.* at 580.

32. *See* U.S. CONST. amend. I.

33. Carol A. Crocca, Annotation, *Propriety of Exclusion of Press or Other Media Representatives from Civil Trial*, 39 A.L.R. 5th 103 (1996).

34. *See* U.S. CONST. amend. I; Crocca, *supra* note 33.

35. *See* Crocca, *supra* note 33; *infra* note 38.

36. 448 U.S. 555 (1980).

37. *Id.* at 580.

38. *In re* Iowa Freedom of Info. Council, 724 F.2d 658, 661 (8th Cir. 1983) (finding a First Amendment right of access to contempt proceedings—a hybrid of criminal and civil proceedings); Newman v. Graddick, 696 F.2d 796, 801 (11th Cir. 1983) (granting the press a right to attend civil proceedings concerning the release of prisoners); *In re* Application of A.H. Belo Corp., 66 F. Supp. 2d 47, 49 (D.D.C. 1999) (stating that under the First Amendment the media and public possess a right to access public hearings and documents where a two-part test (akin to the *Richmond Newspapers* test) is satisfied). In *Newman*, the Eleventh Circuit limited its holding to civil proceedings concerning the release or incarceration of prisoners and the prison's living conditions. *Newman*, 696 F.2d at 801. However, the Eleventh Circuit observed, in accord with the Supreme Court in *Globe Newspaper Co. v. Superior Court*, that "'where, as in the present case, the [court] attempts to deny access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to that interest.'" *Id.* at 802 (quoting Globe Newspaper Co. v. Super. Ct., 457 U.S. 596, 606-07 (1982)). The *Newman* standard was also affirmed in *Wilson v. American Motors Corp.*, 759 F.2d 1568, 1570-71 (1985) (holding that where a court attempts to deny the public access to a civil proceeding, it must satisfy strict scrutiny).

39. Crocca, *supra* note 33, at 129-30. *See generally* Webster Groves Sch. Dist. v. Pulitzer Publ'g Co., 898 F.2d. 1371, 1376 (8th Cir. 1990) (finding that publisher was not entitled to attend motion to enjoin handicapped student from attending school pending exhaustion of administrative expulsion hearings); *In re* Minor, 563 N.E.2d 1069, 1075 (Ill. App. Ct. 1990) (holding that the press does not have an absolute right under the First Amendment to attend juvenile proceedings).

party's privacy[40] or result in significant harm to a party or the general public.[41] However, these firmly-rooted exceptions generally do not include deportation hearings,[42] and there is hardly a reason to carve out an additional exception for deportation hearings. Further, there is no reason to close special interest deportation hearings in the absence of establishing a tenable link between the detainee and terrorist activity. Lastly, deportation hearings have generally been open to the public,[43] and formal administrative proceedings are embracing openness.[44]

2. *Similarities Between Deportation Hearings and Criminal Proceedings*

Second, deportation hearings are quasi-criminal in nature. In deportation hearings, the hearing is adversarial, the alien is entitled to due process, and his ultimate stake in liberty is the same as or greater than in criminal or civil actions.[45] Moreover, deportation hearings are similar to judicial hearings in areas of procedure, burdens of proof, the fact that liberty rights are at stake, the right to habeas corpus relief, and the fact that judges preside over the hearings. [46] The similarities between deportation hearings and judicial hearings are profound and require that they be treated equally for purposes of access.[47]

C. The Applicable Tests for Establishing a Right to Access and Protecting It from Prior Restraints

When one views the Creppy Directive as eroding the press's right to access court proceedings, the appropriate test is the "experience and logic" test.[48] The "experience and logic" test[49] first emerged in *Richmond Newspa-*

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40. Crocca, *supra* note 33, at 128-29. *See generally* State *ex rel.* Great Falls Tribune Co. v. Mont. Eighth Jud. Dist. Ct., 777 P.2d 345, 350 (Mont. 1989) (holding that the public and the press have a right to access court proceedings except where an individual's privacy right outweighs the merits of openness).

41. Ospina v. Trans World Airlines, Inc., 975 F.2d 35, 36 (2d Cir. 1992) (observing the district court's order that the trial be closed to the public *at such times* as sensitive, anti-terrorist airline security information was disclosed) (emphasis added). Notably, in *Ospina*, the district court closed the trial only during the times when sensitive information was disclosed; at all other times the trial was open to the public.

42. There are a few exceptions where deportation hearings are conducted in private; these hearings are usually private when the alien is located in a jail, hospital, or prison, and the INS conducts the hearing wherever the alien is located. JANE PERRY CLARK, DEPORTATION of ALIENS FROM THE UNITED STATES TO EUROPE 363 (1968).

