University of California
Irvine
Law Forum Journal
Vol. 1 **Fall 2003**

Applying the Richmond Test: Closed Deportation Hearings and the First Amendment

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INTRODUCTION

On September 11, 2001 the United States experienced unprecedented terrorist attacks. As a result, in the interest of national security, the government is becoming more vigilant of those who reside in the United States but have violated immigration laws. Those in particular who have been determined to be or are suspected of being associated with terrorist groups such as al Qaeda have been detained and their cases have been determined as "special interest" under a new Department of Justice policy termed the "Creppy directive."

The Creppy Directive

Enacted on September 21, 2001, the Creppy Directive requires that deportation cases that are classified special interest cases are to be closed to the press, members of the public, as well as the detainee's own family members. It originates in a memo given to all immigration judges from Chief Immigration Judge Creppy. Each case is directed to be heard separately, and a Record of Proceeding is not to be released to anyone except the attorney for the case. Only judges who hold a secrecy clearance can be assigned the special interest cases.

Naturally, public outcry was made against the directive, especially pertaining to the question of whether the press, and consequently the public, has a First Amendment right to access these deportation hearings. Two important cases seeking defense of this right to access have reached the

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Appellate courts. The conflict of interest lies in the protection of free speech rights that are so essential, such as freedom of assembly and freedom of press, and on the other hand, the concern that open deportation hearings might damage national security if sensitive intelligence information falls into the wrong hands.

To resolve this issue, the court in each case applies the *Richmond* test, a legal standard developed by the Supreme Court to determine whether or not First Amendment rights to access open hearings override the interests of national security. In *Detroit Free Press,* the courts ruled that the Creppy Directive was unconstitutional. In *New Jersey Media,* the court ruled that the public does not have a First Amendment right of access to deportation hearings. The two courts both apply the *Richmond* test and arrive at opposite conclusions. This paper will argue that although the *Richmond* test is ambiguous and not well constructed, based on the limited guidance that it does give to the courts, the Third Circuit for *New Jersey Media reaches* a more thorough and accurate interpretation of the test than the Sixth Circuit for *Detroit Free Press*. However, due to the obscure history of deportation hearings as well as the limitations of the *Richmond* test, the Sixth Circuit is not at fault here. In effect, the *Richmond* test should be replaced with a courtroom access doctrine that not only adheres to a pathological perspective, but also stands true during times of national crisis.

This paper will: (1) lay out the *Richmond Newspapers* case as the primary precedent; (2) examine the facts associated with both *Detroit Free Press* and *New Jersey Media*; (3) present the legal issue underlying both cases, and (4) formulate an argument and solution to the debated issue.

RICHMOND BACKGROUND

The case of *Richmond Newspapers, Inc. v. Virginia, 488 U.S. 555 (1980)* provides the foundation for our legal analysis. The two-part test developed by Justice Brennan in this case serves as the basis for determining whether or not closed deportation hearings are constitutional. In *Richmond Newspapers*, the issue is not centered on deportation hearings but instead, a murder trial that repeatedly had undergone mistrial due to information leaking out to the jury and the public through the press. Although the Supreme Court of Virginia upheld the closure of the trial, the U.S. Supreme Court reversed the judgment, indicating that a tradition of openness ever since the days of the

Norman Conquest[1] in 1066 requires the continued openness of criminal trials. The cases that took place in England were generally open to the public and were often attended by the men of the community as a part of their duty to render judgment on the criminals. This tradition was taken over to Colonial America and preserved as a value over time. Records of criminal trials from this time forth usually indicate openness, and if any restrictions applied, then it was for the purposes of describing appropriate behavior for those who attended the trials. In short, not only were trials open throughout American history but they were often attended by those in the community as a pastime. This sets forth an "unbroken, uncontradicted history"[2] of openness that prevents the government from closing trials to the public.

