IN THE
COURT OF APPEALS FOR THE
FOURTEENTH CIRCUIT

CASE NUMBER 73-01

MELVIN R. ALLEN, in his capacity as director, IMMIGRATION AND NATURALIZATION SERVICE, **Appellant** **vs.** **THE TSN NEWSGROUP, INC.,** **Appellee.**	**Appeal from the U.S. District Court for Ebbetts**

OPINION OF THE COURT

Judge Vincent Scully delivered the opinion of the Court:

In this appeal, we consider whether the Immigration and Naturalization Service may conduct private hearings on deportation proceedings in certain circumstances. The director of the INS, Melvin Allen, acting in accordance with the direction of the Attorney General, designates certain cases to be special interest cases, to be conducted in secret, closed off from the public. The TSN Newsgroup, Inc.[1] argues that closure of these hearings is unconstitutional. The Government filed a motion to dismiss, arguing that closing special interest cases was not unconstitutional. The trial court granted the injunction, finding blanket closure of deportation hearings in "special interest" cases unconstitutional. For the reasons that follow, we affirm the lower court's order granting Plaintiff a preliminary injunction.

[1] The TSN Newsgroup, Inc. sought class action status and has been joined by several other newsgathering organizations. Without deciding whether a class action would be appropriate, we identify the Plaintiffs as "Newspapers" in this opinion for simplicity's sake.

I. FACTS AND PROCEDURAL HISTORY

On September 21, 2001, Director Melvin Allen issued a directive (the "Allen directive") to all United States Immigration Judges requiring closure of special interest cases. The Allen directive requires that all proceedings in such cases be closed to the press and public, including family members and friends. The Record of the Proceeding is not to be disclosed to anyone except a deportee's attorney or representative, "assuming the file does not contain classified information." "This restriction on information includes confirming or denying whether such a case is on the docket or scheduled for a hearing."

On December 19, 2002, Immigration Judge Elizabeth Hacker conducted a bond hearing for Al-Ibn Ja'hamith ("Ja'hamith"), one such special interest case. Ja'hamith was subject to deportation, having overstayed his tourist visa. The Government further suspects that the Islamic charity Ja'hamith operates supplies funds to terrorist organizations. Ja'hamith's family, members of the public, including a Congressman, and several newspapers sought to attend his deportation hearing. Without prior notice to the public, Ja'hamith, or his attorney, courtroom security officers announced that the hearing was closed to the public and the press. Ja'hamith was denied bail, detained, and has since been in the Government's custody. Subsequent hearings, conducted on January 2 and 10, 2002, were also closed to the public and the press. Ja'hamith has been transferred to Chicago for additional proceedings.

II. ANALYSIS

The Two-Part *Richmond Newspapers* Test

The sole issue for consideration here is whether the First Amendment affords the press and public a right of access to deportation hearings. The Newspapers argue, and we agree, that the right of access should be governed by the standards set forth in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), and its progeny. The Government argues that the Newspapers cannot demonstrate a right of access to deportation hearings by the standards of the Richmond Newspapers test.[2]

[2] *Richmond Newspapers* involved a blanket closure order at a murder trial. The Supreme Court examined the historical evidence of the evolution of the criminal trial in Anglo-American justice (which had historically been presumed to be open to the public) and the core purposes of the Bill of Rights to ensure effective communication on government function. The Court determined that a summary closing of the trial process was not permissible.

This test has two parts. The first is a historical examination, the so-called "experience" test, in which we examine the question of whether these proceedings have historically been open. The second is the "logic" test, in which the value of openness of the proceedings is judged.

Under this two-part "experience and logic" test from *Richmond Newspapers*, we conclude that there is a First Amendment right of access to deportation proceedings. Deportation hearings, and similar proceedings, have traditionally been open to the public, and openness undoubtedly plays a significant positive role in this process.

A. The Experience Test: *Deportation Proceedings Have Been Traditionally Accessible to the Public*

When we embark on the first leg of the analytical journey, we look to the history of the proceedings and whether they have been historically open to the public. The reason is that our national experience informs our judgment about whether a right of accessibility should be found: "[B]ecause a 'tradition of accessibility implies the favorable judgment of experience,' *Globe Newspaper Co. v. Superior Court,* 457 U.S. 596, 611, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982), (quoting *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 589 (1980) (Brennan, J., concurring)), we . . . consider . . . whether the place and process have historically been open to the press and general public." *Press- Enterprise Co. v. Superior Court,* 478 U.S. 1, 8, 106 S.Ct. 2735 (*Press- Enterprise II).*

The parties first dispute whether this inquiry requires a significantly long showing that the proceedings at issue were historically open, such as a common law tradition. The Government cites *Richmond Newspapers* for the proposition that the tradition of open hearings must have existed from the time "when our organic laws were adopted," presumably at the adoption of the Bill of Rights. *See Richmond Newspapers,* 448 U.S. at 569.

The Supreme Court effectively silenced this argument in *Press-Enterprise II,* where the Court relied on exclusively *post*-Bill of Rights history in determining that preliminary hearings in criminal cases were historically open. *See Press-Enter. II,* 478 U.S. at 10-12. Courts of Appeals have similarly not required such a showing. *See, e.g., United States v. Simone,* 14 F.3d 833, 842 (3d Cir. 1994) (finding First Amendment right of access despite no history of such); *Cal-Almond., Inc.,* 960 F.2d 105, 109 (finding history of access to be determined by reviewing

current state statutes); *Applications of Nat'l Broad. Co., Inc. v. Presser*, 828 F.2d 340, 344 (6th Cir. 1987) (finding First Amendment right of access while reviewing history from 1924-1984). Justice Brennan's formulation of the "experience" prong of the test in his *Richmond Newspapers* concurrence, adopted as the prevailing view of how to approach the issue, speaks on this point. *See Press-Enter. II*, 478 U.S. at 8 (adopting Justice Brennan's formulation); *Globe Newspapers*, 457 U.S. at 605 (same). Specifically, Justice Brennan opined:

> First, the case for a right of access has special force when drawn from an enduring and vital tradition of public entree to particular proceedings or information. *Cf. In re Winship*, 397 U.S. 358, 361-362 (1970). Such a tradition commands respect in part because the Constitution carries the gloss of history. *More importantly, a tradition of accessibility implies the favorable judgment of experience*. Second, the value of access must be measured in specifics. Analysis is not advanced by rhetorical statements that all information bears upon public issues; *what is crucial in individual cases is whether access to particular Government process is important in terms of that very process.*
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> *Richmond Newspapers*, 448 U.S. at 589 (Brennan, J., concurring) (emphasis added).