43. Detroit Free Press v. Ashcroft, 303 F.3d 681, 701 (6th Cir. 2002).

44. *See* KENNETH CULP DAVIS, 3 ADMINISTRATIVE LAW TREATISE § 14:13 (2d ed. 1980).

45. *Detroit Free Press*, 303 F.3d at 696 (quoting N. Jersey Media Group, Inc. v. Ashcroft, 205 F. Supp. 2d 288, 301 (D.N.J. 2002)).

46. *See id.* at 696-98.

47. *Id.* at 696-99.

48. N. Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198, 208-09 (3d Cir. 2002); *Detroit Free Press*, 303 F.3d at 694-96.

49. Scholars tout Justice Brennan's concurring opinion in *Richmond Newspapers* as being the most

pers, Inc. v. Virginia[50] when the Supreme Court held that the press and the public have a First Amendment right to attend criminal trials.[51] In *Press-Enterprise Co. v. Superior Court*,[52] the Supreme Court refined the *Richmond Newspapers* test such that a *qualified* right of access is proved when there has been a "tradition of accessibility" to the type of proceeding at issue,[53] and "public access plays a significant positive role in the function[] of the particular process in question."[54] Since then, courts have applied the *Richmond Newspapers* query as a test of general applicability.[55] Federal courts employ this test to determine if a right of access exists outside the context of criminal trials,[56] including deportation hearings[57] and administra-

important because it "became the foundation for subsequent decisions in this area." Michael J. Hayes, Note, *What Ever Happened to "The Right to Know"?: Access to Government-Controlled Information Since* Richmond Newspapers, 73 VA. L. REV. 1111, 1117 (1987). The "logic" portion is one of "two helpful principles" that Brennan discusses in his concurrence. Richmond Newspapers, Inc. v. Virginia., 448 U.S. 555, 589 (1980). The "logic" query may be satisfied by determining "whether access to a particular government process is important in terms of that very process." *Id.* at 589 (Brennan, J., concurring). While Brennan's "two helpful principles" were not set out as mandatory requirements, in practice courts have required a showing of both logic and experience (experience may be satisfied by a historical tradition of openness). Press-Enterprise Co. v. Super. Ct., 478 U.S. 1, 8 (1986) (describing the two-part test as "two complementary considerations"); *N. Jersey Media Group, Inc.*, 308 F.3d. at 216 (refusing to find a right of access solely on the logic prong). Notably, the Third Circuit, while requiring the experience prong, gives little weight to the logic prong, because as currently applied, no proceeding has passed the history prong but failed the logic inquiry. *Id.* at 217. The Third Circuit notes the importance in looking at not only the positive impact that openness would have but also any negative impact that openness would have on the public's safety and welfare. *Id.*

50. In *Richmond Newspapers*, the issue was whether the press had a First Amendment right to attend criminal trials. The Supreme Court looked to both experience and logic in determining whether the press enjoyed a right to attend criminal trials. A history of openness will often satisfy the experience prong, and for the logic prong, the Court looked to the positive impact of opening trials to the public. *Richmond Newspapers, Inc.*, 448 U.S. at 573-76.

51. *Id.*

52. 478 U.S. 1 (1986).

53. The press and public's right of access to deportation hearings is not absolute. *Id.*; Detroit Free Press v. Ashcroft, 195 F. Supp. 2d 937, 944 (E.D. Mich. 2002). The Supreme Court notes that where the *Richmond Newspapers* test is met, a qualified right of access exists that may be overcome only if "specific, on the record findings" demonstrate that closure meets a compelling governmental interest that is narrowly tailored to serve that interest. *See* Press-Enter. Co. v. Super. Ct., 478 U.S. 1, 13-14 (1986). This test is the Court's articulation of its strict scrutiny standard for the First Amendment right of access.

54. *Id.*, 478 U.S. at 8.