The Court also stresses in this case the importance of publicity and the value of having the public and press present at criminal trials. The First Amendment grants people the right to freedom of speech and prevents government from interfering with the rights of the press, and the Court believed here that this right is most importantly relied upon when dealing with criminal cases, noting that "the freedoms of speech, press and assembly, expressly guaranteed by the First Amendment, share a common core purpose of assuring freedom of communication on matters relation to the functioning of the government."[3] Freedom of speech implies a notion of a freedom to listen.[4] Although it is true that the First Amendment does not provide an explicit right to attend criminal trials, the Court argued that freedom to attend criminal trials was so essential to free speech that it is an implicit freedom granted in the First Amendment. This implicit freedom gives people the ability to assemble in public, to "speak or to take action…to listen, observe and learn"[5] and thereby keeping the government in check.

Consequently, a history of open cases and their positive roles in the trial process, help to justify the continued openness of criminal trials. This idea is broken down in Justice Brennan's concurrence into what became the *Richmond* two-part test. Under this test the Court examines the first prong,

[1] Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 565 (1980).

[2] Id. at 573.

[3] Id. at 556.

[4] Kleindienst v. Mandel, 408 U.S. 753, 762 (1972).

[5] Hague v. Committee for Indus. Org., 307 U.S. 496, 519 (1939).

"experience:" that there should be an enduring and vital tradition of openness in related cases, and the second prong, "logic:" whether public access plays a significant and positive role in the functioning of the particular process. This is the standard by which we will measure the circuit court opinions of *Detroit Free Press v. Ashcroft* and *New Jersey Media Group, Inc. v. Ashcroft* cases.

A. Facts

Detroit Free Press v. Ashcroft involves a plaintiff named Haddad who was taken into custody by the U.S. Immigration and Naturalization Service for overstaying his 6 month visa. He is a native of Lebanon and prior to this incident, has been residing periodically in Ann Arbor, Michigan for approximately thirteen years. Mr. Haddad runs an Islamic charity organization and is suspected to be associated with the September 11th hijackers by funding a portion of their operations. Prior to Mr. Haddad's arrest, Judge Creppy issued the Creppy Directive in order to ensure the closure of his hearing. Mr. Haddad, along with Detroit Free Press, Inc. and Herald Co., Inc., the Detroit News Inc., Congressman Conyers, and Metro Times, Inc., all file suit against defendants Attorney General John Ashcroft, Chief Immigration Judge Michael Creppy and Immigration Judge Elizabeth Hacker.[6] Mr. Haddad files his complaint under the Administrative Procedures Act, the Immigration and Nationality Act, and the Fifth Amendment's Due Process Clause. The Newspaper plaintiffs claim a First Amendment right to attend his hearing and argue that the Creppy Directive is unconstitutional. In the District Court of the Eastern District of Michigan, a preliminary injunction was granted to the plaintiffs and this judgment is affirmed in the Sixth Circuit Court of Appeals.

New Jersey Media Group, Inc. v. Ashcroft is a case with a similar background, though it is not concerned with a particular detainee on trial but rather the Plaintiffs are the press: New Jersey Media Group, Inc. and New Jersey Law Journal. They seek access to the special interest deportation hearings that are closed under the Creppy Directive.[7] The district court ruled in favor of the plaintiffs and the Attorney General appealed. The 3rd Circuit Court of Appeals, however, reversed, upholding the constitutionality of the Creppy Directive.

[6] Detroit Free Press, et al., v. Ashcroft, 195 F. Supp. 2d 937, 941 (E.D. Mich. 2002).

[7] New Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198, 198 (3rd Cir. 2002).

B. Legal Issue

The two part *Richmond* test is applied to both cases in deciding whether or not Plaintiffs have a First Amendment right of access to the deportation hearings. If both parts of the test are passed, then Plaintiffs have this right. At this point, the government may only exclude the press if it demonstrates a sufficient interest in overcoming this right. To do so, the government must meet the Strict Scrutiny test. Strict Scrutiny demands that in order to inhibit the disclosure of information, compelling government interest must be shown and it needs to be demonstrated through finding that the particular denial is narrowly tailored to serve its interest.[8] In deciding whether or not a preliminary injunction should be granted to the Plaintiffs, a strong likelihood of success needs to be demonstrated. The *Richmond* test is the sole factor to consider in weighing the likelihood of success. We first examine whether in both cases the experience prong has been satisfactorily analyzed by the court.

