No. 02-2524

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

NORTH JERSEY MEDIA GROUP, INC., et al.,
Plaintiffs-Appellees,

v.

JOHN ASHCROFT, Attorney General of the United States, et al.,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

BRIEF FOR APPELLEES

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JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF ISSUES

1. Does the Creppy directive violate the First Amendment, where the directive categorically closes an entire class of deportation proceedings from beginning to end, without any case-by-case, individualized assessment of whether closure is necessary?

2. Does the Creppy directive violate INS regulations?

3. Did the district court err in issuing a nationwide injunction?

STATEMENT OF THE CASE

Ten days after the attacks of September 11, 2001, the Chief Immigration Judge, Michael Creppy, issued a memorandum to all Immigration Judges and Court Administrators outlining "additional security procedures" to be immediately applied in certain deportation cases designated by the Attorney General as special interest cases. Gov't App. 54. These security measures require immigration judges "to close the hearing to the public, and to avoid discussing the case or otherwise disclosing any information about the case to anyone outside the Immigration Court." The Creppy directive specifically instructs that "[t]he courtroom must be closed for these cases - no visitors, no family, and no press."

In addition, the directive mandates that the very existence of a closed proceeding be withheld from the public. The directive states that the "restriction on information includes confirming or denying whether such a case is on the docket or scheduled for a hearing."[1]

On November 22, 2001, the New Jersey Law Journal, the publisher of a weekly newspaper covering law and public affairs, sent a reporter to the Immigration Court in Newark to report on the proceedings. He was informed by a court official that the proceedings were closed to the public. Gov't App. at 68. Reporters for both the Law Journal and the Herald News, a newspaper published by the North Jersey Media Group, were denied access to another immigration hearing scheduled for February 14, 2002. Id. at 60. The previous day, the Herald News was denied access to docket information on special interest cases. See id. Reporters from both newspapers were again denied access when they attempted to

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[1] However broad the category of "special interest" cases may be -- a fact that the government has refused to disclose -- very few, if any, of the individuals arrested on immigration charges after September 11 have been charged and prosecuted with terrorism-related offenses under the immigration laws. In response to pending FOIA litigation, see Center for Nat'l Sec. Studies v. Department of Justice, No. 01-CV-2500 (D.D.C. filed Dec. 5, 2001), the government provided immigration charges for 718 INS detainees arrested in the wake of September 11, and only two of those individuals were apparently charged with terrorism-related offenses under the immigration laws. It is unknown whether those charges were ultimately pursued. The remaining 716 individuals were charged with visa violations, or other non-terrorism related immigration offenses.

attend an immigration hearing on February 21, 2002. See id. at 69.

On March 6, 2002, the newspapers filed a federal court challenge to the Creppy directive, asserting that the Creppy Memo's categorical closure policy preempted the case-by-case inquiry required by the First Amendment, and also violated INS regulations. The newspapers argued not only that case-by-case inquiries could further all of the government's asserted interests in closed proceedings, but that because the Creppy Memo permitted special interest detainees to disseminate any information concerning the proceeding, the Creppy Memo could not achieve its goal of secrecy. On May 28, 2002, the district court applied the First Amendment analysis set forth in Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980), and found that the history of open deportation proceedings, coupled with the vital role that openness plays in the proceedings, supported the existence of a right of access. Gov't App. 27-29. Because the Creppy categorical directive was not narrowly tailored to serve the government's interests, the district court found that it violated the First Amendment. The court accordingly granted plaintiffs' motion for a preliminary injunction enjoining the operation of the Creppy directive. It stressed, however, that the government may seek appropriate closure orders in particular cases. See id. at 38 ("the government will be in the same position it occupied before the [Creppy directive] issued, that is,

closure of deportation proceedings in specific individual cases will be attainable").

The court rejected the newspapers' regulatory claim on the ground that the newspapers had no private right of action under INS regulations mandating that deportation hearings "shall be open" and that hearings shall be closed only where an "Immigration Judge" exercises his or her discretion to close the hearing.

The government subsequently moved for a stay and for clarification, contending that the injunction should be limited to claims brought by plaintiffs within the District of New Jersey; on June 5, 2002, the district court denied the government's motions. On June 17, 2002, this Court also denied a stay. On June 28, the Supreme Court without opinion issued a stay pending appeal in this Court.

The Creppy directive has also been challenged in Detroit Free Press v. Ashcroft, 195 F. Supp. 2d 937 (E.D.Mich. 2002). There, newspaper plaintiffs sought access to the deportation hearings of Rabih Haddad, a detainee subject to the Creppy directive. As in this case, the district court applied the Richmond Newspapers analysis and found that the Creppy categorical directive violated the First Amendment. The district court there also refused to grant a stay pending appeal; the Sixth Circuit likewise denied a stay pending appeal, finding both a "slim likelihood" that it would reverse and the "unlikely" possibility that the government would suffer irreparable harm in the absence of a stay. See Detroit Free Press v.

Ashcroft, 2002 WL 1332836 (6th Cir. Apr. 18, 2002).[2]

SUMMARY OF ARGUMENT

The Creppy directive imposes blanket secrecy over every minute of every immigration proceeding deemed by the Justice Department to fall within a category of "special interest" cases. There is no individualized, case-by-case determination regarding the need for closure, much less specific, on-the-record findings that closure is necessary. The Justice Department has simply determined, unilaterally and in advance of any particular hearing, that all so-called "special interest" cases shall be conducted behind closed doors.

According to the government, deportation proceedings can be conducted in total secrecy, even though they are formal, trial-type hearings in which the government is seeking to deprive an individual of his liberty. Indeed, many of the individuals subject to the Creppy directive have been jailed for months pursuant to

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[2]In response to the Sixth Circuit's denial of the stay, the government released transcripts from prior closed hearings in Haddad's case, along with a press release stating that the government had thus far not relied upon "extremely sensitive information" in Haddad's immigration proceedings and that the information could therefore be released without causing "irreparable harm." The statement further explained that if the government sought in the future to introduce "more sensitive" information, it would seek to close those particular hearings. See Statement of Associate Attorney General Jay Stephens, at http://www.usdoj.gov (April 19, 2002). On July 9, 2002, a hearing in Haddad's case was held in open court; the government did not seek to close the hearing.

these secret proceedings.

The categorical nature of the Creppy directive is the defining -- and constitutionally dispositive -- feature of this case. The First Amendment tolerates secret proceedings only under the most narrow circumstances and only where there is concrete and specific evidence that closure is absolutely necessary. A categorical closure rule is inherently incompatible with this fundamental principle.

The government appears implicitly to recognize as much, and thus seeks to avoid the requirements of First Amendment scrutiny altogether by arguing that the press and public have no First Amendment right to attend deportation proceedings. The government's principal argument is that the Richmond Newspapers analysis does not apply at all to any administrative hearings, and accordingly, that it is irrelevant whether deportation hearings satisfy the two-part test of experience and logic. This Court, however, has made clear that the Richmond Newspapers test applies to all proceedings, including administrative proceedings. Accordingly, the government's sweeping argument must be rejected. See Whiteland Woods, L.P. v. Township of West Whiteland, 193 F.3d 177 (3d Cir. 1999). Moreover, even apart from this Circuit's decisions, the government offers no persuasive reason why -- from the perspective of the First Amendment -- formal agency hearings are different than court proceedings, and should thus be exempt from the Richmond

Newspapers analysis.

Notably, although the government offers several arguments responding to the history of openness in deportation hearings, the government does not, and could not, plausibly contend that there is a general tradition of closing such hearings. Nor does the government seriously contend that openness would not be beneficial in deportation proceedings. The government states that there may be circumstances where the agency will want to close proceedings, but the decision below leaves open that possibility. Moreover, as this Court has made clear, the relevant question is whether -- as "a general rule"-- openness would enhance the functioning of the proceeding. United States v. Simone, 14 F.3d 833, 840 (3d Cir. 1994). The INS's own regulations make clear that the government itself believes that openness is generally beneficial.