55. In practice, the *Richmond Newspapers* test is generally applicable outside the context of criminal trials, and courts have generally applied the two-part "experience and logic" test in determining whether claimants have a First Amendment right of access to government proceedings. The following cases show in what contexts it has been applied: *Press-Enter. Co. v. Super. Ct.*, 478 U.S. 1 (1986) (preliminary hearings); *Press-Enter. Co. v. Super. Ct.*, 464 U.S. 501, 501-04 (1984) (voir dire); *United States v. Simone*, 14 F.3d 833, 840 (3d Cir. 1994) (post-trial examination of jurors); *United States v. Smith*, 787 F.2d 111, 116 (3d Cir. 1986) (transcripts of sidebars or in camera hearings). The generally applicable test for determining whether claimants have a First Amendment right to access government proceedings is the *Richmond Newspapers* two-part "experience and logic" test. *See* Detroit Free Press v. Ashcroft, 303 F.3d 681, 695 (6th Cir. 2002) (noting that courts have consistently applied this test to determine rights of access to judicial proceedings, even outside the context of criminal trials). *See also* United States v. Miami Univ., 294 F.3d 797, 821 (6th Cir. 2002) (applying the *Richmond Newspapers* test in student disciplinary board hearings); Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1066 (3d Cir. 1984) (applying the *Richmond Newspapers* test in a civil trial); Brown & Williamson Tobacco Corp. v. FTC, 710 F.2d 1165, 1777-79 (6th Cir. 1983) (applying the *Richmond Newspapers* test in a civil action against administrative agency).

56. *Detroit Free Press*, 303 F.3d at 695.

57. N. Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198, 221 (3d Cir. 2002); *Detroit Free Press*,

tive hearings.[58] Thus, the *Richmond Newspapers* test is the appropriate standard for determining whether the First Amendment guarantees the press a right to attend deportation hearings.[59]

Next, when one views the Creppy Directive in its broadest sense—as government action to suppress speech in order to protect national security interests—the appropriate test is set out in *New York Times Co. v. United States* (the *Pentagon Papers Case*).[60] In *New York Times Co.*, the federal government sought to enjoin the *New York Times* and the *Washington Post* from publishing the Pentagon Papers, which were the results of the government's classified study on its decisionmaking policies with respect to Vietnam.[61] The United States cited protection of the government's national security information as a reason for enjoining publication of the Pentagon Papers.[62] A plurality of the Court held the injunctions unconstitutional and noted that prior restraints arrive at the Court bearing a heavy presumption against constitutional validity.[63] Moreover, the Supreme Court observed that the government has a heavy burden of justification for imposing prior restraints.[64] In their plurality opinions, Justices Brennan, White, and Stewart agreed that a prior restraint may be supported only when publication results in a direct and immediate harm to the government's national security interests.[65] The Creppy Directive, when viewed against the backdrop of *New York Times Co.*, does not pass constitutional muster. The Creppy Directive's mandatory closure effectively works as a prior restraint to infringe upon the press's right to obtain and subsequently publish information from special interest deportation hearings. Moreover, the Creppy Directive's mandatory closure does not require the government to first allege and prove that openness will lead to a direct and immediate harm to its national security or antiterrorism efforts.

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303 F.3d at 705.

58. *N. Jersey Media Group, Inc.*, 308 F.3d at 207-09. By applying this "two-part" test, courts have "consistently . . . found a right of access to civil proceedings and quasi-judicial administrative proceedings." Detroit Free Press v. Ashcroft, 195 F. Supp. 2d 937, 942 (E.D. Mich. 2002).

59. Both the Third and Sixth Circuits applied the *Richmond Newspapers* test to determine if there was a First Amendment right of access to attend "special interest" deportation hearings. *N. Jersey Media Group, Inc.*, 308 F.3d at 207-09; *Detroit Free Press*, 303 F.3d at 703.

60. 403 U.S. 713 (1971).

61. *See id.* at 714.

62. *Id.* at 718.

63. *Id.* at 714.

64. *Id.*

65. Justice Brennan observed that a prior restraint may be supported only by "governmental allegation *and proof* that publication must inevitably, directly and immediately cause" harm to the government's security interests. *Id.* at 726-27 (emphasis added). Justices White and Stewart agreed that disclosure of the Pentagon Papers would not result in "direct, immediate, and irreparable damage" to the country or its citizens. *Id.* at 730.

IV. THE CIRCUIT SPLIT

As mentioned earlier, the fallout from the Creppy Directive is marked by discord between the Third and Sixth Circuits.[66] In *North Jersey Media Group, Inc. v. Ashcroft*,[67] the Third Circuit found the Creppy Directive constitutional and held that the press and the public do not possess a right to access special interest deportation hearings.[68] Notably, the Third Circuit confined its holding only to special interest deportation hearings.[69] In contrast, the Sixth Circuit in *Detroit Free Press v. Ashcroft*[70] held the Creppy Directive unconstitutional and stated that the First Amendment guarantees the press a right to access deportation hearings; notably, the Sixth Circuit did not limit its finding to "special interest" deportation hearings.[71]

The Sixth Circuit first applied the two-part "experience and logic" test, as set out in *Richmond Newspapers, Inc. v. Virginia*,[72] to determine whether the First Amendment includes a right to access deportation hearings.[73] After establishing the right to access deportation hearings, the Sixth Circuit then reviewed the Creppy Directive under the strict scrutiny standard [74] and held that it was not narrowly tailored and thus was unconstitutional.[75]

Like the Sixth Circuit, the Third Circuit also applied the *Richmond Newspapers* "experience and logic" test but reached a very different result, largely because it did not apply the test in the same manner as the Sixth Circuit.[76] In applying the "experience" prong, the Third Circuit framed the

66. *See* N. Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198, 221 (3d Cir. 2002) (holding that the press does not have a right of access to deportation hearings); Detroit Free Press v. Ashcroft, 303 F.3d 681, 705 (6th Cir. 2002) (holding that the press does have a right of access to deportation hearings).