Prong 1: Experience

The main question is whether the Creppy Directive requiring closure of special interest cases violates the plaintiff's first amendment right of access to deportation hearings. To decide this we need to look more closely at the Court's decision in *Richmond Newspapers*, which is the most important precedent in this area of law. Parallel to the reasoning in *Richmond Newspapers*, the court in *Detroit Free Press* accounts for the strong history of open trials in history. Although it acknowledges that history supports the openness of criminal trials but not necessarily administrative trials, it cites Justice Brennan's concurrence where emphasis is added to beneficial effects of access, interpreting this to mean that a short history of access is sufficient enough to demonstrate a First amendment right of access.[9] Deportation hearings have been presumptively open since 1965 under INS regulations. Also, the similarity between judicial proceedings and deportation proceedings is noted in the sense that what is at stake is essentially the same between a criminal trial and a deportation hearing. This court also notes that the Framers

[8] Strict Scrutiny will not be addressed in this paper; instead the focus will be on the *Richmond* test.

[9] Detroit Free Press, 303 F.3d at 742.

of the Constitution had no notion of what modern administrative hearings were to be like, and therefore, we should model our decisions about these hearings on what historically has looked similar to them; namely, judicial proceedings. The court therefore concludes, based on the *Richmond Newspapers* precedent and its own examination of historical access to trials, that the experience prong of the Richmond test is satisfied.

The court in *New Jersey Media* does not agree with this line of reasoning. It stresses that although it might be true that a right to access criminal trials is implicit in the First Amendment, it distinguishes deportation hearings from them and compares it more with administrative hearings. Administrative hearings differ from criminal trials because they are conducted by officers who are part of the Executive branch of government. Upon examining the nature of administrative hearings the court finds that there is no general right to access the proceedings. Many of these types of hearings were held in private homes, hospitals, and prisons. The public could not access them. The Senate met behind closed doors up until 1794 and the House likewise until 1812. Even so, committee sessions were not usually open to the public until around the 1970's. The court also notes the interesting fact that our democracy, the basis from which all our freedoms come, was also created behind closed doors at the Constitutional Convention of 1787.[10] Like the House and Senate, Social Security meetings have been limited in its access to the public. These are just one in many types of hearings that the government has deemed presumptively closed to the public.

Even just looking at the history of deportation hearings specifically, we find that they have often been closed to the public. Ever since the 1900's these hearings have been conducted in homes, prisons or hospitals, access to which is generally prohibited to the rest of the public.[11] Thus, the court in *New Jersey Media* finds that there is not sufficient demonstration of access to deportation hearings and hearings of similar kinds in history to pass the experience prong of the *Richmond* test.

[10] Id. at 710.

[11] Id. at 712.

Prong 2: Logic

Next we examine the logic prong and its application in both of our cases. The court in *Detroit Free Press* lays out five main arguments as to how openness will serve as a significant and positive role in the process of the deportation hearings. First, it notes that public access to the hearings will keep the Executive branch accountable for its actions by making sure that all proceedings are conducted in a fair and trustworthy manner.[12] Second, it ensures that the government will do its job properly and will not make mistakes.[13] Third, especially due to the events of September 11th, open hearings will serve a therapeutic effect in the community, allowing for open forums of expression of concern.[14] Fourth, having open trials will encourage people to view trials with a feeling of trust and integrity.[15] Fifth, access to hearings will ensure that people are being effective citizens and participating in the governmental system.[16] For all these reasons, the court concludes that the logic prong is satisfied, and as a result, the burden then shifts to the government to prove a compelling interest in overriding the Plaintiff's First Amendment right to attend the hearings.

