INVESTIGATING TERRORISM: THE ROLE OF THE FIRST AMENDMENT

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This iBrief discusses the constitutionality of a government policy enacted shortly after September 11, 2001 that denies public access to deportation hearings in cases allegedly bearing some connection to terrorism. This ibrief discusses two Circuit Courts of Appeals decisions on the issue and argues that this policy is unconstitutional.

BACKGROUND

¶1 In the wake of the tragic events of September 11, 2001, the U.S. government launched a massive investigation to uncover those responsible for the attacks and to thwart future terrorist activity.[2] As part of this effort, on September 21, 2001, Chief Immigration Judge Michael Creppy, acting under direction from Attorney General John Ashcroft, issued a directive to Immigration Judges mandating that cases designated as special interest by the Department of Justice be closed to the public.[3] Special interest cases are those where the alien is suspected of having connections to, or information about, terrorist organizations that are plotting against the United States.[4] In addition to closure to all visitors, family, and press, the directive further requires that the cases be removed from the public docket so that the case's existence is not publicly known.[5] This total ban on public access was challenged by various media entities in two separate cases, resulting in a split between the Third and Sixth Circuits as to whether the ban is constitutional.[6] In August 2002, the Sixth Circuit held the ban unconstitutional;[7] in October 2002, the Third Circuit held the ban was constitutional.[8] The plaintiff in the Third Circuit petitioned for a writ of certiorari, but the Supreme Court declined to hear the case.[9]

THE FIRST AMENDMENT AND THE RIGHT OF ACCESS

¶2 The First Amendment to the Constitution states, in pertinent part, "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . "[10] The Supreme Court has held that, although the First

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[2] Detroit Free Press v. Ashcroft, 303 F.3d 681, 682 (6th Cir. 2002).
[3] *Id.* at 683.
[4] North Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198, 202 (3d Cir. 2002).
[5] *Id.* at 203.
[6] *See id*; *see also Detroit Free Press*, 303 F.3d 681.
[7] *Detroit Free Press*, 303 F.3d at 710.
[8] *North Jersey Media Group*, 308 F.3d at 221.
[9] North Jersey Media Group, Inc. v. Ashcroft, 123 S. Ct. 2215 (2003).
[10] U.S. Const. amend. I.

Amendment does not explicitly create a right of access to court proceedings, a right of access does exist when "the place and the process have historically been open to the press and general public [and] public access plays a significant positive role in the functions of the particular process in question."[11] Although formalized by the Court in *Press-Enterprise Co. v. Superior Court*,[12] this rationale was first articulated in Justice Brennan's concurrence in *Richmond Newspapers, Inc. v. Virginia*,[13] and thus is typically referred to by courts as the *Richmond Newspapers* test.[14]

Recent history of First Amendment and National Security

¶3 This is not the first time in U.S. history that the courts have been asked to weigh concerns over national security against the Constitution's free speech guarantee. In the wake of the Vietnam War, when fears of a communist attack on the U.S. were widespread, the Supreme Court considered the government's national security concerns against the media's First Amendment rights. In the seminal case of *New York Times Co. v. United States* the government sought to prevent the publication of the Pentagon Papers, a government-sanctioned analysis of the errors of the Vietnam War. The Court held that the government's national security concerns did not trump the news media's First Amendment rights.[15] The Court was adamant that national security concerns should not serve to dismantle the meaning of the First Amendment and the protection it provides the news media: "In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy."[16] The Court defined that role as providing a check on what is otherwise an extremely powerful Executive, particularly in the national security arena, where the Executive enjoys wide latitude. The Court further noted that "the Government's power to censor the press was abolished so that the press would remain forever free to censure the Government."[17] The Court's analysis was well-grounded in the actual intent of the Framers; consider the comments of Patrick Henry at the Virginia ratification convention, "Congress may carry on the most wicked and pernicious of schemes under the dark veil of secrecy. The liberties of a people never were, nor ever will be, secure, when the transactions of their rulers may be concealed from them."[18] Justice Douglas reflected this sentiment, stating, "secrecy in government is fundamentally anti-democratic."[19]