67. 308 F.3d. 198 (3d Cir. 2002).

68. *Id.* at 221.

69. *Id.* at 220.

70. 303 F.3d 681 (6th Cir. 2002).

71. *Id.* at 705.

72. 448 U.S. 555 (1980).

73. *Detroit Free Press*, 303 F.3d at 700.

74. *Id.* at 705. Where a First Amendment right of access is burdened, the applicable standard of review is strict scrutiny. *See id.* In such cases, the government may overcome the challenge only if the denial of access "is necessitated by a compelling governmental interest, and [it] is narrowly tailored to serve that interest." Globe Newspaper Co. v. Super. Ct., 457 U.S. 596, 606-07 (1982). The strict scrutiny standard was refined in *Press-Enter. Co. v. Super. Ct.*, in which the Supreme Court stated that "[t]he interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." 478 U.S. 1, 9-10 (1986) (quoting Press-Enter. Co. v. Super. Ct., 464 U.S. 501, 510 (1984)).

75. *Detroit Free Press*, 303 F.3d at 705.While applying the *Richmond Newspapers* "experience and logic" test, the Sixth Circuit noted that deportation hearings have historically been open to the press and that nonsubstantive issues such as access to deportation hearings are subject to constitutional limitations. *Id.* at 701. The court also noted that under the "logic" analysis, public access to deportation hearings serves as a "check" on the executive's power to ensure fairness and that this is perhaps the only means of ensuring that an alien's due process rights are honored under the executive's broad authority in the law of immigration. *Id.* at 703-04. The Sixth Circuit also stated that the Creppy Directive failed under the strict scrutiny standard because although national security is a compelling governmental interest, the Creppy Directive was not narrowly tailored. *Id.* at 710.

76. N. Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198, 221 (3d Cir. 2002). The court in *North Jersey Media Group, Inc.* found under the *Richmond Newspapers* "experience" prong that Congress never granted access to deportation hearings and that there was not a consistent history of opening such

issue as whether there is a historical right of access to government proceedings generally.[77] By contrast, the Sixth Circuit addressed whether deportation hearings have a tradition of public accessibility.[78] At the outset, the Third Circuit distinguished political proceedings from judicial proceedings. Because political proceedings historically were closed to the public, this framework directly led the Third Circuit to conclude that the press has no right to access deportation hearings.[79] By contrast, the Sixth Circuit's reasoning is more precise in that it directly addressed whether a particular type of hearing—namely deportation hearings—was traditionally open to the public.[80] The Third Circuit's framework is unfortunate because it ignores the fact that deportation hearings are more akin to judicial hearings, particularly criminal proceedings, which have always been accessible by the public.[81] Furthermore, deportation hearings are similar to criminal trials because in both proceedings a person's liberties are at stake under the guarantees of due process.

Also, the Third Circuit observed that notwithstanding 8 C.F.R. § 3.27's presumption of openness for deportation hearings,[82] there are deportation hearings conducted in private places where the public is generally not allowed, such as prisons, hospitals, and private homes.[83] This argument is unsound because these cases only provide exceptions to the general rule of openness. Moreover, the "special interest" deportation hearings at issue do not fall within the exceptional category for deportation hearings in prisons, hospitals, and private homes,[84] because such "special interest" deportation hearings are held in immigration court. Furthermore, commentary suggests that the deportation hearings conducted in prisons, hospitals, or private homes were held at such locations for the convenience and benefit of the alien.[85] The "special interest" deportation hearings held in immigration court are unlike those held in prisons, hospitals and private homes and are most similar to those that have historically enjoyed a presumption of openness.

Under the logic prong, the Sixth Circuit applied a refined *Richmond Newspapers* test as set out in *Press-Enterprise Co. v. Superior Court* and

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hearings to the press. *Id.* at 212. Also, under the "logic" prong, the court observed that open hearings would not serve a significant positive role because they could reveal information to terrorists and threaten national security. *Id.* at 220.