The logic prong is not so easily satisfied in *New Jersey Media*. The court proposes that although open hearings have yielded several superior legal results, it is essential to consider the detrimental consequences that would arise if these deportation hearings are indeed opened to the public. It is pointed out interestingly enough that in every case the logic prong could be satisfied, thus making this part of the test virtually impossible to be falsified. It notes that the harms that should be considered include the fact that terrorist organizations could find out information that will cause them to alter their plan of action for future attacks, or that they might make the hearings a target in itself. In addition, the defendant on trial might be hesitant to be completely cooperative if he or she is not assured that the hearing is closed. These factors are not

[12] Id. at 751.

[13] Id.

[14] Id. at 752.

[15] Id. at 753.

[16] Id. at 754.

taken into consideration in *Detroit Free Press*, and the court here argues that they prevent the passing of the logic prong of the test.

ARGUMENT

Richmond Test Does Not Give Clear Guidance To The Courts

The fact that the Third Circuit and the Sixth Circuit courts reach opposite rulings is perplexing. After all, the facts and issue in *New Jersey Media* and *Detroit Free Press* are virtually identical. Both cases involve the deportation hearing of a non-citizen detained by the government after September 11th and the question of whether or not the First Amendment affords the press and public the right of access to the hearing. The same controlling precedent (*Richmond Newspapers*) is applied in both cases. How then, does one court rule in favor of the closure of deportation hearings and the other against? The answer lies in the ultimate failure of the *Richmond* test to give clear guidance to the courts. The vagueness of the test's language gives the burden of interpretation to the courts and leaves them freedom to reach differing conclusions.

To illustrate the ambiguity of the *Richmond* test, we first examine the experience prong. The court decides in *Richmond Newspapers* that what needs to be sought after in weighing experience is an "unbroken, uncontradicted history."[17] An inquiry into the history of openness in trials must be made. Yet the specific length of what it means to have an "unbroken" history is never pointed out. It leads us to wonder whether fifty years of history is enough to satisfy the standard, or whether at least a hundred years are needed. Also, the word "uncontradicted" leaves us room for interpretation. For instance, uncontradicted can mean that there needs to be a consistent history of openness within trials without exception, or, on the other hand, it can mean that there needs to be a general presumption of openness in trials regardless of a few exceptions. In addition, the Court in *Richmond Newspapers* never specifies what kind of trials the test can apply to. The Court's opinion exclusively examines criminal trials, but it never addresses the question of whether or not a

[17] Richmond Newspapers, 448 U.S. at 573.

history of open criminal trials can apply to decisions involving deportation hearings, which are administrative in nature.

We next examine the *Richmond* Court's direction with regard to logic. The Court instructs us to "weigh the importance of public access to the trial process itself" while making sure that access plays a "significant and positive role in that process."[18] What is meant by "significant" and "positive" is again open to interpretation. The Sixth Circuit finds that openness plays a significant and positive role in the trial process because it keeps the government accountable to its actions and "enhances the integrity" [19] of what takes place. The Third Circuit views significance and positivism more holistically and weighs a balance of pros and cons about openness. As a result of the *Richmond* test's ambiguity, the courts in *New Jersey Media* and *Detroit Free Press* have freedom to decide what they want the Richmond test to mean.

DESPITE AMBIGUITY OF THE RICHMOND TEST, THIRD CIRCUIT INTERPRETATION STILL PREVAILS

Although a level of freedom in interpretation exists, I argue that the Third Circuit for *New Jersey Media* makes a more accurate and thoroughly-reasoned interpretation of the test than the court in *Detroit Free Press*. To determine which court was more accurate in its assessment of how "experience" and "logic" have been fulfilled in closing deportation cases, we need to define what the Court in *Richmond* most likely means by those terms.

What is Experience?