Therefore, although historical context is important, a brief historical tradition might be sufficient to establish a First Amendment right of access where the beneficial effects of access to that process are overwhelming and uncontradicted. *See id.* Accordingly, the Supreme Court has called both prongs of the test "complimentary considerations." *Press-Enter. II*, 478 U.S. at 8. This comports with the Court's view that the First Amendment concerns "broad principles," *Globe Newspapers*, 457 U.S. at 604, applicable to contexts not known to the Framers. *See, e.g.*, *Erznoznik v. Jacksonville*, 422 U.S. 205 (1975) (applying First Amendment protection to drive-in movie theaters). However, we are mindful that "[a] historical tradition of at least some duration is obviously necessary, . . . [or] nothing would separate the judicial task of constitutional interpretation from the political task of enacting laws currently deemed essential." *In re The Reporters Comm. for Freedom of the Press*, 773 F.2d 1325, 1332 (D.C. Cir. 1985) (Scalia, J.).

Nonetheless, deportation proceedings historically have been open. Although exceptions may have been allowed, the general policy has been one of openness. The first general immigration act was enacted in 1882. *See Kleindienst*, 408 U.S. at 761. Repeatedly, Congress has enacted statutes closing exclusion hearings. *See e.g.*, Treasury Department, Immigration Laws and Regulations 4 (Washington D.C., Government Printing Office 1893); Act of March 3, 1903

§ 25 (Ch. 1012, 32 Stat. 1213) (requiring exclusion hearings to be held "separate and apart" from the public); 1952 Immigration and Nationality Act, 66 Stat. 163, Section 163 (same). None of these statutes, however, has ever required closure of deportation hearings. Since 1965, INS regulations have explicitly required deportation proceedings to be presumptively open. *See* 8 C.F.R. § 3.27. Since that time, Congress has revised the Immigration and Nationality Act at least 53 times without indicating that the INS had judged their intent incorrectly. *See* United States Dept. of Justice, Immigration and Naturalization Service, *Immigration and Naturalization Legislation from the Statistical Yearbook*, (last modified 05/28/2002) <http://www.ins.usdoj.gov/graphics/aboutins/statistics/legishist/index.htm> ("*Statistical Yearbook*").

The Government argues that the history of explicitly closing exclusion hearings, while not specifying that deportation hearings be closed, does not show that Congress intended deportation hearings to be open. Instead, the Government contends, this demonstrates that Congress took the INS's discretion away for exclusion hearings and specifically gave them discretion to open or close deportation hearings. We find the Government's reading unpersuasive. Having explicitly closed exclusion hearings, it would have been easy enough for Congress expressly to state that the Attorney General had such discretion with respect to deportation hearings. But it did not. The Immigration and Nationality Act is replete with examples where discretion is specifically delegated to the Attorney General. *See, e.g.*, 8 U.S.C. § 1154 (a)(1)(J) (2002) ("The determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of the Attorney General."); 8 U.S.C. §1182 (a)(9)(B)(v) (2002) ("The Attorney General has sole discretion to waive clause (i)"). To the extent that their actions were ambiguous, the Supreme Court has repeated "the long standing principle of construing any lingering ambiguities in deportation statutes in favor of the alien." *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 459 (1987) (citing *INS v. Errico*, 385 U.S. 214, 225 (1966)); *see also Costello v. INS*, 376 U.S. 120, 128 (1964); *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948).

Moreover, the history of immigration law informs Congress's legislation. Open hearings, apart from their value to the community, have long been considered to advance fairness to the parties. *See generally Richmond Newspapers*, 448 U.S. 555. Additionally, Congress has long been aware that deportees are constitutionally guaranteed greater procedural rights than those

excluded upon initial entry. *See, e.g., Ex rel. Mezei*, 345 U.S. at 212 (reviewing this history). Therefore, Congress likely legislated key differences between both procedures accordingly.

Next, relying on *Capital Cities Media, Inc.*, the Government impermissibly expands the relevant inquiry by arguing that there was no common law right of access to administrative proceedings. First, this argument ignores the fact that the modern administrative state is an entity unknown to the Framers of the First Amendment. This argument also fails to recognize the evolving nature of our Government. Administrative proceedings come in all shapes and sizes. To the extent that we look to similar proceedings, we should look to proceedings that are similar in form and substance. This was the approach taken by the Third Circuit in *The First Amendment Coalition*. In that case, when analyzing the history prong of the test, the Third Circuit compared an administrative disciplinary board's function to that of a grand jury because both could only recommend, not impose, punishment. *See First Amendment Coalition*, 784 F.2d at 473.

As stated earlier, to paraphrase the Supreme Court, deportation hearings "walk, talk, and squawk" very much like a judicial proceeding. Substantively, we look to other proceedings that have the same effect as deportation. Here, the only other federal court that can enter an order of removal is a United States District Court during sentencing in a criminal trial. *See* 8 U.S.C.A. § 1228(c) (2002). At common law, beginning with the Transportation Act of 1718, the English criminal courts could enter an order of transportation or banishment as a sentence in a criminal trial. *See generally* Javier Bleichmar, *Deportation as Punishment: A Historical Analysis of the British Practice of Banishment and its Impact on Modern Constitutional Law*, 14 Geo. Immigr. L.J. 115, 125 (1999) (citing A. Roger Ekrich, Bound for America: The Transportation of British Convicts to the Colonies 1718-1775 (1987)). As *Richmond Newspapers* discussed in great length, these types of criminal proceedings have historically been open. *Richmond Newspapers*, 448 U.S. at 564-74.