77. *Id.* at 211 (citing Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 212 (1953)). The court rejected the notion of a historical right of access to deportation proceedings, noting that deportation proceedings lacked a sufficient "tradition of openness." *Id.*

78. *Detroit Free Press*, 303 F.3d at 700.

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

80. *Detroit Free Press*, 303 F.3d at 700.

81. *See* Richmond Newspapers Inc. v. Virginia, 448 U.S. 555, 564-65 (1980).

82. "All hearings, other than exclusion hearings, shall be open to the public except that . . . ." 8 C.F.R. § 3.27 (2002).

83. *N. Jersey Media Group, Inc.*, 308 F.3d at 212.

84. *Id.*

85. "If the alien is located in a county jail, hospital, prison or at his own home, *he may be given the hearing where he is* . . . ." CLARK, *supra* note 42, at 363 (emphasis added) (internal footnote omitted).

stated that openness undoubtedly plays a significant role in the process of deportation hearings.[86] By contrast, the Third Circuit observed that open hearings would not serve a significant positive role because they could reveal information to terrorists and threaten national security.[87]

Notably, before the Third Circuit's final opinion in *North Jersey Media Group, Inc.*, the Supreme Court ruled in favor of the government by staying the district court's preliminary order to enjoin enforcement of the Creppy Directive.[88] Thus, the Court granted the stay that effectively closed special interest deportation hearings to the press and the public in the Third Circuit. Because of the circuit split, this question is ripe for review. The Supreme Court's response to the Third Circuit's case may indicate an ultimate opinion in favor of the Third Circuit. On the other hand, the stay may represent the Supreme Court's interest in ensuring that the appeal went forward to allow the Third Circuit to address the issue before the Supreme Court grants certiorari and resolves the question.

The only other circuit to address this split was the D.C. Circuit Court of Appeals in *Center for National Security Studies v. United States Department of Justice*.[89] In *Center for National Security Studies*, the D.C. Circuit held that the First Amendment and Freedom of Information Act did not entitle public interest groups to access information from the Department of Justice concerning the September 11 detainees.[90] The D.C. Circuit also stated that it did not find the Sixth Circuit's reasoning compelling, and that it "join[ed] the Third, Fourth, and Seventh Circuits in holding that the courts must defer to the executive on decisions of national security."[91]

V. ANALYSIS

For the following four reasons, the Creppy Directive's blanket closure of deportation hearings is unconstitutional.

First, the Creppy Directive is unconstitutional because it fails the *Richmond Newspapers* two-part "experience and logic" test and infringes on the press's right to access deportation hearings. The *Richmond Newspapers* "experience and logic" test places a significant amount of weight on history under the experience prong; in fact, the Third Circuit observes that it has not found a case where a proceeding passed the experience test but failed the

86. Detroit Free Press v. Ashcroft, 303 F.3d 681, 700 (6th Cir. 2002).

87. *N. Jersey Media Group, Inc.*, 308 F.3d at 218.

88. The District Court for the District of New Jersey granted the newspaper publishers' motion to enjoin the attorney general from enforcing the memo's blanket closure on deportation hearings. N. Jersey Media Group, Inc. v. Ashcroft, 205 F. Supp. 2d 288, 305 (D.N.J. 2002). The Supreme Court issued a stay on the injunction pending the government's appeal to the Third Circuit. Ashcroft v. N. Jersey Media Group, Inc., 536 U.S. 954 (2002). On appeal, the Third Circuit held that the press and the public have no First Amendment right to access. *N. Jersey Media Group, Inc.*, 308 F.3d at 221, *cert. denied*, 123 S. Ct. 2215 (2003).

89. 331 F.3d 918 (D.C. Cir. 2003).

90. *Id.* at 937.

91. *Id.* at 932.

logic test.[92] When examining deportation hearings under the *Richmond Newspapers* experience prong, one finds that federal courts have a tradition of granting access to civil proceedings[93] and deportation hearings.[94] Next, under the logic prong, it makes sense to maintain openness in light of the executive's plenary power over deportation and the limited amount of Article III judicial review over immigration and deportation matters.[95] Finally, because "[d]emocracies die behind closed doors[,]"[96] the outward appearance of justice is best served by a default rule that opens deportation hearings to the press.