In weighing the experience factor for a certain type of proceeding, one should determine if over a substantial period of history, cases of similar nature have been open to the public. In this manner we see whether or not history has rendered favorable experience with regard to openness. In the Supreme Court's analysis of *Richmond Newspapers,* only the history of criminal cases is examined because what is at issue is a criminal trial. Also, the history of open trials established from the case was one of longstanding tradition. Therefore in selecting the history that applies in deportation hearings, the Third Circuit is

[18] Id. at 589.

[19] Id. at 579.

correct in narrowing down the relevant historical scope to the specific history of administrative hearings and demanding a substantial historical time frame in which the hearings need to be open. It keeps in mind that an "unbroken and uncontradicted history" seems to demand more than just a few decades of presumed openness in deportation hearings. Only in 1965, during a period of time when U.S. Immigration policy started becoming more progressive and liberal,[20] did a regulation within the Immigration and Nationality Act establish a presumption of openness. Less than forty years of history does not establish the kind of demonstration of openness that the *Richmond* court sought.

Conversely, the Sixth Circuit does not limit what is included in the history of deportation hearings, and argues that "a brief historical tradition" might be sufficient to establish a First Amendment right of access."[21] It cites the similarities between deportation hearings and trials of English criminal courts in 1718 that could banish criminals and transport them away. Through this strategy the Sixth Circuit argues that such types of criminal cases (as mentioned in *Richmond Newspapers*) prove to be legitimate precedents to deportation hearings. Although it is true that procedural aspects are similar between deportation hearings and such criminal trials (both are adversarial in nature, both involve a person receiving notice from the court, and in both cases the government has a burden to prove the guilt of the person[22]), deportation hearings are administrative. The immigration courts which conduct such trials (and which issued the Creppy directive) belong to the Department of Justice, which is of the Executive branch. A directive issued from the Executive branch (applying only to courts under its authority) should be evaluated under a separate standard than the standards used in judicial branch proceedings such as in the *Richmond* case. Nothing in *Richmond Newspapers* supports the assertion that conclusions about judicial branch proceedings can also be applied to political branch proceedings. Moreover, the fact that the Sixth Circuit states that a short tradition of openness will suffice for the experience prong of the *Richmond* test directly contradicts the Supreme Court's reading in *Richmond Newspapers* that a long, solid tradition of openness is required. Thus, with regard to experience, the Sixth Circuit too hastily to includes

[20] See www.immigration.gov (visited March 2003).

[21] Detroit Free Press, 303 F.3d at 742.

[22] Evan P. Shultz, *Looks like Justice*, Legal Times, Nov.1, 2002, Law.com.

criminal trials as precedent to deportation hearings, thereby compromising the high standard of experience set forth in *Richmond Newspapers.*

What is Logic?

Justice Brennan's concurrence in *Richmond Newspapers* formally sets out the two part test. Within it not only does he define logic to mean that openness needs to be an important aspect of the trial in question, he also notes that there are several purposes that need to be furthered within trials in general. Although the trial is a way of "adjudicating disputes and protecting rights," it also "plays a pivotal role in the entire judicial process, and by extension, in our form of government."[23] This seems to be calling for a broad application of the logic prong, suggesting that we are not to limit ourselves to the internal function of the trial itself and how openness facilitates that function, but to examine how openness might impact the judicial process and our government as a whole. Although Brennan's concurrence is written in support of public trials, what is essential to extract from this is that during the construction of the logic prong, the importance of the broad effects of open trials is taken into account. Applying this to the two courts' analysis of the logic prong in the Third and Sixth Circuit, we find that the Third Circuit's analysis for *New Jersey Media* applied a broader and more balanced view of logic.