It bears note that the history of administrative proceedings is briskly evolving to embrace open hearings. *See* 3 Kenneth Culp Davis, *Administrative Law Treatise* § 14:13, at 58-61 (2d ed. 1980) ("The prevailing tendency [is] to open all hearings of a somewhat formal character, overriding interest in privacy and in confidentiality"). Thus, the "favorable judgment of experience" counsels that openness better serves formal administrative hearings. *See Richmond Newspapers*, 448 U.S. at 589*; see also Fitzgerald v. Hampton*, 467 F.2d 755, 766-67 (D.C. Cir.

1972) (holding that closing civil servant's termination hearing violated due process). As the Supreme Court aptly recognized in 1938:

> The vast expansion of this field of administrative regulation in response to the pressure of social needs is made possible under our system by adherence to the basic principles that the legislature shall appropriately determine the standards of administrative action and that in administrative proceedings of a quasi-judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. *These demand "a fair and open hearing,"* - essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important Governmental process. Such a hearing has been described as an "inexorable safeguard."
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> *Morgan v. United States,* 304 U.S. 1, 14-15 (1938) (citations omitted) (emphasis added).

Finally, to refute the history of open hearings, the Government points to a single passage in a study about deportation of non-citizens to Europe during the 1920's and a single Second Circuit case, for the proposition that deportation hearings took place in a variety of settings, including prisons, hospitals, and homes. *See* J. Clark, *Deportation of Aliens from the United States to Europe* 363 (1931); *United States ex rel. Ciccerelli v. Curran*, 12 F.2d 394, 396 (2d Cir. 1926) (finding that deportation hearings may be held in prison). However, neither of these sources speak to the norm. Certainly, while these examples might have been exceptional cases, neither of these sources even hint that the public could not attend a hearing at a prison, hospital, or home. Certainly, one could imagine family and friends being present at some of these places. Finally, the study cited by the Government points out that members of Congress sometimes attended, or sent representatives to, such hearings. *See* Clark, *supra* at 368.

B. The Logic Test: *Public Access Plays a Significant Positive Role in Deportation Hearings*

Next, we turn to the "logic" prong, which asks "whether public access plays a significant positive role in the functioning of the particular process in question." *Press-Enter. II*, 478 U.S. at 8-9. Public access undoubtedly enhances the quality of deportation proceedings. Much of the reasoning from *Richmond Newspapers* is also applicable to this context.

First, public access acts as a check on the actions of the Executive by assuring us that proceedings are conducted fairly and properly. *See Richmond Newspapers*, 448 U.S. at 569

(noting that public access assures that proceedings are conducted fairly, including discouraging perjury, the misconduct of participants, and decisions based on secret bias or partiality). In an area such as immigration, where the Government has nearly unlimited authority, the press and the public serve as perhaps the only check on abusive Government practices.

Second, openness ensures that Government does its job properly; that it does not make mistakes. "It is better that many [immigrants] should be improperly admitted than one natural born citizen of the United States should be permanently excluded from his country." *Kwock Jan Fat v. White*, 253 U.S. 454, 464 (1920). "Congressional oversight hearings can prevent future mistakes, but they can do little to correct past ones. In contrast, openness at the hearings can allow mistakes to be cured at once." *Soc'y of Prof'l. Journalists*, 616 F. Supp. at 575-576. Moreover, "[t]he natural tendency of Government officials is to hold their meetings in secret. They can thereby avoid criticism and proceed informally and less carefully. They do not have to worry before they proceed with the task that a careless remark may be splashed across the next day's headlines." *Id.*

These first two concerns are magnified by the fact that deportees have no right to an attorney at the Government's expense. Effectively, the press and the public may be their only guardian.

Third, after the devastation of September 11 and the massive investigation that followed, the cathartic effect of open deportations cannot be overstated. They serve a "therapeutic" purpose as outlets for "community concern, hostility, and emotions." *Richmond Newspapers*, 448 U.S. at 571. As the lower court here stated:

> It is important for the public, particularly individuals who feel that they are being targeted by the Government as a result of the terrorist attacks of September 11, to know that even during these sensitive times the Government is adhering to immigration procedures and respecting individuals' rights . . . . And if in fact the Government determines that Ja'hamith is connected to terrorist activity or organizations, a decision made openly concerning his deportation may assure the public that justice has been done.

Fourth, openness enhances the perception of integrity and fairness. "The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known." *Press-Enter.*, 464 U.S. at 508. The most stringent safeguards for a deportee "would be

of limited worth if the public is not persuaded that the standards are being fairly enforced. Legitimacy rests in large part on public understanding." *See First Amendment Coalition v. Judicial Inquiry & Review Bd.*, 784 F.2d 467, 486 (3d Cir. 1986) (en banc) (Adams, J., concurring in part, dissenting in part).

Fifth, public access helps ensure that "the individual citizen can effectively participate in and contribute to our republican system of self-Government." *Globe Newspaper*, 457 U.S. at 604. "[A] major purpose of [the First Amendment] was to protect the free discussion of Governmental affairs." *Id.* Public access to deportation proceedings helps inform the public of the affairs of the Government. Direct knowledge of how their Government is operating enhances the public's ability to affirm or protest Government's efforts. When Government selectively chooses what information it allows the public to see, it can become a powerful tool for deception.

Additionally, the Government has not identified one persuasive reason why openness would play a negative role in the process. Nothing like the excessive financial burdens noted by the Supreme Court in *Houchins v. KQED*, Inc., 438 U.S. 1 (1978) would be applicable here.

III. CONCLUSION

No one will ever forget the egregious, deplorable, and despicable terrorist attacks of September 11, 2001. These were cowardly acts. In response, our Government launched an extensive investigation into the attacks, future threats, conspiracies, and attempts to come. As part of this effort, immigration laws are prosecuted with increased vigor.