The government's reliance on Congress's plenary power over immigration is also misplaced. Here, plaintiffs challenge the means by which the federal government has chosen to implement its immigration power, and not a substantive decision regarding which classes of immigrants to admit or expel. Accordingly, Congress's plenary power cannot insulate the Creppy directive. See Patel v. Zemski, 275 F.3d 299 (3d Cir. 2001).

A fundamental premise underlying the right of access is that an "informed"

public is indispensable to our representative form of government. Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 604-05 (1982). Given the range of societal issues that are now addressed by administrative agencies, it is difficult to overstate the implications of the government's contention that the Executive branch should be permitted to conduct all administrative trials in total secrecy whenever it chooses to do so -- even where, as here, these adjudicative proceedings involve the liberty of individuals. There is simply no tradition or authority for the notion that, in the United States, the government can deprive individuals of their liberty behind closed doors.

In short, the district court's First Amendment analysis was correct. It also does not leave the government powerless to protect sensitive information. Contrary to the government's characterization of the district court's decision, it does not require that any immigration proceeding "be opened to the public and press," Gov't Br. at 18, but holds only that the government may not rely on the Creppy directive and must instead seek closure on a case-by-case basis, as required by longstanding First Amendment case law. Any other result would be irreconcilable with our Nation's profound commitment to an open society -- a commitment that has withstood challenge for two centuries and that has proved to be more, not less, important in times of national moment.

STANDARD OF REVIEW

A preliminary injunction is reviewed for abuse of discretion, with questions of law reviewed de novo. Rose Art Indus. v. Swanson, 235 F.3d 165, 170-71 (3d Cir. 2000).

ARGUMENT

I. UNDER THE TWO-PART RICHMOND NEWSPAPERS TEST, THERE IS A FIRST AMENDMENT RIGHT TO ATTEND DEPORTATION PROCEEDINGS.

The Supreme Court has established a two-part test to determine whether the press and public have a First Amendment right to attend a particular type of proceeding. That test looks to whether the proceeding has traditionally been open and whether openness serves a positive role in the functioning of the proceeding.

Under this test, the press and public have a right to attend criminal and civil court proceedings. See I. A. This Court has also made clear that the two-part test governs access to particular types of administrative proceedings, and that under the test, a First Amendment right will attach to certain administrative proceedings but not others depending upon the particular features of the proceeding. See, e.g., Whiteland Woods, L.P. v. Township of West Whiteland, 193 F.3d 177 (3d Cir. 1999). See I. B. Applying that test here, the newspapers have a First Amendment right to attend deportation hearings. See I. C. And, contrary to the government's

contention, Congress's immigration power does not negate that right. See I. D.

A. The Right To Attend Criminal And Civil Court Proceedings Under The Two-Part Richmond Newspapers Test.

In Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980), the Supreme Court held that the press and public have a First Amendment right to attend criminal trials. The Court emphasized that open trials were a fundamental element of a democratic society and made clear that the First Amendment not only limits restrictions on speech, but also "prohibit[s] government from limiting the stock of information from which members of the public may draw." Id. at 575-76. The Court stressed that closure would thus be permitted only in the most narrow circumstances, where no other alternative was available.

In Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982), the Court strongly reaffirmed Richmond Newspapers, striking down a Massachusetts law that categorically closed courtrooms during the testimony of minor victims of sex offenses. The Court acknowledged that Massachusetts had a compelling interest in "safeguarding the physical and psychological well-being of a minor," id. at 607, but emphasized that a categorical closure law was not a narrowly tailored means of achieving that interest and that the State had to proceed on a "case-by-case basis" to determine whether closure was necessary. Id. at 608.

In both Richmond Newspapers and Globe Newspaper, the Court applied a two-part inquiry, now frequently referred to as the "experience and logic" test. Globe Newspaper, 457 U.S. at 606. The first prong looks to tradition because "a tradition of accessibility implies the favorable judgment of experience." Id. at 605 (quoting Richmond Newspapers, 448 U.S. at 589). The second prong asks whether openness plays a significant positive role in the functioning of the particular process in question. Id. at 606. In making this latter assessment, the Court considers a variety of factors, including whether openness advances the public "appearance of fairness," "safeguards the integrity of the fact-finding process," and "permits the public to . . . serve as a check upon" the government's actions. Id.

Since Richmond Newspapers and Globe Newspaper, the Supreme Court and courts of appeals have applied the two-part test in finding a First Amendment right to attend a variety of other criminal proceedings in addition to the trial itself. See, e.g., Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984) (Press-Enterprise I) (voir dire examinations); Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986) (Press-Enterprise II) (pre-trial hearings); United States v. Simone, 14 F.3d 833 (3d Cir. 1994) (post-trial examination of jurors); United States v. Smith, 776 F.2d 1104 (3d Cir. 1985) (bill of particulars); In re Application of The Herald

Co., 734 F.2d 93 (2d Cir. 1984) (pretrial suppression hearings); In re Charlotte Observer, 882 F.2d 850 (4th Cir. 1989) (pretrial motion for venue change); United States v. Chagra, 701 F.2d 354 (5th Cir. 1983) (bail reduction hearings).

The Supreme Court has not yet addressed whether there is a right to attend civil proceedings, but most circuits have decided that issue, including this Court in Publicker Industries, Inc. v. Cohen, 733 F.2d 1059 (3d Cir. 1984). Publicker firmly established almost two decades ago that the Richmond Newspapers test is applicable outside the criminal context and that, under that test, the press and public have a First Amendment right to attend civil proceedings. This Court noted that civil proceedings were historically open and that civil proceedings had many of the same attributes as a criminal trial. The Court stressed that a right to attend civil proceedings is critical to ensure that the "discussion of governmental affairs is an informed one." Id. at 1070 (internal quotation marks and citations omitted).

Most of the other circuits have now addressed whether the right of access under Richmond Newspapers applies to civil proceedings. All have agreed with this Court that the governing test is the two-part Richmond Newspapers inquiry and that the press and public have a First Amendment right to attend civil court proceedings under that test. See, e.g., Westmoreland v. CBS, 752 F.2d 16, 23 (2d Cir. 1984); Rushford v. New Yorker Magazine, 846 F.2d 249 (4th Cir. 1988);

Brown & Williamson Tobacco Co. v. Federal Trade Commission, 710 F.2d 1165 (6th Cir. 1983); In re Continental Illinois Securities Litigation, 732 F.2d 1302 (7th Cir. 1984); Newman v. Graddick, 696 F.2d 796 (11th Cir. 1983).

Two important principles emerge from this case law. First, Richmond Newspapers was not a static, fact-bound decision, but rather, set forth a general analytical framework based on guiding principles with "broad application." Brown & Williamson, 710 F.2d at 1178 (finding right to attend civil tobacco trial, emphasizing that issues of public importance should not be adjudicated behind closed doors). And second, in rejecting the notion of secret proceedings as antithetical to this country's most basic democratic traditions, Richmond Newspapers and its progeny have stressed over and over that the right of access to government proceedings rests on principles that are fundamental to a representative form of government, in which the public must be permitted to see for itself whether justice is being done. See, e.g., Globe Newspaper, 457 U.S. at 605. As this Court stated in Publicker, 733 F.2d at 1070, public access "provides information leading to a better understanding of the operation of government as well as confidence in and respect for our judicial system."