The Sixth Circuit in *Detroit Free Press* notes several positive roles that openness plays in the conduction of trials. To review, it states that public access allows for checks on the Executive to make sure that proceedings are being conducted fairly, helps the public to ensure that government does not make mistakes, provides therapeutic relief to a post September 11th society, advances the perception of integrity and fairness of government, and promotes effective participation of citizens.[24] Three of the five above reasons have to do with the internal conduction of the trial itself, while the others apply more generally to the public at large. Upon closer examination, these five roles of openness, which the court deems as being essential to the conduction of trials, reduce to two basic roles. One is that the government's integrity is kept in check and the other is that participation in public trials is good for the social

[23] Richmond Newspapers, 448 U.S. at 596.

[24] Detroit Free Press, 303 F.3d at 751.

health of the public. Yet these are only two of many potential factors that need to be considered in weighing the importance of public access to trials.

The Third Circuit, in citing the Watson Declaration, gives a more balanced account of what the repercussions of public access would be like in both the context of the trial itself and society at large. While not ignoring the obvious benefits of public access to trials demonstrated in *Detroit Free Press*, the court pushes the examination of public access further. In his Declaration, Dale L. Watson, the Executive Assistant Director of Counterterrorism and Counterintelligence Federal Bureau of Investigation, points out that privacy is for the most part desired by the detainees as a result of fear due to the stigma that comes from being labeled a suspected terrorist. Also, if all special interest cases are not closed to the public, then information leaks will inevitably happen, posing a threat to the security of everyone in the nation. In addition, immigration judges are not experienced enough in the field of terrorism and national security to make well-grounded judgment calls for closure of trials on a case by case basis.[25] The upshot of public trials, the court notes, is perhaps a slightly fairer one. Yet the downside outweighs everything, because social health and political freedoms are meaningless if physical well-being is endangered. As legal scholar Floyd Abrams notes, "It will not do to act as if we can decide every civil liberties issue as if the events of September 11 had not occurred."[26] The state of our current affairs calls us not to ignore the pressing security issues we face. In this manner the Third Circuit deferentially and thoroughly "weighs"[27] the importance of public access in the functioning of trials, just as it is instructed by the *Richmond* precedent, and finds that it is outweighed by a factor far more important: the threat of national security in a time of potential war.

As a result, we find that in comparing the Third and Sixth Circuits' analysis of the *Richmond* two-part test, the Third Circuit emerges with a systematic and thorough analysis that proves to be more true to the standards set by the *Richmond* precedent.

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[25] New Jersey Media Group, 308 F.3d at 218.

[26] Floyd Abrams, *The First Amendment and the War Against Terrorism,* 5 University of Pennsylvania Journal of Constitutional Law 1, 3 (October 2002).

[27] Richmond Newspapers, 448 U.S. at 589.

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HEART OF THE DEBATE:

THE CONFUSING HISTORY OF DEPORTATION HEARINGS

Perhaps the most difficult issue to resolve in addressing the conflict between the Third and Sixth Circuit is whether deportation hearings have a true and long-standing history of openness. The first immigration act was enacted in 1882. Since then, Congress has enacted many statutes that close exclusion hearings, but not deportation hearings. The difference between an exclusion hearing and a deportation hearing is that an exclusion hearing involves non-citizens seeking access to the country whereas deportation hearings involve non-citizens who have gained access to the country and who wish to stay. Closure of exclusion hearings include the Act of March 3, 1903 and the 1952 Immigration and Nationality Act.[28] Yet these acts have nothing to do with the closure of deportation hearings. In the 1965 revision of the Immigration and Nationality Act, the Immigration and Naturalization Service declared deportation hearings to be presumptively open. The Sixth Circuit interprets this to mean that even before 1965 there was nothing specified about whether deportation hearings should be closed. The Third Circuit, however, interprets the recent declaration of presumptive openness as an ambiguous start to a short history of open deportation hearings. It notes that a "recent— and rebuttable—regulatory presumption is hardly the stuff of which Constitutional rights are forged."[29] With regard to deportation hearings conducted in geographically inaccessible places such as in homes and hospitals, the Sixth Circuit views them as presumptively open while the Third Circuit views these hearings as closed to the public since they cannot physically access them.