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[11] Press-Enterprise Co. v. Superior Court of California, 478 U.S. 1, 8 (1986) (citing Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 605-606 (1982)).
[12] *Id.*
[13] Richmond Newspapers Co. v. Virginia, 448 U.S. 555, 589 (1980) (Brennan, J., concurring).
[14] *See, e.g.*, North Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198, 209 (3d Cir. 2002).
[15] New York Times Co. v. United States, 403 U.S. 713, 714 (1971).
[16] *Id.* at 718 (Black, with Douglas, J., concurring).
[17] *Id.*
[18] *North Jersey Media Group*, 308 F.3d at 210 (quoting 3 ELLIOT'S DEBATES 169-70 (J. Elliot ed. 1881)).
[19] *New York Times*, 403 U.S. at 724 (Douglas, with Black, J., concurring).

THE SPLIT BETWEEN THE SIXTH AND THIRD CIRCUITS

The Sixth Circuit held the Creppy directive unconstitutional: *Detroit Free Press v. Ashcroft*

¶4 A series of hearings in the deportation action for Rabih Haddad, an alien who "overstayed his tourist visa" was commenced on December 19, 2002.[20] Haddad's case was designated as a special interest case because of suspicion that the "Islamic charity . . . [he] operates supplies funds to terrorist organizations."[21] Consequently, the hearings in Haddad's case were closed to the public and the press.[22] Haddad, along with several newspapers and Congressman John Conyers, who had wished to attend the hearings, commenced an action against Attorney General John Ashcroft, Chief Immigration Judge Creppy, and the Immigration Judge presiding over Haddad's case, seeking injunctive and declaratory relief.[23] Most relevant here, the plaintiffs "sought a declaratory judgment that the Creppy directive, facially and as applied, violated their First Amendment rights of access to Haddad's deportation proceedings."[24] The U.S. District Court for the Eastern District of Michigan held for the plaintiffs, holding that the ban on access to the proceedings constituted an unconstitutional abridgment of the plaintiff's First Amendment right of access.[25] The government appealed the decision.[26] The Sixth Circuit, however, affirmed the District Court's holding.[27] In its opinion, the Sixth Circuit reasoned that, under the *Richmond Newspapers* test, there was a sufficient history of openness in deportation hearings and significantly positive effects from allowing media access to create a right of access under the First Amendment.[28] The Court went on to conclude that the government's national security concerns did not survive strict scrutiny, reasoning that although national security is a compelling interest, the ban was not narrowly tailored.[29] The government did not pursue a writ of certiorari.[30]

The Third Circuit upheld the ban: *North Jersey Media Group v. Ashcroft*

¶5 Concerned that they were being closed out of "possibly hundreds" of deportation proceedings in the New Jersey area as a consequence of the Creppy directive, the North Jersey Media Group, "the publisher of two daily newspapers serving the northern Jersey area," filed a complaint in the U.S. District Court for New Jersey, arguing that the closure of hearings in special interest cases was unconstitutional.[31] The plaintiffs

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[20] Detroit Free Press v. Ashcroft, 303 F.3d 681, 684 (6th Cir. 2002).
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] Detroit Free Press v. Ashcroft, 195 F. Supp. 2d 937, 947-48 (E.D. Mich. 2002).
[26] *Detroit Free Press*, 303 F.3d at 685.
[27] *Id.* at 711.
[28] *Id.* at 700-04.
[29] *Id.* at 705-10.
[30] *Supreme Court Allows Secret Deportation Hearings to Stand*, LAWYER'S COMM. FOR HUMAN RIGHTS, *at* http://www.lchr.org/media/2003_alerts/0527.htm (May 27, 2003).
[31] North Jersey Media Group, Inc. v. Ashcroft, 205 F. Supp. 2d 288, 290-91 (D.N.J. 2002).

prevailed in the District Court;[32] however, the decision was reversed by the U.S. Court of Appeals for the Third Circuit.[33] The Third Circuit reasoned that under the *Richmond Newspapers* test, no right of access existed because there was an insufficient history of openness for deportation hearings and too many potentially negative ramifications from allowing media access to the proceedings existed.[34] The plaintiffs pursued a writ of certiorari from the Supreme Court, but the Court declined to hear the case.[35]