The political branches of our Government enjoy near-unrestrained ability to control our borders. "[T]hese are policy questions entrusted exclusively to the political branches of our Government." *Fiallo v. Bell*, 430 U.S. 787, 798 (1977). Since the end of the 19th Century, our Government has enacted immigration laws banishing, or deporting, non-citizens because of their race and their beliefs. *See, e.g., Wong Wing v. United States*, 163 U.S. 228, 237 (1896) (court cannot limit Congress from expelling "aliens whose race or habits render them undesirable as citizens"); *Chae Chan Ping v. United States*, 130 U.S. 581 (1889) ("*The Chinese Exclusion Case*"); *Galvan v. Press*, 347 U.S. 522, 529 (1954) (finding that Congress can deport former member of Communist organization even if they personally did not advocate the violent overthrow of the Government); *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952). While the Bill of Rights jealously protects citizens from such laws, it has never protected non-citizens facing

deportation in the same way. In our democracy, based on checks and balances, neither the Bill of Rights nor the judiciary can second-guess Government's choices.

The only safeguard on this extraordinary Governmental power is the public, deputizing the press as the guardians of their liberty. "An informed public is the most potent of all restraints upon misgovernment[.]" *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936). "[They] alone can here protect the values of democratic Government." *New York Times v. United States*, 403 U.S. 713, 728 (1971) (per curiam) (Stewart, J., concurring).

Today, the Executive Branch seeks to take this safeguard away from the public by placing its actions beyond public scrutiny. Against non-citizens, it seeks the power to secretly deport a class if it unilaterally calls them "special interest" cases. The Executive Branch seeks to uproot people's lives, outside the public eye, and behind a closed door.

Democracies die behind closed doors. The First Amendment, through a free press, protects the people's right to know that their Government acts fairly, lawfully, and accurately in deportation proceedings. When Government begins closing doors, it selectively controls information rightfully belonging to the people. Selective information is misinformation. The Framers of the First Amendment "did not trust any Government to separate the true from the false for us." *Kleindienst v. Mandel*, 408 U.S. 753, 773 (1972) (quoting *Thomas v. Collins*, 323 U.S. 516, 545 (Jackson, J., concurring)). They protected the people against secret Government.

The judgment below is affirmed.[3]

Judges H. Caray, H. Callas, E. Harwell, and R. Barber concur.

[3] The Court expresses its thanks to the *amicus curiae* (friend of court filing) of counsel George T. Patton, Jr.

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DISSENTING OPINION

Judge Uecker, with whom Judge Brennaman, joins, dissenting:

We dissent. Employing the *Richmond Newspapers* test compels a different result than that reached by the majority. We would reverse the trial court and dismiss the Newspapers' complaint.

A. The "Experience" Test

In *Richmond Newspapers*, 448 U.S. at 575, 100 S.Ct. 2814, the Supreme Court acknowledged the State's argument that the Constitution nowhere explicitly guarantees the public's right to attend criminal trials, but it found that right implicit because the Framers drafted the Constitution against a backdrop of longstanding popular access to criminal trials. Likewise, in 733 F.2d at 1059, we found a First Amendment right of access to civil trials because at common law, such access had been "beyond dispute."

The history of access to political branch proceedings is quite different. With all due respect, the majority errs by analogizing criminal proceedings, which are judicial proceedings

under Article III of the Constitution, to the overall historical approach to legislative and executive branch proceedings under Articles I and II.

The Government correctly notes that the Framers themselves rejected any unqualified right of access to the political branches for, as we explained in *Capital Cities Media, Inc. v. Chester*, 797 F.2d 1164, 1168 (3d Cir.1986), the evidence on this point is extensive and compelling. We need not restate it in full here, but a few snippets are instructive. At the Virginia ratification convention, Patrick Henry was a leading opponent of Government secrecy. He said of the publication clause: "[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." 3 *Elliot's Debates* at 169-70 (J. Elliot ed. 1881). Nevertheless, even Henry conceded that not all Government activities should be publicized, particularly those related to "military operations or affairs of great consequence." *Id.* at 170. Thomas Jefferson agreed, noting that "[a]ll nations have found it necessary, that for the advantageous conduct of their affairs, some [executive] proceedings, at least, should remain known to their executive functionary only." Randall, 3 *Life of Thomas Jefferson* 211 (1858), *reprinted in* Wiggins, *Freedom or Secrecy* 67-68 (1964).

Congressional practice confirms that there is no general right of public access to Governmental proceedings or information. The members of the First Congress did not open their own proceedings to the public--the Senate met behind closed doors until 1794, and the House did likewise until after the War of 1812. *See* Watkins, *Open Meetings under the Arkansas Freedom of Information Act,* While both Houses thereafter opened floor deliberations, committee sessions remained closed and were not routinely opened to the public until the mid-1970s. at 272. Even today, the Senate operates under a resolution limiting public access to "routine Senate records" for 20 years after their creation and to "sensitive records, such as investigative files" for 50 years after their creation, and each Senate committee retains the right to extend that access period for its own records. S. Rep. 474, 96th Cong. 2nd Sess., 126 Cong. Rec. S15209-10 (daily ed., Dec. 1, 1980), U.S.Code Cong. & Admin.News 1996, p. 4659. *See generally Capital Cities Media,* 797 F.2d at 1170-71.

Indeed, it is interesting to note that our democracy was *created* behind closed doors, as the delegates at the Constitutional Convention in Philadelphia in 1787 excluded the public from their proceedings.

This tradition of closing sensitive proceedings extends to many hearings before administrative agencies. For example, although hearings on Social Security disability claims profoundly affect hundreds of thousands of people annually, and have great impact on expenditure of Government funds, they are open only to "the parties and to other persons the administrative law judge considers necessary and proper." . Likewise, administrative disbarment hearings are often presumptively closed. *See, e.g.,* (Office of Comptroller of Currency); (Federal Reserve Board of Governors). The Government lists more than a dozen other examples of mandatorily or presumptively closed administrative proceedings. For instance, hearings on charges of wrongdoing may often be closed at the administrator's discretion for "good cause," to protect the "public interest," or under similar standards. *See, e.g.,* (Office of Personnel Management); (Nuclear Regulatory Commission); (Small Business Administration); (Department of Justice); (Office of Foreign Asset Control); (Office of Veterans Affairs). Hearings on adverse passport decisions by the Department of State "shall be private." . *See also* (hearings on ethics charges against Government employees may be closed "in the best interests of national security, the respondent employee, a witness, the public or other affected persons"); (hearings before Department of Energy Office of Hearings and Appeals may be closed at discretion of administrator).