Second, 8 C.F.R. § 3.27, entitled "Public Access to Hearings," sets out the rules of procedure for immigration courts and creates a presumption of openness for deportation hearings.[97] Section 3.27 mandates that all hearings other than exclusion hearings be open to the public, with enumerated exceptions.[98] One should note two exceptions for allowing closed deportation hearings. First, an immigration judge may limit attendance or close the hearing entirely if doing so protects witnesses, parties, or the public's interest.[99] Second, a new exception to 8 C.F.R. § 3.27 was added just after the Creppy Directive's issuance. This new exception is found in subpart (d), which mandates that an immigration judge close deportation hearings where a protective order is filed under seal pursuant to 8 C.F.R. § 3.46.[100] Under section 3.46, protective orders may be issued but are limited to the type of information where disclosure or dissemination is substantially likely to "harm the law enforcement or national security interests of the United States."[101] The regulations also state that the standard for issuance of a protective order shall conform to the strict scrutiny test under the Supreme Court's First Amendment jurisprudence.[102] Unlike the Creppy Directive's mandatory blanket closure, 8 C.F.R. § 3.27(d) requires that deportation hearings be closed only when a protective order is filed[103] (i.e., only after the government demonstrates specific findings—as required in *Press-Enterprise Co. v.*

92. *N. Jersey Media Group, Inc.*, 308 F.3d at 217.
93. *See supra* note 38; Crocca, *supra* note 33.
94. *Detroit Free Press*, 303 F.3d at 701.
95. *Infra* note 121.
96. *Detroit Free Press*, 303 F.3d at 683.
97. 8 C.F.R. § 3.27 (2002).
98. "All hearings, other than exclusion hearings, shall be open to the public except that . . . ." *Id.* The exceptions expressly provided for include instances where the immigration judge may limit the number of attendees depending on the available space. The immigration judge may also limit or close the hearing for purposes of protecting the witnesses, parties, or the public interest. Under newly-promulgated regulations, the immigration judge must close the hearing if a protected order has been filed under seal. *Id.*
99. *Id.* § 3.27(b).
100. *Id.* § 3.46.
101. Protective Orders in Administrative Immigration Proceedings, 67 Fed. Reg. 36799, 36800 (May 28, 2002) (codified at 8 C.F.R. § 3.27(d)).
102. "[P]rotective orders are limited to an important and substantial governmental interest in safeguarding the public, and national security and law enforcement concerns. The rule no more limits a respondent's . . . rights than is necessary or essential to protect the particular governmental interests involved." *Id.* at 36800.
103. 8 C.F.R. § 3.27(d) (2002).

Superior Court[104]— that rebut the presumption of openness by showing that closure is narrowly tailored to further the government's objectives).[105] By contrast, the Creppy Directive usurps the press's rights without requiring the government to first articulate its interests against open hearings and prove how an open hearing will directly threaten national security.

Third, the Creppy Directive is unconstitutional under the "direct and immediate" harm test of *New York Times Co. v. United States*[106] because its mandatory blanket closure effectively serves as a prior restraint on the press, and it is not narrowly tailored to the government's interest in protecting national security.

The Creppy Directive effectively works as a prior restraint and thus is unconstitutional. Similar to the unconstitutional injunctions in *New York Times Co.*, the Creppy Directive's mandatory blanket closure works as a prior restraint by preventing the press from obtaining information from special interest deportation hearings and subsequently publishing it. Prior restraints have long been recognized as unconstitutional,[107] and there is no reason why the strict scrutiny test should not be applied to the Creppy Directive.

Next, the Creppy Directive is not narrowly tailored for the following three reasons. First, the Creppy Directive is overly broad because it mandates closure of *all* special interest deportation hearings without first establishing how an open hearing will result in direct, immediate harm to national security. Thus, the Creppy Directive effectively closes some deportation hearings in which openness would present little or no risk at all to national security. Second, the risks to national security attendant to open hearings are likely minimal when one considers that of approximately 1200 immigrants detained in the post-September 11 sweeps, only a few (roughly 130)[108] had any "significant information" about possible terrorist activity and were arrested and criminally charged.[109] Further, more than half of the 1200 detainees were removed from the United States on minor charges such as overstaying their nonimmigrant visas, charges that were likely unrelated

104. 478 U.S. 1 (1986).

105. "[P]roceedings cannot be closed unless specific, on the record findings are made demonstrating that 'closure is essential to preserve higher values and is narrowly tailored to serve that interest.'" *Id.* at 13-14 (quoting Press-Enter. Co. v. Super. Ct., 464 U.S. 501, 510 (1984)).

106. 403 U.S. 713 (1971).

107. *See id.* at 714; Near v. Minnesota, 283 U.S. 697, 722-23 (1931).

108. Daniel Montalvo, *Legal Challenges to Government Policies on Post-September 11th Detainees: An Update and Analysis of the Current Cases*, IMMIGR. BUS. NEWS & COMMENT, Nov. 15, 2002, *available at* 2002 WL 31507519.