THE SIXTH CIRCUIT GOT IT RIGHT: THE CREPPY DIRECTIVE IS UNCONSTITUTIONAL

¶6 The Third Circuit found that there was no right of access to deportation proceedings because a.) there is not a history of openness for deportation hearings and b.) there are significant negatives to allowing openness.[36] However, the court's reasoning on both these points is problematic. First, in concluding there is an insufficient history of openness, the Court discarded strong arguments rooted in principles of statutory interpretation.[37] Current immigration laws provide for the closing of exclusion hearings "while remaining silent on deportation proceedings."[38] Under the principle of *expressio unius est exclusion alterius*, the fact that the statute specifically closes exclusion proceedings but is silent as to deportation proceedings creates a presumption of openness for deportation hearings.[39] If the statute's silence on deportation proceedings creates any ambiguity, that ambiguity must be resolved in favor of the alien.[40] Furthermore, the Sixth Circuit concluded, based on a review of the evidence offered, that "deportation proceedings historically have been open."[41] The Third Circuit admitted that it was "tempted" by the *expressio unius est exclusion alterius* doctrine argument.[42] However, the court declined to follow its logic, because of a handful of examples where deportation proceedings are closed. These include situations where abused alien children are involved, as well as some deportation proceedings held in places where physical access is not readily available, such as prisons.[43] These arguments, however, are unavailing, particularly in light of the strong statutory argument. Cases involving abused alien children certainly constitute a special category, the treatment of which should not be extrapolated and applied to the whole.[44] Similarly, while places such as prisons are not easily accessible to the public, there is no indication that the public could not attend these proceedings if they so

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[32] *Id.* at 305.
[33] *North Jersey Media Group*, 308 F.3d at 221.
[34] *Id.* at 220.
[35] North Jersey Media Group, Inc. v. Ashcroft, 123 S. Ct. 2215 (2003).
[36] *North Jersey Media Group*, 308 F.3d at 221.
[37] *Id.* at 211-12.
[38] *Id.* at 212; *see also* 8 C.F.R. § 3.27 (1987).
[39] *Id.* at 212; *see also* Detroit Free Press v. Ashcroft, 303 F.3d 681, 701 (6th Cir. 2002).
[40] *Detroit Free Press*, 303 F.3d at 702 (quoting INS v. Cardoza-Fonseca, 480 U.S. 421, 459 (1987) (citing INS v. Errico, 385 U.S. 214 (1966))).
[41] *Id*. at 701.
[42] *North Jersey Media Group*, 308 F.3d at 213.
[43] *Id.* at 212-13.
[44] *See id.* at 225 (Scirica, J., dissenting).

wished.[45] The strong statutory construction in favor of openness should not be outweighed by these arguments. Thus, the Third Circuit's conclusion that the first part of the *Richmond Newspapers* test was not satisfied was incorrect.

¶7 Similarly, the Third Circuit's conclusion that there are not significant positive benefits from openness is problematic. The Court rightly pointed out that both the positive and negative effects of openness should be weighed in considering this aspect of the test.[46] However, the Court placed too much weight on the negative effects. The Sixth Circuit advanced five positive effects from openness,[47] none of which the Third Circuit refuted.[48] The Sixth Circuit's identified the following five positive effects: "public access acts as a check on the actions of the Executive by assuring us that proceedings are conducted fairly and properly,"[49] "openness ensures that government does its job properly; that it does not make mistakes,"[50] the hearings have a "cathartic effect" on people's raw emotions in the wake of September 11,[51] "openness enhances the perception of integrity and fairness,"[52] and public access ensures the ability of citizens to "participate in and contribute to our republican system of government."[53] "[T]he Government has not identified one persuasive reason," the Sixth Circuit continued, "why openness would play a negative role in the process."[54] However, the Third Circuit noted several possible negatives, each relating to disclosure of information regarding the investigation into terrorist activity in the United States and the extent to which such disclosure would impede that investigation.[55] While these concerns are certainly valid, the dissent points out that they are "not generally implicated in the panoply of deportation hearings that occur throughout the United States."[56] The dissent goes on to conclude that the fact that national security concerns may exist in a handful of deportation hearings is not "sufficient justification for rejecting a qualified right of access to deportation hearings in general."[57] The dissent argues forcefully that to "permit concerns relevant only to a discrete class of cases to determine there is no qualified right of access to any of the broad range of deportation proceedings" would contravene the purpose and the language of the *Richmond Newspapers* test.[58] Thus, a right of access does