Faced with this litany of administrative hearings that are closed to the public, the Newspapers cannot claim a general First Amendment right of access to Government proceedings without urging a judicially-imposed revolution in the administrative state. They wisely avoid that tactic, at least directly. Instead they submit that, despite frequent closures throughout the administrative realm, deportation proceedings in particular boast a history of openness sufficient to meet the *Richmond Newspapers* requirement. We now assess that claim, and find that we disagree.

Although the Newspapers do not argue directly for a general right of access to Government proceedings, they maintain that *FMC v. South Carolina Ports Authority,* 535 U.S. 743, 122 S.Ct. 1864, 152 L.Ed.2d 962 (2002), compels us to recognize the procedural similarities between civil trials and deportation hearings and extend the same access rights to each.

1. The history of deportation proceedings

For a First Amendment right of access to vest under *Richmond Newspapers*, we must consider whether "the place and process have historically been open to the press and general public," because such a "tradition of accessibility implies the favorable judgment of experience." Noting preliminarily that the question whether a proceeding has been "historically open" is only arguably an objective inquiry, we nonetheless find that based on both Supreme Court and Third Circuit precedents, the tradition of open deportation hearings is too recent and inconsistent to support a First Amendment right of access.

The strongest historical evidence of open deportation proceedings is that since the 1890s, when Congress first codified deportation procedures, "[t]he governing statutes have always expressly closed *exclusion* hearings, but have *never* closed deportation hearings." (Newspapers' Br. at 30- 31.) In 1893, the Executive promulgated the first set of immigration regulations, which expressly stated that exclusion proceedings shall be conducted "separate from the public." *See* Treasury Dept., *Immigration Laws and Regulations* 4 (Washington D.C., Gov't Printing Office 1893). Congress codified those regulations in 1903 and, since that time, it has repeatedly reenacted provisions closing exclusion hearings. In contrast, although Congress codified the regulations governing deportation proceedings in 1904 and has reenacted them many times since, it has never authorized the general closure that has long existed in the exclusion context.

The Newspapers submit that under the rule of construction *expressio unius est exclusio alterius,*[4] Congress's practice of closing exclusion proceedings while remaining silent on deportation proceedings creates a presumption that it intended deportation proceedings to be open. In support of this interpretation, they point out that the current Justice Department regulations provide explicitly that "[a]ll hearings, other than exclusion hearings, shall be open to the public except that ... [f]or the purpose of protecting ... the public interest, the Immigration Judge may limit attendance or hold a closed hearing." 8 C.F.R. § 3.27. From this they conclude that the regulations state explicitly what the statutes had long said implicitly, namely that deportation hearings are to be open unless an individualized case is made for closure.

But there is also evidence that, in practice, deportation hearings have frequently been closed to the general public. From the early 1900s, the Government has often conducted deportation hearings in prisons, hospitals, or private homes, places where there is no general

[4] Very loosely, the inclusion by expression of one is the exclusion of those not identified.

right of public access. Even in recent times, the Government has continued to hold thousands of deportation hearings each year in federal and state prisons. *See* H.R.Rep. No. 104-469, pt. I, at 124 (1996). Moreover, hearings involving abused alien children are closed by regulation no matter where they are held, and those involving abused alien spouses are closed presumptively. *See* 8 C.F.R. § 3.27(c).

The Newspapers contend that there is no evidence that hearings conducted in hospitals, prisons, and private homes were closed to the public. The majority here agrees, concluding that this evidence does not "even hint that the public could not attend a hearing [in these places].... Certainly, one could imagine family and friends being present." While we agree it is possible that some select non-party individuals might have been present in such places, we are unwilling to assume that the general public enjoyed unfettered access, a clearly counter-intuitive suggestion, particularly since *Richmond Newspapers*, in asking whether "the place and process have historically been open," seems to place the burden of proof on the party claiming openness.

We ultimately do not believe that deportation hearings boast a tradition of openness sufficient to satisfy *Richmond Newspapers*. In *Richmond Newspapers* itself, the Court noted an "unbroken, uncontradicted history" of public access to criminal trials in Anglo American law running from "before the Norman Conquest" to the present, and it emphasized that it had not found "a single instance of a criminal trial conducted in camera in any federal, state, or municipal court during the history of this country." Likewise, we have found that access to civil trials at common law was "beyond dispute."

The tradition of open deportation hearings is simply not comparable. While the *expressio unius* distinction between exclusion and deportation proceedings is a tempting road to travel, we are unwilling effectively to craft a constitutional right from mere Congressional silence, especially when faced with evidence that some deportation proceedings were, and are, explicitly closed to the public or conducted in places unlikely to allow general public access. Although the 1964 Department of Justice regulations did create a presumption of openness, a recent--and rebuttable--regulatory presumption is hardly the stuff of which Constitutional rights are forged.

The Newspapers contend, quite correctly, that at least within the geographic confines of the Third Circuit, a showing of openness at common law is not required. *See, e.g., United States v. Criden,* 675 F.2d 550, 555 (3d Cir.1982) (finding a right of access to pretrial hearings even though no right existed at common law); *United States v. Simone,* 14 F.3d 833, 838 (3d

Cir.1994) (finding a right although no history predated 1980); *Whiteland Woods*, 193 F.3d at 181, (finding a "tradition of accessibility" based on a recent statutory guarantee). We agree that under these decisions a 1000-year history is unnecessary, and that in some cases, largely limited to the criminal context, relatively little history is required. These cases do *not*, however, allow us to dispense with the *Richmond Newspapers* "experience" requirement where history is ambiguous or lacking, and to recognize a First Amendment right based solely on the "logic" inquiry.