B. The Richmond Newspapers Test Applies To Administrative Proceedings.

Notwithstanding Richmond Newspapers and its progeny, the government contends that the district court erred in finding a right to attend deportation proceedings. Although the government argues that deportation proceedings fail the two-part test, its principal argument is that Richmond Newspapers has no applicability whatsoever to administrative proceedings and that the district court therefore erred in even applying the two-part test. Instead, the government asks the Court to announce a categorical rule holding that there is no First Amendment right to attend any type of administrative proceeding -- regardless of the specific history and tradition of the proceeding, the nature and formality of the proceeding, the interests at stake, or the degree to which openness might be beneficial to the functioning of the proceeding.

In contrast, plaintiffs do not seek a categorical rule, and specifically do not argue that all administrative proceedings must be open. Rather, plaintiffs argue (and the district court held) only that Richmond Newspapers supplies the governing test. Whether or not any particular proceeding will be open will depend on the outcome of that test.

The district court correctly rejected the government's sweeping, categorical argument. First, and dispositively, this Court has made unmistakably clear that Richmond Newspapers supplies the governing analysis for all proceedings, not just

criminal and civil court proceedings. Moreover, even apart from this Court's decisions, the government's argument is unavailing.

1. Third Circuit law establishes that the Richmond Newspapers test applies to all proceedings.

The government characterizes Richmond Newspapers as a "limited" decision, Gov't Br. at 19, but ultimately acknowledges that both the Supreme Court and this Court have applied Richmond Newspapers to phases of the criminal process beyond the trial proper. The government also acknowledges that this Court in Publicker, 733 F.2d 1059, has found a First Amendment right to attend civil court proceedings, but states that the decision was issued "despite Justice O'Connor's warning" that Richmond Newspapers does not have any implications outside the context of "criminal trials." Gov't Br. at 20 (quoting Globe Newspaper, 457 U.S. at 611 (O'Connor J., concurring)). The government makes no mention of other Justices' views on civil proceedings,[3] and discounts the fact that the Supreme Court has now applied Richmond Newspapers beyond the criminal trial. Nor does the government acknowledge that every other circuit that has addressed the issue of access to civil court proceedings has agreed with this

[3] See, e.g., Richmond Newspapers, 448 U.S. at 599 (Stewart, J., concurring in judgment) (expressing view that right of access applies to civil proceedings).

Court that there is a right to attend such proceedings under Richmond Newspapers.

Thus, contrary to the government's characterization, Richmond Newspapers has not been a limited decision without germinal significance. More to the point, the law in this Circuit unequivocally rejects the position that Richmond Newspapers is applicable only to criminal and civil court proceedings.

In First Amendment Coalition v. Judicial Inquiry & Review Bd., 784 F.2d 467 (3d Cir. 1986), for example, this Court applied the Richmond Newspapers test to the hearings of an administrative disciplinary board that was established by the Pennsylvania Supreme Court in 1968 to investigate complaints against state judges. Although the Court ultimately concluded that the press had no right to attend the board hearings, the Court reached that conclusion only after finding that the particular type of administrative hearing at issue did not satisfy either prong of the two-part test. Id. at 472 (resting its decision on "the unique history and function of the Judicial Review Board").[4]

The government contends that First Amendment Coalition "distinguished" Richmond Newspapers and that the decision is actually "dispositive" of its

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[4] In particular, the Court noted that the hearings had not been open since the board's creation in 1968 and that openness would not be beneficial because the board was investigatory in nature and thus "akin" to a grand jury. Id. at 473 (explaining reasons for grand jury secrecy).

position. Gov't Br. at 31-32. In support of that reading, the government selectively quotes language from the decision in which the Court stated that cases finding a right of access to criminal trials are of "limited usefulness in the context of the fundamentally different procedures of judicial disciplinary boards." Gov't Br. at 31 (quoting First Amendment Coalition, 784 F.2d at 472). This argument misapprehends both the import of First Amendment Coalition and the newspapers' argument.

Although the outcome of the two-part test in First Amendment Coalition was a denial of access, the case in fact proves plaintiffs' contention, i.e., that Richmond Newspapers sets forth a general test applicable to all types of proceedings, and that whether any particular type of proceeding must be open depends on the application of the test. That analysis is precisely the one undertaken by this Court in First Amendment Coalition when it assessed whether the particular administrative hearings at issue there had traditionally been open and whether openness would play a positive role in the functioning of those proceedings.

Insofar as the government is asserting that First Amendment Coalition stands for the categorical proposition that the Richmond Newspapers test is applicable only to criminal and civil court hearings, that is plainly incorrect. If First

Amendment Coalition had announced a bright-line rule that all administrative proceedings fall outside of the Richmond Newspapers two-part analysis, then this Court's lengthy analysis of whether the particular type of administrative board hearings in that case had traditionally been open, and whether openness would be beneficial to those proceedings, would have been superfluous.[5]

In Capital Cities Media, Inc. v. Chester, 797 F.2d 1164 (3d Cir. 1986), this Court again made clear that the Richmond Newspapers test governs the question of access to all proceedings. There, the Court stated that the press and public had no First Amendment right of access to the executive files and records of a state environmental agency, emphasizing that the First Amendment did not create a general right of access to "government-held information." Id. at 1171. However, the Court made absolutely clear that it was not constructing a rule applicable to all government-held information and specifically distinguished government proceedings, citing Richmond Newspapers for the proposition that "we now know that the free speech clause bars government interference with the flow of

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[5] The government's position is also refuted by the very language it quotes from the decision: "These administrative proceedings, unlike conventional criminal and civil trials, do not have a long history of openness." 784 F.2d at 472. The government's brief emphasizes the word "proceedings," Gov't Br. at 31 (quoting First Amendment Coalition, 784 F.2d at 472), yet the critical word is "these," a clear reference to the particular "judicial disciplinary boards" mentioned in the prior sentence. 784 F.2d at 472.

information through the closure of governmental proceedings that historically have been open to the public . . . ." 797 F.2d at 1168 & n.4 (emphasis added).[6]

Capital Cities is also significant because it rejects the government's reading of First Amendment Coalition. As the Capital Cities Court made clear, this Court in First Amendment Coalition did not reject a First Amendment right of access to disciplinary board hearings on the basis of a categorical rule that all administrative hearings fall outside the Richmond Newspapers analysis. 797 F.2d at 1174. Rather, as Capital Cities noted, the First Amendment Coalition Court assessed the constitutional right of access to disciplinary board hearings in light of the "two complementary considerations" of experience and logic. Id. (quoting Press-Enterprise II, 478 U.S. at 8).

Finally, and most recently, in Whiteland Woods, L.P. v. Township of West Whiteland, 193 F.3d 177 (3d Cir. 1999), this Court again left no doubt that the

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[6] Significantly, even as to the agency records in that case, the Court went on to apply the two-part Richmond Newspapers test and denied the press access to the records only after concluding that the plaintiffs could not "satisfy both tests of experience and logic," 797 F.2d at 1176 (quoting Press-Enterprise II, 478 U.S. at 9).

Here, plaintiffs seek access to proceedings, and not executive files. Thus, the ultimate holding in Capital Cities is inconsequential, as are the other decisions cited by the government involving requests for agency records and files. Gov't Br. at 30 (citing, e.g., ACLU v. Mississippi, 911 F.2d 1066 (5th Cir. 1990) (state commission records); Calder v. IRS, 890 F.2d 781 (5th Cir. 1989) (tax records)).

Richmond Newspapers test applies to all proceedings. There, the Court applied the two-part test and concluded that although the press and public had no First Amendment right to videotape a local planning commission meeting, they did have a constitutional right to attend such meetings. Id. at 180-81. In doing so, the Court cited Capital Cities for the proposition that "[w]hether the public has a First Amendment right of access to a particular government proceeding depends on 'two complementary considerations'" identified by the Supreme Court, tradition and logic. Id. at 181 (quoting Capital Cities, 797 F.3d at 1174). After assessing the planning commission meetings in light of these two considerations, the Court stated, "we believe the Planning Commission meetings are precisely the type of public proceeding to which the First Amendment guarantees a public right of access." 193 F.3d at 181.