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[45] *See* Detroit Free Press v. Ashcroft, 303 F.3d 681, 703 (6th Cir. 2002).
[46] *North Jersey Media Group*, 308 F.3d at 217.
[47] *Detroit Free Press*, 303 F.3d at 703-04.
[48] *North Jersey Media Group*, 308 F.3d at 217 ("We agree with . . . the Sixth Circuit that openness in deportation hearings performs each of these salutary functions . . . ").
[49] *Detroit Free Press*, 303 F.3d at 703-04.
[50] *Id.* at 704.
[51] *Id.*
[52] *Id.*
[53] *Id.* (quoting Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 604 (1982)).
[54] *Id.* at 705.
[55] *North Jersey Media Group*, 308 F.3d at 218-19.
[56] *Id.* at 225 (Scirica, J., dissenting).
[57] *Id.*
[58] *Id.*

exist and national security concerns should be addressed on a case-by-case basis in the proceedings in which they are implicated, applying the strict scrutiny standard when the right of access is abridged.[59]

¶8 Having determined that a right of access does exist, the inquiry turns to whether the Creppy directive's total ban on access to cases of special interest survives a strict scrutiny test. The Sixth Circuit stated, a "government action that curtails a First Amendment right of access 'in order to inhibit the disclosure of sensitive information' must be supported by a showing 'that denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest.'"[60] Both the Sixth Circuit and the dissent in the Third Circuit agreed that national security is a compelling interest.[61] However, both the Sixth Circuit and the dissent in the Third Circuit agree that the Creppy directive total ban fails the 'narrowly tailored' prong of the strict scrutiny test.[62] The courts argue that the total ban is not the least restrictive alternative because a case-by-case review, in which the government can "make the required showing of special interest, under seal to the Immigration Judge, subject to appellate review" is a viable option.[63] Because an alternative, which can achieve the same objective of protecting sensitive information, is available to the government, they may not choose the more restrictive option, expressed in the Creppy directive.

CONCLUSION

¶9 The tragic events of September 11, 2001 marked a turning point in American history, signaling the start of a terrorism-centered focus for the FBI, the creation of the Department of Homeland Security, and the commencement of the open-ended 'War On Terrorism.' The attacks triggered widespread fear and anxiety, particularly within those parts of the country directly hit by the terrorists. However, September 11th did not change the fundamental core of this country. Our Constitution and the system of government for which it provides, including its protection of civil liberties, remain intact in the wake of September 11, as they have in the wake of past national tragedies in American history. Many argue that the threat posed by terrorism demands that we curtail civil liberties to enable the perpetuation of the United States. However, the Constitution's protections of civil liberties are specifically designed to preserve the country in perpetuity. As the court stated in *New York Times*, "The Framers of the First Amendment, fully aware of both the need to defend a new nation and the abuses of the English and Colonial governments, sought to give this new society strength and security by providing that freedom of speech, press, religion, and assembly should not be abridged."[64] Thus, concerns for self-preservation should not be met by limiting civil liberties; concerns for self-preservation must be met following the Constitution and preserving civil liberties. The perpetuation of

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[59] *Id.*
[60] *Detroit Free Press*, 303 F.3d at 705 (quoting *Globe Newspaper*, 457 U.S. at 606-07).
[61] *Id.*; *North Jersey Media Group*, 308 F.3d at 227 (Scirica, J., dissenting).
[62] *Detroit Free Press*, 303 F.3d at 707; *North JerseyMedia Group*, 308 F.3d at 228 (Scirica, J., dissenting).
[63] *North Jersey Media Group*, 308 F.3d at 227 (Scirica, J., dissenting).
[64] New York Times v United States, 403 U.S. 713, 719 (1971) (Black, with Douglas, J., concurring).

the United States goes hand in hand with the perpetuation of civil liberties. We cannot allow ourselves to fall into the trap of false security that comes with compromising those liberties. Our civil liberties have enabled American strength and prosperity in the past, and we must not countenance a future where those civil liberties no longer form the bedrock of our government.