In *Criden*, the defendant requested that the court conduct *in camera* his pretrial motion to suppress evidence, and the court acquiesced. A reporter filed suit alleging a First Amendment right to view those proceedings. As the case arose before *Press-Enterprise II* formalized the *Richmond Newspapers* test, we were not bound to apply that test, and we stated that:

> We do not think that historical analysis is relevant in determining whether there is a first amendment right of access to pretrial criminal proceedings. We recognize that, at common law, the public apparently had no right to attend pretrial criminal proceedings. On the other hand, there was no counterpart at common law to the modern suppression hearing.... [W]e proceed to examine the current role of the first amendment and the societal interests in open pretrial criminal proceedings.

Although this language supports the Newspapers' contention that we have overlooked the experience requirement in certain cases, it does not bind us here. The case arose in the criminal context, where First Amendment rights of access had been found many times previously. More importantly, we were not bound to apply the *Richmond Newspapers* test because in *Richmond Newspapers* itself, no approach commanded a majority, and the Court had not yet decided *Press-Enterprise II*. We are now obligated to apply that test, and we have recognized that "the role of history in the access determination" is "crucial." *Capital Cities Media*, 797 F.2d at 1174.

The Newspapers' reliance on our decision in *Simone*, 14 F.3d at 833, is similarly misplaced. The Newspapers overstate our holding in that case. In assessing whether there is a right of access to post-trial examinations of jury misconduct, we noted that the only available evidence postdated 1980. We recognized that evidence "of such recent vintage [does] not establish a tradition of closure," *Simone*, 14 F.3d at 838, and concluded that "the 'experience' prong of the 'logic and experience' test provides little guidance." *Id.* We then found a right while focusing mainly on the logic prong, but critical to that giant step was our reflection that "*[g]iven the overwhelming historical support for access in other phases of the criminal process,*

we are reluctant to presume that the opposite rule applies in this case in the absence of a distinct tradition to the contrary." *Id.* (emphasis added). This logic effectively limits *Simone* 's scope to the criminal context, or at least to those areas with "overwhelming historical support for access." As discussed *supra*, the tradition of public access in the administrative realm is inconsistent at best, so we must rigorously apply both prongs of the *Richmond Newspapers* test.

Although we are confident that our precedents do not allow us to find a First Amendment right of access to deportation hearings absent strong historical evidence, the Supreme Court's recent ruling in *FMC v. South Carolina Ports Authority*, 535 U.S. at ----, 122 S.Ct. at 1864, gives us pause. In holding that state sovereign immunity bars an administrative agency from adjudicating a private party's complaint against a nonconsenting state, the Supreme Court recognized that "formalized administrative adjudications were all but unheard of" during the Framers' time. *Id.* at 1872. It nevertheless found that because Federal Maritime Commission adjudications "walk[ ], talk[ ], and squawk [ ] like a civil lawsuit," *id.* at 1873 (quoting the Court of Appeals decision), "they are the type of proceedings from which the Framers would have thought the States possessed immunity when they agreed to enter the Union." *Id.* at 1872. The Court therefore concluded that state sovereign immunity applies to administrative proceedings. *Ports Authority* had not been decided when the lower court heard this case, and the Newspapers now assert that it forces us to distinguish the procedures in deportation hearings from those in civil trials before finding that different rights exist in each context. Were this suggestion correct, we would indeed be hard pressed to find meaningful differences between the two types of proceedings. A deportation proceeding is commenced with a "Notice to Appear," *see* 8 C.F.R. § 239.1, a document strongly resembling a civil complaint. In turn, a respondent may proffer affirmative defenses. *See Martinez- Montoya v. INS*, 904 F.2d 1018 (5th Cir.1990). As in a civil trial, a respondent has the right to be represented by counsel of his choosing, *see* 8 C.F.R. § 240.3, and has the right to be present during his hearing. *See* 8 U.S.C. § 1229a(b)(4). He or she is also guaranteed an opportunity to cross-examine witnesses and present evidence on his or her behalf. *Id.* While slight differences exist regarding such minor matters as the admissibility of hearsay evidence, we agree that on a procedural level, deportation hearings and civil trials are practically indistinguishable.

Despite these undeniable similarities, however, we do not believe that the Supreme Court intended in *Ports Authority* to import the full panoply of constitutional rights to any

administrative proceeding that resembles a civil trial. The Court's reasoning was based fundamentally on its enduring presumption "that the Constitution was not intended to 'raise up' any proceedings against the States that were 'anomalous and unheard of when the Constitution was adopted.'" *Ports Authority*, 535 U.S. at ----, 122 S.Ct. at 1872 (quoting *Hans v. Louisiana*, 134 U.S. 1, 18, 10 S.Ct. 504, 33 L.Ed. 842 (1890)). Put slightly differently, the Court started from the premise that state sovereign immunity shields nonconsenting states from complaints brought by private persons, regardless of where private persons bring those complaints. It then concluded that since Federal Maritime Commission proceedings strongly resemble civil trials to which state sovereign immunity applies, the Framers would have intended the same right to freedom from private suit to apply in each context.

In contrast, there is no fundamental right to attend Government proceedings underpinning the Newspapers' alleged right to attend deportation proceedings. *See* discussion *supra.* This is not a situation where the Framers contemplated a perfectly transparent Government, only to have deportation proceedings, which they did not foresee, jeopardize that intended scheme. This is also not a situation involving allegations that the Government assigned to an administrative agency a function that courts historically performed in order to deprive the public of an access right it once possessed. And most importantly, this is not a situation that risks affront to states' "residual and inviolable sovereignty," *id.* at 1870 (quoting The Federalist No. 39, p. 245 (C. Rossiter ed. 1961) (J. Madison)), *the* concern that motivated the Court. We therefore decline to loose the *Ports Authority* analysis from its Eleventh Amendment moorings. Instead of analogizing procedures, the proper approach is that developed in *Richmond Newspapers,* and as we have explained, under that test we find an insufficient tradition of openness to support the right.