The government's only response to Whiteland Woods is to note that state law provided a right of access to the planning commission meetings. Gov't Br. at 33. But the government fails to acknowledge that this Court specifically found a "constitutional" right to attend the meetings based on the First Amendment. 193 F.3d at 180-81. See also United States v. Miami University, 2002 WL 1378233 (6th Cir. June 27, 2002) (applying Richmond Newspapers test to student disciplinary proceedings but finding test not satisfied, specifically contrasting

student proceeding to "a courtroom or administrative hearing") (emphasis added) (quotation marks and citation omitted).

In sum, this Court's decisions definitively establish that the Richmond Newspapers test governs "[w]hether the public has a First Amendment right of access to a particular government proceeding . . . ." Whiteland Woods, 193 F.3d at 181 (quoting Capital Cities, 797 F.3d at 1174).

2. Administrative proceedings should not be treated as categorically different than criminal and civil court proceedings for First Amendment purposes.

The government devotes most of its First Amendment discussion to an abstract and general discussion of the "political branches" of government in an effort to explain why the Richmond Newspapers test should never apply to agency hearings. Gov't Br. at 21-25. But, as shown above, that argument is foreclosed by this Court's decisions, and in any event, lacks merit.

Indeed, any abstract discussion of administrative hearings ignores the various contexts and ways in which agencies operate. In this case, for example, the government has categorically closed trial-type adjudicatory hearings that will determine whether an individual will spend months in a detention cell and then be deported. Yet the government contends that, like a cabinet meeting, and irrespective of tradition, these proceedings should be shielded from any public

scrutiny.

Both the Supreme Court and this Court have repeatedly eschewed such formalistic arguments and have steadfastly refused to assess claims of access based on the labels attached to particular proceedings. Rather, the courts have looked to the precise nature and role of a particular proceeding. See Press-Enterprise II, 478 U.S. at 11-12 (finding that "California preliminary hearings are sufficiently like a trial"); Simone, 14 F.3d at 839 (noting that "'the First Amendment question cannot be resolved solely on the label we give the event'") (quoting Press-Enterprise II, 478 U.S. at 7); id. (recognizing that "'the distinction between trials and other official proceedings is not necessarily dispositive, or even important, in evaluating the First Amendment issues'") (quoting Press-Enterprise I, 464 U.S. at 516 (Stevens, J. concurring)); Smith, 776 F.2d at 1111 (stating that the "functions performed by a bill of particulars" are "akin to the functions of an indictment"); Publicker, 733 F.2d at 1070 (concluding that the civil justice system shares "many of those attributes of the criminal justice system"). See also CBS, Inc. v. United States Dist. Court for Cent. Dist., 765 F.2d 823, 825 (9th Cir. 1985) (then-Judge Kennedy finding "no principled basis for affording greater confidentiality to post-trial documents and proceedings than is given to pre-trial matters," since the "functioning of the judicial process and the governmental system" are furthered as

much by "post-conviction proceedings as [by] the trial itself").

Formal agency adjudicative proceedings (like deportation proceedings) have all the hallmarks of court proceedings and serve many of the same functions. That very point was recently emphasized by the Supreme Court in FMC v. South Carolina State Ports Authority, 122 S.Ct. 1864 (2002), where the Court rejected the government's argument that states could be subjected to administrative proceedings even though the Eleventh Amendment would have granted them immunity if the same dispute had been brought in court. The Court stressed that the similarities between the agency adjudication in that case and civil lawsuits are "overwhelming," observing that the hearing in that case "walks, talks and squawks" like a civil lawsuit. Id. at 1873-74. The Court thus concluded that the Eleventh Amendment could not be circumvented merely by placing the adjudication into an agency proceeding rather than court. Id. at 1869-70.[7]

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[7] The government notes that not every constitutional right (such as the Sixth Amendment right to counsel) is available in agency proceedings. But the courts have not held that Richmond Newspapers applies only where the proceeding in question resembles a criminal trial in every respect. Rather, as discussed in text, the inquiry is a functional one, asking whether there are sufficient similarities such that the openness would play a positive role. See, e.g., Press-Enterprise II, 478 U.S. at 11-12. Indeed, if a proceeding had to be identical in every respect to a criminal trial, then Publicker, 733 F.2d 1059, would have come out differently since there is plainly no constitutional right to counsel in civil proceedings.

Ultimately, the government offers no reason why the First Amendment values identified in Richmond Newspapers would not apply with equal force to formal adjudicative agency proceedings. Instead, it offers a series of doctrinal and policy arguments, none of which are availing.

The government's primary argument appears to be that criminal and civil trials have a different tradition than administrative proceedings. In particular, the government stresses that although criminal and civil trials were historically open at common law, modern administrative agencies are creatures of statute and post-date the Constitution. Gov't Br. at 22-24. But the premise of the government's argument -- that the history of openness must be found in pre-constitutional common law -- has been considered and squarely rejected by both the Supreme Court and this Court. See, e.g., Press-Enterprise II, 478 U.S. at 10-12 (relying on post-ratification history in finding a right to attend pre-trial preliminary hearings); Whiteland Woods, 193 F.3d at 181 (finding a "tradition of accessibility" based upon recent statutory guarantee of open planning commission meetings from 1960s); Simone, 14 F.3d at 838 (finding right of access despite fact that "[n]either the parties nor this court have been able to find cases dating before 1980 in support of either openness or closure for this type of post-trial proceeding"); Smith, 776 F.2d at 1111 (right of access to bills of particular, although they are only a "modern

trend" with a "brief history" in relation to indictments); United States v. Criden, 675 F.2d 550, 555 (3d Cir. 1982) (right of access to pretrial hearings though "at common law, the public apparently had no right to attend pretrial criminal proceedings"); see also Applications of National Broadcasting Co., Inc., 828 F.2d 340, 344 (6th Cir. 1987) (relying on history from 1924-1984).

Moreover, the government's rigid focus on the need for pre-constitutional history in the context of agency hearings is particularly unworkable and unhelpful. See, e.g., South Carolina State Ports Authority, 122 S.Ct. at 1872 ("[b]ecause formalized administrative adjudications were all but unheard of in the late 18th century and early 19th century," the "relevant history does not provide direct guidance"). See also id. (observing that "[t]he Framers, who envisioned having a limited Federal Government, could not have anticipated the vast growth of the administrative state").[8]

The government claims that Press-Enterprise II does not justify reliance on post-ratification history because it involved only a question regarding the "scope" of the right of access to criminal proceedings. Gov't Br. at 32-33. But neither

[8] The government states undifferentiatingly that the Framers saw secrecy as a "principal virtue" of the unitary executive. Gov't Br. at 23-24. But the government, of course, offers no evidence that the Framers would have wanted the entire modern administrative adjudicatory apparatus to be conducted in secret. See South Carolina State Ports Authority, 122 S.Ct at 1872.