109. *See id.* The exact number of September 11 detainees is unknown. Nat'l Sec. Studies v. United States Dep't of Justice, 215 F. Supp. 2d 94, 99-100 (D.D.C. 2002). The Justice Department ceased publicizing the total in November 2001. David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 960 (2002). The "special interest" aliens are those who "might have connections with, or possess information pertaining to, terrorist activities against the United States." N. Jersey Media Group, Inc. v. Ashcroft 308 F.3d 198, 202 (3d Cir. 2002) (quoting FBI's Executive Assistant Director for Counterterrorism and Counterintelligence).

to the terrorist attacks.[110] Third, the Creppy Directive is not narrowly tailored because it does not require the government to first articulate national security risks that necessitate closure; thus, the closure of special interest deportation hearings is not limited to those hearings where openness would result in a direct and immediate harm to national security.

As a final note on the *New York Times Co.* test, in *Ospina v. Trans World Airlines, Inc.*,[111] the Second Circuit affirmed a lower court's application of a standard reminiscent of the *New York Times Co.* test. *Ospina* was a civil action to recover damages when a bomb exploded on an airplane during a terrorist hijacking.[112] During the trial, the judge closed the hearings to the public, but only "at such times as sensitive, anti-terrorist airline security information was disclosed, discussed or evaluated."[113] On appeal, the Second Circuit noted and did not find improvident the lower court's decision to close the civil proceeding at times when sensitive, anti-terrorist airline security information was disclosed.[114] The decision to close the trial to the public was made at the discretion of the trial judge only after the United States expressed its concerns about disclosure of the airline security materials.[115] The government's interest in protecting information in "special interest" deportation hearings is strikingly similar to the national security interests involved in *Ospina*. *Ospina*'s compromise presents a workable solution for the instant case, as it balances the press's right to access with the government's compelling interest of protecting the public from adverse effects of disclosure of anti-terrorist information. The Creppy Directive's mandatory blanket closure is overly broad and is hardly a solution in light of the *New York Times Co.* test and the *Ospina* compromise.

Fourth, the Sixth Amendment's guarantee of a public trial to defendants in criminal proceedings is founded on an underlying policy of openness. This policy favoring openness should also apply to special interest deportation hearings because aliens, like criminal defendants, are also at risk of losing their liberty. In addition to the Sixth Amendment's guarantee of a public trial for criminal defendants, *Richmond Newspapers* held that a right to attend criminal trials is implicit in guarantees of the First Amendment.[116] By analogy, a right to attend open deportation hearings may also be an implicit right under the First Amendment. In light of the Supreme Court's current composition, a longstanding principle such as the press's right to attend judicial hearings is likely to be honored and the Creppy Directive invalidated or at least modified. Furthermore, the policies behind open hearings remain valid today. The United States should not forego the interests of

110. *See* Montalvo, *supra* note 108 and accompanying text.
111. 975 F.2d 35 (2d Cir. 1992).
112. *Id.* at 36.
113. *Id.*
114. *See id.*
115. *Id.*
116. *See supra* note 50.

justice and fairness when holding open hearings will not likely result in direct, immediate harm to national security.

As a final argument for the Creppy Directive's unconstitutionality, there is also support for the argument that closed judicial hearings are unconstitutional solely on due process grounds.[117] Deportation hearings are quasi-judicial proceedings[118] where an alien's right of liberty to remain in the United States is adjudicated under the guarantees of due process.[119] Aliens, regardless of their legal status, are entitled as "persons" to the guarantees of due process in deportation proceedings.[120] Aside from the alien's attorney and family members, interested members of the public may serve as the alien's only reviewing board to check the administrative process.[121] Thus, closure is likely to erode the "check" the press provides American people by ensuring that all persons'(including aliens') due process rights are honored.[122]

VI. A PROPOSED ALTERNATIVE

A. An Alternative Solution to the Creppy Directive

An alternative solution that satisfies the dual purpose of protecting the right of access without jeopardizing national security would be to remove

117. *See In re* Rosahn, 671 F.2d 690, 696-97 (2d Cir. 1982).

118. Arguably, deportation hearings are a hybrid of judicial and administrative hearings. A deportation hearing is judicial in that it is an "adversarial adjudicative" process, and the "'ultimate individual stake . . . is the same as or greater than in criminal or civil actions.'" Detroit Free Press v. Ashcroft, 303 F.3d 681, 696 (6th Cir. 2002) (quoting N. Jersey Media Group, Inc. v. Ashcroft, 205 F. Supp. 2d 288, 301 (D.N.J. 2002)). For some aliens, this "ultimate individual stake" may well be liberty, and deportation hearings should afford aliens sufficient due process in determining their "right to be and remain in the United States." Yamataya v. Fisher, 189 U.S. 86, 100-01 (1903). Deportation hearings are administrative in that they are conducted by a non-judicial agency such as the Immigration and Naturalization Service. *Detroit Free Press*, 303 F.3d at 696 (observing that deportation hearings are administrative). However, the similarities between deportation hearings and judicial hearings are profound and insist that they be treated as such for purposes of access. *See id.* at 696-98 (noting that deportation hearings are similar to judicial hearings in areas of procedure, burdens of proof, the fact that liberty rights are at stake, the right to habeas corpus relief, and that judges preside over deportation hearings).