Finally, many deportation hearings have been held in state prisons, excluding the presence of the public. These exceptions to openness do not bother the Sixth Circuit, while the Third Circuit notes them as breaks in a supposedly unbroken history of openness. The true subjectivity of what constitutes openness now emerges. Is the unbroken history of openness satisfied when a tradition of openness stands irrespective of certain exceptions; are those exceptions precisely what breaks the tradition of openness and

[28] Detroit Free Press, 303 F.3d at 743.

[29] New Jersey Media Group, 308 F.3d at 241.

contradicts it? The lack of facts with regards to the history of deportation hearings consequently spurs on an opinion-based disagreement between the two Appellate courts.[30] Due to the limited statutory regulations imposed upon deportation hearings in our country's history, it is virtually impossible for courts to resolve whether deportation hearings historically have been intended to be open or closed. One possible solution might be to look back to the beginnings of American history and observe what the Federalists thought about the closure of political branch proceedings, especially during periods of international crisis.

The Federalists: A History of Secrecy

The extent of press access allowed at government proceedings directly corresponds to the extent the public has a right to know about government information. In Martin Halstuk's study of the Federalist period, he notes that from the years of 1794-1798, the nation faced its first international crisis when the government became split on what the role of the U.S. would be in the war between England and France. Through the events surrounding the Jay Treaty of 1794, the XYZ Affair in 1798 and the passing of the Sedition Act that followed, it seems evident that the Federalist's policy on the public's right to know about government information was one of skepticism.[31]

A tradition of government secrecy in the U.S. can be traced back to the Constitutional Convention of 1787. Hamilton wrote that 'if the ratification deliberations had been open, 'the clamours of faction would have prevented any satisfactory result.'"[32] Hamilton, although he believed that the voice of the people needed to be heard, resolved that there are certain instances when openness in government is not viable. For instance, when Great Britain and France became at war, the U.S. was torn as to whether to support France, its ally, or Britain, who was a primary trade partner. It was finally decided that

[30] Julie Hilden, *A Complete Information Blackout Part 2: Disagreement by Courts on the Closure of Immigration Hearings Makes Supreme Court Review Likely*, Writ, Oct. 15, 2002, FindLaw.com.

[31] Mark E. Halstuk, *Policy of Secrecy—Pattern of Deception: What Federalist Leaders Thought about a Public Right to Know, 1794-1798,* 7 Communication Law and Policy Journal 51, 54-55 (Winter 2002).

[32] Id. at 59.

peace with Britain needed to be made, resulting in the signing of Jay's Treaty in a secret gathering of the nation's leaders. Jay eventually signed an agreement with British Foreign Minister Lord Grenville, also in secret. When Jay's treaty actually reached Washington, people were not only surprised and angered by the secret negotiations, they were upset because most of the terms favored Britain.

Years later, when Adams became President, he wanted to avert war with France. Another round of secret negotiations took place as he sent a three-member team to Paris with its motives hidden from the public. French Foreign Minister Talleyrand sent three secret representatives, referred to as X, Y, and Z to meet them to present the terms they demanded if peace were to ensue.[33] The ultimate outcome of the negotiations was a failure, for France's demands were outrageous and unrealistic.[34]Once again, when the public learned of these secret negotiations, they were infuriated. This set the stage for the passage of the Sedition Act, which stated that it was illegal to publish "any false, scandalous and malicious writing against the government of the United States…with intent to defame…"[35] We find that the events surrounding the Jay Treaty, XYZ Affair and the Sedition Act demonstrate that the framers of our nation's history "believe the Constitution imposed few or no limits on executive-branch government secrecy, at least when it came to international affairs."[36] Since our Founding Fathers executed this kind of secrecy, it may be speculated that they might not have thought secrecy with regard to deportation hearings to be unheard of. In fact, it seems they would agree with the notion that many instances call for the closure of similar government proceedings, and that the public's right to know is not something to be taken for granted in this area.

[33] Id. at 68-69.