Press-Enterprise II, nor any of the other decisions discussed in text above, suggest such a limitation. Indeed, if Press-Enterprise II and the other criminal cases involved only marginal "scope" questions, then it is difficult to understand the lengthy examinations of history undertaken in those cases. Press-Enterprise II, 478 U.S. at 10-11. In any event, the government's explanation does not take into account cases such as Whiteland Woods, where this Court found a tradition of access to Planning Commission meetings based on state statutes dating only from the latter half of this century.[9]

The government next argues that under contemporary regulations many administrative hearings are "closed, presumptively closed, or subject to closure at the discretion of an administrator or regulated party." Gov't Br. at 26-27. As an initial matter, plaintiffs note that none of the agency hearings cited by the government involve the adjudication of an individual's physical liberty. Moreover, some appear to involve informal hearings. See, e.g., 34 C.F.R. § 31.7(d)(1) (salary

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[9] The government also advances a textual argument in support of its originalist position, suggesting that the right found in Richmond Newspapers was based on the interaction between Article III and the Sixth Amendment. But Article III could not have been the basis for the First Amendment right in Richmond Newspapers, because it involved a state court proceeding not subject to Article III. Moreover, Richmond Newspapers was, quite clearly, based upon the First, and not the Sixth, Amendment.

off-set hearing is an "informal proceeding"). In any event, whether any of these hearings must be open would depend upon the appropriate application of the Richmond Newspapers test.

The government argues that looking at whether a "particular" agency proceeding should be open will "turn narrow regulatory distinctions into constitutional mandates." Gov't Br. at 36. But the very benefit of the Richmond Newspapers test is precisely the fact that it can take into account the unique traditions and characteristics of a given proceeding, and does not therefore require an "all or nothing" approach. Not surprisingly, therefore, the Supreme Court and this Court have eschewed sweeping generalities and repeatedly held that the proper inquiry should focus on the particular type of proceeding at issue. See, e.g., Press-Enterprise II, 478 U.S. at 9 ("a qualified First Amendment right of public access" exists "[i]f the particular proceeding in question passes these tests of experience and logic") (emphasis added); Simone, 14 F.3d at 837-40 (finding right of access to post-trial hearings on juror misconduct, reserving question whether right of access exists for mid-trial hearings); First Amendment Coalition, 784 F.2d at 472 (discussing "the unique history and function of the Judicial Review Board" under Pennsylvania Constitution); Smith, 776 F.2d at 1111 (looking narrowly at access to bills of particulars). See also supra (citing additional cases).

The government also contends that the application of Richmond Newspapers to administrative hearings might create a disincentive for agencies to open proceedings in the future out of fear of constitutionalizing the right of access. Gov't Br. at 36-37. But there is no reason to believe that agencies will close proceedings for the wrong reasons.[10] The government's argument simply ignores the fact that the Supreme Court and this Court have routinely found a tradition of access to modern procedures based on openness appropriately created by an executive or legislative body. See, e.g., Whiteland Woods, 193 F.3d at 181 (relying on Pennsylvania statutes from second half of twentieth century); Press-Enterprise II, 478 U.S. at 10-13 (finding tradition of access based principally on state statutes and practices from twentieth century).

Finally, the government cites a variety of cases for the proposition that there is no general right of access to government-held information, facilities or records. Gov't Br. at 19. The newspapers do not dispute that general proposition; indeed, as we have repeatedly emphasized, plaintiffs do not argue that all proceedings must

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[10]As the Attorney General's Committee on Administrative Procedure declared in its 1941 Report: "Hearings should be, and almost invariably are, public . . . . This is as it should be; the practice is an effective guarantee against arbitrary methods in the conduct of hearings." Final Report of the Attorney General's Committee on Administrative Procedure 68 (1941).

be open, but only those that can satisfy the two-part test.[11]

In sum the implications of the government's position are extraordinary. Virtually every aspect of American life is now dealt with by administrative agencies. If the public and press could be categorically barred from all formal adjudicative agency proceedings, then the government could operate in secrecy to an alarming extent -- even where, as here, the government seeks to deprive individuals of their liberty.

C. Deportation Proceedings Satisfy The Two-Part Richmond Newspapers Test.

1. Deportation proceedings have never been closed.

The history of immigration law demonstrates a consistent presumption in

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[11] For example, the government cites Houchins v. KQED, Inc., 438 U.S. 1 (1978), a plurality decision issued two years before Richmond Newspapers. As the government ultimately acknowledges, however, that case involved access to "facilities," not to a proceeding. Gov't Br. at 19. Indeed, the media in Houchins sought access to a prison. As the Houchins Court itself emphasized, prisons have never been open to the public because public access has not been deemed compatible with the functioning of a prison. Nothing in Houchins remotely suggests that an administrative trial was the type of setting that could be insulated from public scrutiny. In fact, Houchins provided specific examples of the types of government settings that it viewed as analogous to prisons, listing "public facilities such as hospitals and mental institutions." 438 U.S. at 14. Moreover, Richmond Newspapers cited Houchins only for the limited proposition that "reasonable restrictions on general access" are permissible because courtrooms "have limited capacity." Richmond Newspapers, 448 U.S. at 581 n.18. See First Amendment Coalition, 789 F.2d at 474.

favor of open deportation proceedings for more than a century. That history has, moreover, been codified in regulations, which for almost forty years have expressly mandated that deportation proceedings are presumptively open. See 8 C.F.R. § 3.27.[12]

The federal government began regulating immigration in the last quarter of the nineteenth century,[13] and specifically addressed the question of open hearings as early as the 1890s. From that point forward, the governing statutes and regulations have always expressly closed exclusion hearings (i.e., hearings to determine whether aliens may enter the country), but have never closed deportation hearings (i.e., hearings involving aliens who have already entered the United States and whom the government is seeking to remove from the country).[14]

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[12] Section 3.27 provides in part:

"All hearings, other than exclusion hearings, shall be open to the public except that ***

(b) For the purpose of protecting witnesses, parties, or the public interest, the Immigration Judge may limit attendance or hold a closed hearing."

[13] The first federal immigration laws appear to date to 1875. See Act of Mar. 3, 1875, 18 Stat. 477 (1875); INS v. St. Cyr, 533 U.S. 289, 305 (2001).

[14] The different treatment of exclusion and deportation is of longstanding duration. See, e.g., Leng May Ma v. Barber, 357 U.S. 185, 187 (1958). Aliens in the country generally have greater statutory and constitutional rights, and accordingly, have historically been afforded greater procedural protections in their hearings. Zadvydas v. Davis, 533 U.S. 678, 693 (2001). In 1996, the immigration laws changed the nomenclature of these two types of proceedings. Deportation and

The first set of laws addressing access to immigration proceedings appeared in regulations enacted in 1893, which expressly stated that exclusion proceedings shall be conducted "separate from the public." See Treasury Department, Immigration Laws and Regulations 4 (Washington D.C., Government Printing Office 1893). In 1903, the regulatory mandate for closed exclusion hearings was codified in the immigration statutes. See Act of March 3, 1903 § 25 (Ch. 1012, 32 Stat. 1213) (providing that exclusion hearing be "separate and apart" from the public). Provisions closing exclusion hearings were repeatedly reenacted in both statutes and regulations over the remainder of the century.[15]

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exclusion hearings are now both referred to as "removal" proceedings, see 8 U.S.C. § 1229(a), but the distinction between aliens who have entered the country and those who have not remains significant, and there continue to be separate grounds of deportability and inadmissibility. See, e.g., 8 U.S.C. § 1227 (deportability); 8 U.S.C. § 1182 (inadmissibility).

The government contends that it would be anomalous for there to be a First Amendment right to attend deportation hearings but not exclusion proceedings. Gov't Br. at 38. But the two-part Richmond Newspapers test is designed to avoid sweeping holdings. Exclusion proceedings have a very different tradition of openness, emanating from a different constitutional tradition.