2. Relaxing the experience requirement would be wrong.

As we have explained in detail *supra,* there is no fundamental right of access to administrative proceedings. Any such access, therefore, must initially be granted as a matter of executive grace. The Government contends that by relaxing the need for a "1000-year tradition of public access," (Gov't Br. at 35), we would permanently constitutionalize a right of access whenever an executive agency does not consistently bar all public access to a particular proceeding. We do not adopt this reasoning in its entirety, for as we have discussed *supra*, we

have sometimes found a constitutional right of access to proceedings that did not exist at common law. *See, e.g.,* (finding a public access right to post-trial jury examinations).

The Newspapers disagree, arguing that "the *constitutional* right of access under the First Amendment does not, and could not, turn on whether the legislature has chosen to supply that right." We believe this reasoning to be precisely backwards, for *Richmond Newspapers* requires a tradition of access before recognizing a constitutional right to that access. Given that order of events, there must perforce be a period of time during which access to a particular proceeding is not constitutionally compelled, although during that period the executive could, of course, grant access as a matter of grace.

Nevertheless, we agree with the Government that a rigorous experience test is necessary to preserve the "basic tenet of administrative law that agencies should be free to fashion their own rules of procedure." *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 544, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978). Were we to adopt the Newspapers' view that we can recognize a First Amendment right based solely on the logic prong if there is no history of closure, we would effectively compel the Executive to close its proceedings to the public *ab initio* or risk creating a constitutional right of access that would preclude it from closing them in the future. Under such a system, reserved powers of closure would be meaningless. It seems possible that, ironically, such a system would result in less public access than one in which a constitutional right of access is more difficult to create.

At all events, we would find this outcome incredible in an area of traditional procedural flexibility, and we are unwilling to reach it when a reasonable alternative is present. By insisting on a strong tradition of public access in the *Richmond Newspapers* test, we preserve administrative flexibility and avoid constitutionalizing ambiguous, and potentially unconsidered, executive decisions.

B. The Logic Test

Even if we could find a right of access under the *Richmond Newspapers* logic prong, absent a strong showing of openness under the experience prong, a proposition we do not embrace, we would find no such right here. The logic test compels us to consider "whether public access plays a significant positive role in the functioning of the particular process in question." *Press- Enterprise II,* 478 U.S. at 8, 106 S.Ct. 2735. The lower court here observed

that "there are abundant similarities between these proceedings and judicial proceedings in the criminal and civil contexts," and concluded that "the same functional goals served by openness in the civil and criminal judicial contexts would be equally served in the context of deportation hearings." As we have discussed *supra*, we agree that deportation proceedings look very much like judicial trials. As we will now explain, however, we find that the logic inquiry has drifted from its intended role and that, properly conceived, it does not support openness in this case.

In *Press-Enterprise II*, the case that formalized the *Richmond Newspapers* test, the Court identified several reasons that openness plays a significant positive role in preliminary hearings. It recognized that "[b]ecause of its extensive scope, the preliminary hearing is often the final and most important step in the criminal proceeding," and in many cases it "provides the sole occasion for public observation of the criminal justice system." *Id.* at 12, 106 S.Ct. 2735 (citation omitted). Similarly, it found that "the absence of a jury, long recognized as an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge, makes the importance of public access to a preliminary hearing even more significant." at 12-13, 106 S.Ct. 2735 (citations omitted). Summarizing that "[d]enying the transcript of a [ ] preliminary hearing would frustrate what we have characterized as the 'community therapeutic value' of openness," it concluded that a qualified First Amendment right of access attaches to preliminary hearings. at 13, 106 S.Ct. 2735.

In subsequent cases, this Court has noted six values typically served by openness: "[1] promotion of informed discussion of Governmental affairs by providing the public with the more complete understanding of the judicial system; [2] promotion of the public perception of fairness which can be achieved only by permitting full public view of the proceedings; [3] providing a significant community therapeutic value as an outlet for community concern, hostility and emotion; [4] serving as a check on corrupt practices by exposing the judicial process to public scrutiny; [5] enhancement of the performance of all involved; and [6] discouragement of perjury." *Simone*, 14 F.3d at 839.

We agree with the lower court that openness in deportation hearings performs each of these salutary functions, but we are troubled by our sense that the logic inquiry, as currently conducted, does not do much work in the *Richmond Newspapers* test. We have not found a case in which a proceeding passed the experience test through its history of openness yet failed the logic test by not serving community values. Under the reported cases, whenever a court has

found that openness serves community values, it has concluded that openness plays a "significant positive role" in that proceeding. But that cannot be the story's end, for to gauge accurately whether a role is positive, the calculus must perforce take account of the flip side--the extent to which openness impairs the public good. We note in this respect that, were the logic prong only to determine whether openness serves some good, it is difficult to conceive of a Government proceeding to which the public would not have a First Amendment right of access. For example, public access to *any* Government affair, even internal CIA deliberations, would "promote informed discussion" among the citizenry. It is unlikely the Supreme Court intended this result.

In this case the Government presented substantial evidence that open deportation hearings would threaten national security. These concerns are highly applicable to the question whether openness, on balance, serves a positive role in removal hearings. We find that upon factoring them into the logic equation, it is doubtful that openness promotes the public good in this context.

The Government's security evidence is contained in the declaration of Dale Watson, the FBI's Executive Assistant Director for Counterterrorism and Counterintelligence. Watson presents a range of potential dangers, the most pressing of which we restate here.

First, public hearings would necessarily reveal sources and methods of investigation. That is information which, "when assimilated with other information the United States may or may not have in hand, allows a terrorist organization to build a picture of the investigation." (Watson Dec. at 4.) Even minor pieces of evidence that might appear innocuous to us would provide valuable clues to a person within the terrorist network, clues that may allow them to thwart the Government's efforts to investigate and prevent future acts of violence. *Id.*

Second, "information about how any given individual entered the country (from where, when, and how) may not divulge significant information that would reveal sources and methods of investigation. However, putting entry information into the public realm regarding all 'special interest cases' would allow the terrorist organization to see patterns of entry, what works and what doesn't." *Id.* That information would allow it to tailor future entries to exploit weaknesses in the United States immigration system.