[34] Id.

[35] Id. at 71.

[36] Id. at 62.

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CONCLUSION & PROPOSED SOLUTION

The Limitations of the Richmond Test and a Pathological Perspective

The opposing conclusions and differing modes of analysis reached in *New Jersey Media* and *Detroit Free Press* show us just how flawed and limited the *Richmond* two-part test is. It further demonstrates to us that it is a test that cannot survive a time of severe national stress. Kathleen Olson writes that we are in a pathological period in which "social or political conditions in the relevant community generate a shift in attitudes regarding toleration that places in jeopardy one or more of the commitments that comprise the core of the First Amendment."[37] This means that in times of national stress (such as post September 11th) people are more willing to give up certain fundamental rights. Olson's proposed solution (as well as the solution I agree with) is that the due to the insight gained from the pathological perspective, it is the Court's duty in non-pathological times to formulate clear guiding principles as to how to interpret case law so as to give "minimal range of discretion" to "future decision-makers who will be called upon to make judgments when pathological pressures are most intense."[38] Decision-makers in pathological times cannot be entrusted with too much freedom to interpret legal standards.

The downfall of the *Richmond* test lies in that it "gives judges too much discretion and too little guidance."[39] Specifically there is a lack of guidance with regard to the extent it applies to proceedings that go beyond criminal trials. The experience prong in particular can be used to limit or expand access, depending on whether the court examines the history of a particular proceeding, similar proceedings, or general types of proceedings. With this room of flexibility, there is no way of predicting what the outcome will be when applying the *Richmond* test in a pathological period.

To avoid this problem of instability, we need to create a principle of courtroom access that will be predictable, clear, and stable. One way to do this

[37] Kathleen K. Olson, *Courtroom Access After 9/11: A Pathological Perspective,* 7 Communication Law and Policy Journal 461, 469 (Autumn 2002).

[38] Id. at 472.

[39] Id. at 463.

is to limit the freedom of the judge to decide on the values of such a principle and to create a rule that anticipates bad times. We can formulate our principle of courtroom access by limiting access to apply to judicial proceedings only. A judicial proceeding is "a procedure involving the formal examination of a matter before a tribunal in a civil or criminal cause in order to determine the matter."[40] This can even extend to administrative hearings such as deportation hearings, as long as it fits this definition of a judicial proceeding. Once this principle is established, the question of whether or not the public has a First Amendment right to courtroom access is settled. The principle takes for granted that courtroom access is an important and beneficial for the public.

Therefore, by applying the newly formulated doctrine of courtroom access, courts will not need to perform the experience prong of the *Richmond* test to see if the type of proceeding they are facing has historically been open. An established presumption of openness for the specified types of proceedings will allow courts to help the public preserve its liberties in times of national crisis, while saving time and energy for themselves. Since openness will be easily established, the burden can then shift to the government in seeking closure, which, as mentioned earlier, requires the Strict Scrutiny test. The fact that a First Amendment right of access is given so freely in this solution is not to say that closure is unwarranted or even unneeded. As demonstrated by the reasoning of the Third Circuit as well as the Federalists, countervailing interests against courtroom access do exist and should not be ignored. What this solution does do, however, is that it skips the whole ambiguity that the *Richmond* Test creates and requires the government to prove whether courtroom closure provisions are tailored to serve a legitimate purpose. In times such as ours, this is not a difficult burden to prove.

Since the two Appellate courts are at odds with one another on the issue of closed deportation hearings, it is likely that the Supreme Court will need to make an immediate ruling. It will be interesting to follow this issue to the next level because it is too late to reform the doctrine of courtroom access in these cases, and as such, the Supreme Court is obligated to rule with either the Third or Sixth Circuit. However, considering the fact that while the Third Circuit's rule was pending the Supreme Court concurrently issued a stay of the preliminary injunction originally granted to the press, we are probably given a hint as to how the Court will rule when this issue comes before it.

[40] Id. at 490.