[15] See, e.g., Act of March 3, 1903 § 25 (Ch. 1012, 32 Stat. 1213); Act of February 20, 1907 § 25 (Ch. 1134, 34 Stat. 898); 1952 Immigration and Nationality Act, 66 Stat. 163, §§ 236, 242 (same); Treasury Department, Immigration Laws and Regulations 3 (1893); Treasury Department, Immigration Laws and Regulations 3 (1895); Treasury Department, Immigration Laws and Regulations 3 (1898); Treasury Department, Immigration Laws and Regulations 3 (1900); Treasury Department, Immigration Laws and Regulations 3 (1902); Treasury Department, Immigration Laws and Regulations 3 (1903); Bureau of Immigration, Department of

By contrast, the immigration statutes and regulations have never included similar provisions for the closure of deportation hearings. In 1891, Congress enacted immigration statutes setting forth the grounds on which aliens inside the United States could be deported. See Act of 1891, 26 Stat. 1086. The first regulations governing deportation proceedings were subsequently promulgated in 1904. See Bureau of Immigration, Department of Commerce and Labor, Immigration Laws and Regulations, 1, 9-10 (1904). Neither the 1891 statutes nor the 1904 regulations contained language closing deportation hearings to the public. Since then, the laws and regulations governing deportation have been repeatedly amended and recodified, but have never authorized the general closure that has long existed in the exclusion context.[16]

Commerce and Labor, Immigration Laws and Regulations 3, 9 (1904); Bureau of Immigration, Department of Commerce and Labor, Immigration Laws and Regulations 3 (1906); Bureau of Immigration and Naturalization, Department of Commerce and Labor, Immigration Laws and Regulations 34 (1907); Bureau of Immigration, Department of Labor, Immigration Laws; Rules of May 1, 1917, 33 (1919); 8 C.F.R. pts. 12 & 19 (1938); 8 C.F.R. pt. 150 (1941 Supp.); 12 Fed. Reg. 5108 (July 30, 1947); 8 C.F.R. pt. 130 (1949); 32 Fed. Reg. 9628 (1967) codified at 8 C.F.R. pt. 236 (1968).

[16] See, e.g., Act of March 3, 1903 § 25 (Ch. 1012, 32 Stat. 1213); Act of February 20, 1907 § 25 (Ch. 1134, 34 Stat. 898); Act of May 10, 1920 (Ch. 174, 41 Stat. 593); Act of May 26, 1924 (Ch. 190, 43 Stat. 153); 1952 Immigration and Nationality Act, 66 Stat. 163, § 242; Bureau of Immigration, Department of Commerce and Labor, Immigration Laws and Regulations 3, 9 (1904); Bureau of Immigration and Naturalization, Department of Commerce and Labor, Immigration

The differential treatment of deportation and exclusion hearings was underscored by the 1952 Immigration and Nationality Act. That Act, 66 Stat. 163, passed only a few years after enactment of the Administrative Procedure Act (1946), consolidated and revised the many prior individual immigration laws, and created most of the procedural features of the modern-day immigration hearing. Consistent with the historical evolution of immigration law, the drafters of the 1952 Act chose to address the procedures for deportation hearings in provisions separate from those dealing with exclusion hearings. Again, exclusion provisions were to be conducted "separate and apart" from the public. Id. at § 236. But, as has consistently been the case, the simultaneously-enacted deportation provisions contained no such closure language.

The current Justice Department regulations, first promulgated in 1964, 19 Fed. Reg. 13243, reflect this longstanding distinction between exclusion and

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Laws and Regulations 34 (1907); Bureau of Immigration, Department of Labor, Immigration Laws; Rules of May 1, 1917, 33 (1919); 8 C.F.R. pt. 19 (1938); 8 C.F.R. pt. 150 (1941 Supp.); 9 Fed. Reg. 11884 (Sept. 19, 1944) (amendment to INS regulations governing deportation hearings, codified at 8 C.F.R. pt. 150 (1944 Supp.)); 10 Fed. Reg. 8096 (Aug. 1, 1945) (codified at 8 C.F.R. pt. 150 (1945 Supp.)); 12 Fed. Reg. 5114 (July 30, 1947) (codified at 8 C.F.R. pt. 150 (1947 Supp.)); 8 C.F.R. pt. 150 (1949); 17 Fed. Reg. 11512 (Dec. 19, 1952) (codified at 8 C.F.R. pt. 242 (1952)); 22 Fed. Reg. 9795 (Dec. 6, 1957) (codified at 8 C.F.R. pt. 242 (1958)); 22 Fed. Reg 9519 (Nov. 28, 1957) (codified at 8 C.F.R. pt. 242 (1958)).

deportation hearings, and provide that the latter can only be closed based on an individualized showing of need. See 8 C.F.R. § 242.16(a) (1965) ("Deportation hearings shall be open to the public."). Such regulations have been consistently reenacted for the past forty years and remain in force today. Indeed, this tradition of openness is so well-settled that even deportation hearings that are conducted by a recently created anti-terrorism court are presumptively open to the public under legislation enacted in 1996.[17]

Not surprisingly, therefore, the one federal decision to squarely address the issue of public access to deportation hearings prior to the Creppy directive concluded that the INS regulation "is but one of countless manifestations of a public policy centuries old that judicial proceedings, especially those in which the life or liberty of an individual is at stake, should be subject to public scrutiny, not only for the protection of the individual from unwarranted and arbitrary conviction, but also to protect the public from lax prosecution." Pechter v. Lyons, 441 F.

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[17] The 1996 statute creating the new anti-terrorist court, in which district court judges preside over removal hearings, is not at issue here because it may be invoked only where the alien is actually charged with being deportable as a terrorist. See 8 U.S.C. §§ 1531-35. The anomaly of the government's position is that it is seeking to conduct closed hearings in cases where there are no charges of terrorism, but if there were such charges, adjudicated by the new anti-terrorism court, there would be no dispute that the hearing would be open under 8 U.S.C. § 1534(a)(2).

Supp. 115, 117-18 (S.D.N.Y. 1977).

The government stresses that "Congress has never seen fit to afford public access rights to adjudicatory administrative proceedings." Gov't Br. at 29. But 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. Moreover, it is clear from the history of immigration law that Congress did not intend for deportation proceedings to be categorically closed; if Congress had wished to do so, it would have explicitly said so, as it did for exclusion proceedings.

The government also suggests that deportation hearings have historically been closed at times, Gov't Br. at 39-40, but offers no evidence for that position, simply citing a study about the deportation of aliens to Europe during the 1920s for the proposition that deportation hearings took place in a variety of settings, including prisons. Gov't Br. at 40 n.8 (citing J. Clark, Deportation of Aliens from the United States to Europe, 363 (1931)). However, the government offers no support for the proposition (which the study did not consider) that such hearings were in fact closed to the public. The government also states that many hearings are still conducted in prisons, and notes that in Houchins, the Supreme Court stated that the public has no right to observe prison conditions. However, Houchins did not deal specifically with hearings in prison, much less deportation hearings, and

the government does not suggest that there is any general closure rule governing prison deportation hearings.[18]

In short, the 100 plus years of history relied upon by the district court is more than sufficient to warrant a finding that open deportation proceedings have "been accorded the favorable judgment of experience." Press-Enterprise II, 478 U.S. at 11 (internal quotation marks and citations omitted). At the very least, there has never been a general history of closure, thus requiring that the Court proceed to the logic prong under Simone, 14 F.3d at 838.[19]

2. Access to deportation proceedings plays a significant positive role in the functioning of the proceeding.

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[18] The government also suggests that some deportation hearings were subject to the same requirement as exclusion hearings and thus were required by regulation to be conducted "separate and apart" from the public. Gov't Br. at 40 n.9. The statutory provision cited by the government applied to a single unique category of aliens, seaman who landed unlawfully, and required that those cases be heard by the board that conducted exclusion hearings (and therefore required that they be "separate and apart" from the public). Thus, the statute proves plaintiffs' point that deportation proceedings were presumptively open while exclusion hearings were closed.