Third, "[i]nformation about what evidence the United States has against members of a particular cell collectively will inform the terrorist organization as to what cells to use and which

not to use for further plots and attacks." *Id.* A related concern is that open hearings would reveal what evidence the Government lacks. For example, the United States may disclose in a public hearing certain evidence it possesses about a member of a terrorist organization. If that detainee is actually involved in planning an attack, opening the hearing might allow the organization to know that the United States is not yet aware of the attack based on the evidence it presents at the open hearing. *Id.*

Fourth, if a terrorist organization discovers that a particular member is detained, or that information about a plot is known, it may accelerate the timing of a planned attack, thus reducing the amount of time the Government has to detect and prevent it. If acceleration is impossible, it may still be able to shift the planned activity to a yet-undiscovered cell. *Id.* at 7.

Fifth, a public hearing involving evidence about terrorist links could allow terrorist organizations to interfere with the pending proceedings by creating false or misleading evidence. Even more likely, a terrorist might destroy existing evidence or make it more difficult to obtain, such as by threatening or tampering with potential witnesses. Should potential informants not feel secure in coming forward, that would greatly impair the ongoing investigation. *Id.*

Sixth, INS detainees have a substantial privacy interest in having their possible connection to the ongoing investigation kept undisclosed. *Id.* at 8. "Although some particular detainees may choose to identify themselves, it is important to note that as to all INS detainees whose cases have been placed in the special interest category concerns remain about their connection to terrorism, and specifically to the worst attack ever committed on United States soil. Although they may eventually be found to have no connection to terrorist activity, discussion of the causes of their apprehension in open court would forever connect them to the September 11 attacks." *Id.* While this stigma concern exists to some extent in many criminal prosecutions, it is noteworthy that deportation hearings are regulatory, not punitive, *see Carlson v. Landon*, 342 U.S. 524, 537, 72 S.Ct. 525, 96 L.Ed. 547 (1952), and there is often no evidence of any criminal wrongdoing.

Finally, Watson represents that "the Government cannot proceed to close hearings on a case-by-case basis, as the identification of certain cases for closure, and the introduction of evidence to support that closure, could itself expose critical information about which activities and patterns of behavior merit such closure." (Watson Dec. at 8-9.) Moreover, he explains, given judges' relative lack of expertise regarding national security and their inability to see the

mosaic, we should not entrust to them the decision whether an isolated fact is sensitive enough to warrant closure.

The Newspapers are undoubtedly correct that the representations of the Watson Declaration are to some degree speculative, at least insofar as there is no concrete evidence that closed deportation hearings have prevented, or will prevent, terrorist attacks. But the *Richmond Newspapers* logic prong is unavoidably speculative, for it is impossible to weigh objectively, for example, the community benefit of emotional catharsis against the security risk of disclosing the United States' methods of investigation and the extent of its knowledge. We are quite hesitant to conduct a judicial inquiry into the credibility of these security concerns, as national security is an area where courts have traditionally extended great deference to Executive expertise. *See, e.g., Zadvydas v. Davis,* 533 U.S. 678, 696, 121 S.Ct. 2491, 150 L.Ed.2d 653 (2001) (noting that "terrorism or other special circumstances" might warrant "heightened deference to the judgments of the political branches with respect to matters of national security"). *See also Dep't of the Navy v. Egan,* 484 U.S. 518, 530, 108 S.Ct. 818, 98 L.Ed.2d 918 (1988) (noting that "courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs"). The assessments before us have been made by senior Government officials responsible for investigating the events of September 11th and for preventing future attacks. These officials believe that closure of special interest hearings is necessary to advance these goals, and their concerns, as expressed in the Watson Declaration, have gone unrebutted. To the extent that the Government's national security concerns seem credible, we will not lightly second-guess them.

In *INS v. Chadha,* 462 U.S. 919, 940-41, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983), the Court heard a challenge to Congress's decision to create a one- House veto over certain deportation decisions made by the Attorney General. In striking down the legislative veto, the Court noted that "what is challenged here is whether Congress has chosen a constitutionally permissible means of implementing that power." *Id.* Most recently, in 533 U.S. at 695-97, 121 S.Ct. 2491, the Court held that despite the Government's plenary power to expel immigrants, the Attorney General lacked the authority indefinitely to detain non-citizens whose countries were unwilling to accept their return, and it cited for the proposition that "Congress must choose a constitutionally permissible means of implementing" its immigration power. at 695, 121 S.Ct. 2491 (quoting 462 U.S. at 941-42, 103 S.Ct. 2764). The issue at stake in the Newspapers' suit is

not the Government's power to expel aliens, but rather its power to exclude reporters from those proceedings. This is plainly a constitutional challenge to the means he has chosen to effect a permissible end, and under we owe no executive deference. We defer only to the executive insofar as it is expert in matters of national security, not constitutional liberties.

We are keenly aware of the dangers presented by deference to the executive branch when constitutional liberties are at stake, especially in times of national crisis, when those liberties are likely in greatest jeopardy. On balance, however, we are unable to conclude that openness plays a positive role in special interest deportation hearings at a time when our nation is faced with threats of such profound and unknown dimension.

We would, therefore, reverse the decision of the lower court.

IN THE

SUPREME COURT OF THE

UNITED STATES OF AMERICA

CASE NUMBER 61-61

MELVIN R. ALLEN, in his capacity as director, IMMIGRATION AND NATURALIZATION SERVICE, **Petitioner** **vs.** **THE TSN NEWSGROUP, INC.,** **Respondent.**	**Appeal from the United States Court of Appeals for the Fourteenth Circuit**

ORDER ON PETITION FOR WRIT OF CERTIORARI

The Petitioner's Petition for Writ of Certiorari is GRANTED. Oral argument shall take place in Crawfordsville, Indiana, on October 25, 2003. The Petitioner shall be entitled to open and close the argument.

/s/ C. Gowdy

C. Gowdy, Clerk, United States Supreme Court