119. The U.S. Constitution does not afford only citizens due process rights. *See* U.S. CONST. amend. V ("No *person* shall be . . . deprived of life, liberty, or property, without due process of law . . . .") (emphasis added). *See also* Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 212 (1953); Wong Yang Sung v. McGrath, 339 U.S. 33, 49-50 (1950); *Yamataya*, 189 U.S. at 100-01; Wong Wing v. United States, 163 U.S. 228, 238 (1896). Also, there is a continuing trend in judicial and administrative reform that affords aliens an increasing amount of due process in deportation hearings. DAVID CARLINER ET AL., THE RIGHTS OF ALIENS AND REFUGEES: THE BASIC ACLU GUIDE TO ALIEN AND REFUGEE RIGHTS 117 (Norman Dorsen ed., S. Ill. Univ. Press 2d ed. 1990) (1977).

120. U.S. CONST. amend. V; *Wong Wing*, 163 U.S. at 238 (recognizing due process rights in deportation hearings); *see Shaughnessy*, 345 U.S. at 212. Aliens within U.S. borders stand on a different due process footing than those seeking entry into the United States. *Id.*

121. In 1996, Congress curtailed the availability of judicial review of final deportation orders when it passed the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"). Lenni B. Benson, *The New World of Judicial Review of Removal Orders*, 12 GEO. IMMIGR. L.J. 233, 233 (1998). However, the availability for judicial review on constitutional challenges remains intact, and this jurisdiction rests with the federal courts of appeals. *Id.* at 238-39. Most importantly, IIRIRA does not allow for judicial review of discretionary decisions by the attorney general. *Id.* at 240.

122. *See* Detroit Free Press v. Ashcroft, 303 F.3d 681, 703-04 (6th Cir. 2002).

the mandatory blanket closure of special interest deportation hearings altogether, and allow the presiding immigration judge to close hearings on a case-by-case basis—but only after the government provides clear and convincing evidence that opening the hearing will result in a direct and immediate harm to national security. This alternative solution is consistent with the Supreme Court's First Amendment jurisprudence, because it applies the Court's longstanding strict scrutiny standard applicable to governmental prior restraints.

B. Application of this New Test

First, the government must prove by clear and convincing evidence how opening a deportation hearing will result in imminent harm to national security.[123] If the government satisfies this burden, and if a protective order is filed under 8 C.F.R. § 3.46, then the immigration judge must decide whether the hearing should be closed at such times as sensitive information is being disclosed. This allows the immigration judge to defer some authority to the national government in proving the threat to the public security instead of blindly enforcing a blanket prohibition on access to special interest deportation hearings. Additionally, applying the case-by-case method approach is consistent with the Court's application of the case-by-case approach in other areas of First Amendment jurisprudence.[124] This proposed test should withstand the exacting strict scrutiny standard. Its prohibition on blanket closure minimizes the government's restraints on the press's First Amendment right to access; its case-by-case character satisfies the strict scrutiny "narrowly tailored" prerequisite; and it places the burden of proving the threat to national security on the party best situated to prove it—the national government.

VII. CONCLUSION

This proposed solution strikes the balance between the press's right to access and the government's interest in protecting national security. Also, this solution maintains the presumption of openness that courts have traditionally applied in the context of access rights. Additionally, the proposed alternative acknowledges that under *Richmond News*, the press has a First Amendment right to access deportation hearings. Moreover, this proposal imports the *New York Times Co.* standard and requires that the government narrowly tailor its restraints while protecting national security interests—

123. The *New York Times Co.* standard should apply here and require the government to show how opening all special interest deportation hearings will result in direct, immediate harm to its national security interests. *See supra* note 65.

124. Federal courts routinely review speech in the context in which it is delivered to determine whether it is protected, particularly in the areas of obscenity and fighting words. Jenkins v. Georgia, 418 U.S. 153, 162 (1974) (Brennan, J., concurring) (noting the Court's use of a case-by-case analysis).

interests that are undoubtedly of the highest order but must ultimately strike a balance with the First Amendment.

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