[19] Additionally, given that "the First Amendment is to be interpreted in light of current values and conditions," Criden, 675 F.2d at 555 (citation omitted), this Court has required consideration of the logic prong even in the absence of a history of openness, when "the relative importance" of the proceeding at issue "has grown immensely" in modern times, id. See also Seattle Times Co. v. United States District Court for the Western Dist. Of Washington, 845 F.2d 1513, 1516 (9th Cir. 1988).

This Court has noted six values 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." Whiteland Woods, 193 F.3d at 181 (quoting Simone, 14 F.3d at 839) (bracketed numbers in original).

Openness in deportation proceedings would serve many, if not all, of these values. Indeed, the government has previously acknowledged the benefits of openness.[20] The government now argues, however, that openness is unnecessary because deportation proceedings are civil, and thus serve "regulatory" purposes, not the "public purpose of retribution." Gov't Br. at 46. But this Court (like other circuits) has held that Richmond Newspapers applies to civil judicial proceedings.

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[20] "The Government acknowledges that it is normally preferable to hold open administrative hearings and, consistent with that notion, administrative removal hearings are presumptively open to the public." Defendants' Opposition To Plaintiffs' Preliminary Injunction Motion at 10 (emphasis in original), in Detroit Free Press, 195 F. Supp. 2d 937.

The government's argument thus fails.[21]

Moreover, because deportation proceedings lack certain features of the criminal and civil process, public scrutiny is that much more critical. Aliens facing deportation have no right to counsel at government expense, and thus will often appear at their hearings without an attorney.[22] Thus, although aliens face both a loss of liberty and banishment from the country, see Delgadillo v. Carmichael, 332 U.S. 388, 391 (1947), they will often face a trained INS prosecutor alone. Under these circumstances, the value of public scrutiny as a check on the system cannot be overstated.[23]

Nor, of course, is there a jury. As the Supreme Court has stressed in finding

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[21] The government also suggests that the procedures in deportation hearings are largely a matter of grace. Gov't Br. at 47. But deportation hearings have long been subject to due process requirements that neither Congress nor an agency are free to ignore. The Japanese Immigrant Case, 189 U.S. 86, 100-01 (1903). See also Fitzgerald v. Hampton, 467 F.2d 755, 766 (D.C. Cir. 1972) (for formal reinstatement hearings, "due process requires" open proceedings).

[22] Even now, months after September 11th, the government has conceded that approximately 25% of the INS detainees still in custody are unrepresented. Gov't Supplemental Submission, in Center for Nat'l Sec. Studies v. Department of Justice, No. 01-CV-2500 (D.D.C. filed Dec. 5, 2001) (pending). See also Tamar Lewin, Rights Groups Press for Names of Muslims Held in New Jersey, N.Y. Times, Jan. 23, 2002, at A9 (allegations that lawyers were denied access to detainees).

[23] Indeed, precisely because liberty is at stake, special protections are required by the Constitution, including habeas corpus review. See St. Cyr, 533 U.S. 289.

a right to attend pretrial preliminary hearings, the jury has functioned historically as a significant check on the judicial system. Press-Enterprise II, 478 U.S. at 12-13 (explaining that "the absence of a jury . . . makes the importance of public access . . . even more significant"). Here, that check is absent.

Furthermore, the prospect of significant judicial scrutiny of final deportation orders is limited, thereby rendering public scrutiny of the initial administrative process essential. Judicial review of deportation orders is circumscribed, see 8 U.S.C. § 1252 et seq, and, although theoretically available, is frequently waived. See Detroit Free Press, 195 F. Supp. 2d at 948 (appeal of immigration judge's decision "may never occur"). Indeed, throughout this litigation, the government has not identified a single September 11 "special interest" INS detainee who has appealed his final order to the federal courts. See Press-Enterprise II, 478 U.S. at 12 (emphasizing that because criminal defendants often plead guilty, the preliminary hearing will often be the "final and most important step" in the process, providing the public with "the sole occasion for public observation").

There can be no question that deportation hearings have historically involved issues of acute interest to the public. At this moment, the manner in which our country is conducting its investigation of the events of September 11 is of particular national interest. As the district court in the Detroit Free Press case emphasized,

"[i]t is important for the public . . . to know that even during these sensitive times the Government is adhering to immigration procedures and respecting individuals' rights." 195 F. Supp. 2d at 944. See also id. ("if in fact the Government determines that [the alien] . . . is connected to terrorist activity or organizations, a decision made openly concerning his deportation may assure the public that justice has been done").

In these ways and others, the deportation system will, as a general matter, benefit from openness. Indeed, the government could not seriously dispute that general proposition given that its own regulations have for 40 years mandated that deportation hearings remain presumptively open. The "logic" prong of Richmond Newspapers is thus satisfied by deportation hearings.

D. Defendants' Reliance On Congress's Plenary Immigration Power Is Misplaced.

The government argues that the Court should not evaluate plaintiffs' claims under the traditional First Amendment test governing challenges to closed proceedings because they arise in the immigration area. That argument is baseless.

As an initial matter, the district court properly concluded that although the Creppy directive may arise in the area of immigration, its purpose was not immigration-related. The government does not, and could not, contend that closed

hearings were deemed necessary to deport the "special interest" detainees. Rather, the government claims that the closed hearings are a necessary law enforcement tool. Thus, the Creppy directive does not represent the federal government's considered judgment about immigration policy.

In any event, even assuming that the Creppy directive could be deemed an immigration-related policy, the government's reliance on the plenary power doctrine is misplaced. That doctrine grants the federal government significant latitude over substantive immigration decisions regarding which categories of aliens to admit to the country and the conditions under which they may remain. But, as the Supreme Court has repeatedly made clear, including just last Term in Zadvydas v. Davis, 533 U.S. 678 (2001), the federal government does not have plenary power over the procedural means it employs to implement or enforce its substantive immigration decisions.

Here plaintiffs do not remotely challenge Congress's substantive authority to deport any given alien if he has violated the immigration laws, but only whether the closed hearing procedures comport with the First Amendment and governing regulations. Indeed, by its terms, the Creppy directive states that it imposes "special procedures" and that those "procedures" are to be followed in certain cases.

This distinction is longstanding and has been consistently applied by the Supreme Court. In INS v. Chadha, 462 U.S. 919, 940-41 (1983), for example, plaintiffs challenged the procedures chosen by Congress to implement its substantive immigration policies (specifically Congress's decision to create a one-House veto over certain deportation decisions made by the Attorney General). The Court struck down the procedure and stated: "The plenary authority of Congress over aliens . . . is not open to question, but what is challenged here is whether Congress has chosen a constitutionally permissible means of implementing that power." Id.

Most recently, in Zadvydas, 533 U.S. at 695-97, the Supreme Court held that the Attorney General lacked authority to indefinitely detain non-citizens with criminal convictions whose native countries were unwilling to accept their return. The Court pointedly rejected the government's contention that the plenary power doctrine insulated the Attorney General's detention policy. The Court stressed that the government's immigration power "is subject to important constitutional limitations" and specifically cited its prior decision in Chadha for the proposition that "Congress must choose a constitutionally permissible means of implementing" its substantive immigration power. Id. at 695 (quoting Chadha, 462 U.S. at 941-42)

(emphasis added) (internal quotations omitted).[24]

This Circuit has likewise stressed this limitation on the plenary power doctrine. In Patel, 275 F.3d 299, for example, the Court rejected the government's reliance on the plenary power doctrine and held that a 1996 statutory provision providing for mandatory detention of certain immigrants pending the outcome of their administrative deportation proceedings was unconstitutional. The Court stressed that the plenary power doctrine could not insulate the mandatory detention provision from meaningful constitutional scrutiny: "The plenary authority of Congress over aliens . . . is not open to question, but what is challenged here is whether Congress has chosen a constitutionally permissible means of implementing that power." Id. at 308 (internal quotation marks and citations omitted).

The government contends that this Court should evaluate this challenge to the Creppy directive under the standard of review employed in Kleindienst v. Mandel, 408 U.S. 753 (1972), where the Court inquired whether the Attorney General's decision in that case was based on a "facially legitimate and bona fide" reason. Gov't Br. at 48-49. But, unlike the instant case, Mandel involved a

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[24] The government relies on the Supreme Court's dictum in Zadvydas that greater deference might be warranted in terrorism-related cases. The government, however, ignores the context of that statement. Zadvydas concerned the release of aliens from detention. This case plainly does not involve the release from detention of any alien.

challenge to the federal government's substantive power to exclude an alien from the country, and not a challenge to the procedural means used by the government to implement that power.[25]

The government's reliance on Reno v. Flores, 507 U.S. 292, 303 (1993), is especially inapposite because that case involved juvenile detention and rested on the Court's view that the government has special responsibilities and powers over unaccompanied children. Gov't Br. at 50-51. Zadvydas makes clear, however, that Congress does not generally have plenary power over its detention policies. See Patel, 275 F.3d 299 (limiting Flores to context of children).[26]

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[25] In Mandel, the government denied entry to a Marxist scholar who wished to speak to various U.S. citizen groups in the United States, who in turn claimed that the alien's exclusion violated their First Amendment right to hear the scholar's views in person. The Court concluded that the government's substantive power to exclude certain groups of aliens could not be abrogated whenever a group of citizens wished to hear the views of a foreign national. Notably, Mandel itself made clear that Congress must afford constitutionally adequate procedures. 408 U.S. at 766-67.

[26] The government also attempts to obfuscate the difference between substantive and procedural policies by quoting Knauff v. Shaughnessy, 338 U.S. 537 (1950), for the proposition that specifying "procedures concerning the admission of aliens" is "an inherent executive power" entitled to substantial deference. Gov't Br. at 51 (quoting Knauff, 338 U.S. at 542). But, as the quote itself demonstrates, the Knauff doctrine applies only to aliens seeking entry. Only in that constitutionally limited context may Congress dictate the procedures. Knauff, 338 U.S. at 542. See Patel, 275 F.2d at 307.

In short, the district court properly concluded that the Creppy directive cannot be insulated from Richmond Newspapers scrutiny. That ruling is firmly grounded in the decisions of the Supreme Court and this Court.

II. THE CREPPY MEMO CANNOT SURVIVE FIRST AMENDMENT SCRUTINY.

A. Richmond Newspapers And Its Progeny Permit Closed Proceedings Only Where There Are Non-Speculative Findings That Closure Is The Least Restrictive Means Of Furthering A Compelling Interest.

To survive First Amendment scrutiny, the party seeking closure must show that "the denial [of access] is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." Globe Newspaper, 457 U.S. at 606-07. Thus, even where there exists a compelling interest, a closure order may not be sustained unless it is narrowly tailored to achieve that interest. Because proceedings may be closed only where necessary, categorical closure orders are forbidden and a case-by-case analysis has been demanded by the Supreme Court and by this Court. Globe Newspaper, 457 U.S. at 608; Press-Enterprise II, 478 U.S. at 13-15; Publicker, 733 F.2d at 1071.

Furthermore, there must be on-the-record findings that are both non-speculative and sufficiently specific so that a reviewing court can determine whether closure was proper. Press-Enterprise II, 478 U.S. at 13 (requiring "specific, on the

record findings"). Vague assertions lacking evidentiary support will not suffice for this purpose. See Globe Newspaper, 457 U.S. at 609 (finding interest insufficient where lacking in "empirical support"); Simone, 14 F.3d at 841.

Finally, and importantly, closure orders must substantially advance the asserted interests underlying the order. Globe Newspaper, 457 U.S. at 609-10; Press-Enterprise II, 478 U.S. at 14 (closure order must have "substantial probability" of advancing government's interest).

In Globe Newspaper, the Supreme Court left no doubt that a categorical rule like the one at issue here cannot satisfy the narrow tailoring requirement mandated by the First Amendment. The statute there required closure during the testimony of all minor victims of sex offenses, regardless of the circumstances of the particular case. Id. at 598. The Court invalidated the statute, stressing that insofar as Massachusetts sought to safeguard the well-being of minor victims of sexual abuse, that interest did "not justify a mandatory closure rule, for it is clear that the circumstances of the particular case may affect the significance of the interest." Id. at 607-08 (emphasis in original). The Court also explained that Massachusetts's closure rule was underinclusive and failed to significantly further the state's interest in protecting minor victims from exposure, observing that "[a]lthough [the statute]

bars the press and general public from the courtroom during the testimony of minor sex victims, the press is not denied access to the transcript, court personnel, or any other possible source that could provide an account of the minor victim's testimony." Id. at 610. The Court thus concluded that "[i]f the [state's] interest in encouraging minor victims to come forward depends on keeping such matters secret, [the statute] hardly advances that interest in an effective manner." Id. Significantly, the Court also noted that Massachusetts's asserted interest in encouraging victims to testify "proves too much" because it was speculative and lacking in "empirical support," and could justify almost any closure directive. Id. at 609-10.

B. The Creppy Categorical Directive Is Not Narrowly Tailored To Achieve The Government's Interests.

The categorical rule embodied in the Creppy memo is similarly flawed. First, the Creppy directive is underinclusive in precisely the same manner as was the Massachusetts statute in Globe Newspaper, and thus fails to substantially advance the government's interests. At the same time, the directive burdens the First Amendment far more than is necessary, and is thus overinclusive. Equally fatal to strict scrutiny analysis, the Creppy memo closes cases without specific findings to establish the need for closure, much less on-the-record findings by a court.

It bears repeating that the only question presented by this case is whether the government can close proceedings based solely on a categorical directive. The newspapers do not challenge the government's right to seek closure of portions of hearings where a compelling need to do so can be demonstrated; nor does the district court's decision preclude the government from seeking such orders.

The Creppy memo is substantially underinclusive because it allows immigrants and their attorneys to publicize the entire proceedings, and even to provide the press with documents submitted into evidence. Yet if secrecy is in fact critical to safeguard national security, then it makes little sense to leave these loopholes open. Moreover, not only may the immigrant and his attorney disclose information, the immigrant may appeal his final order to the federal courts, at which point the press and public, as in Globe Newspaper, can obtain the administrative transcripts. See 457 U.S. at 610.

On appeal, the government contends that, as a matter of law, "the narrow tailoring standard requires the government to permit as much speech as possible; thus, the fact that the closure rule permits speech by aliens should not be a ground for holding it too restrictive of First Amendment rights." Gov't Br. at 54-55 (emphasis in original). That argument is squarely foreclosed by the Supreme Court's decision in Globe Newspaper, which emphasized that Massachusetts's

mandatory closure rule was not narrowly tailored because it left too many loopholes and thus did not advance the state's interests "in an effective manner." 457 U.S. at 610.

The government's factual defense of the loopholes in the Creppy memo is equally unavailing. The government suggests, for example, that not all immigrants will choose to publicize their cases, and that even where an immigrant decides to do so, he may only reveal portions of his case. In essence, then, the government argues that there is no certainty, but only a chance that the information will be revealed. Gov't Br. at 54-55. Yet if the information in these immigration cases is as sensitive as the government claims, then it makes little sense for the government to leave to chance whether the information is revealed.[27]

The government also notes that many detainees may not appeal their cases to federal court and that, where they do, full judicial review may not always be available. Gov't Br. at 56. But, as discussed above, far from supporting the Creppy directive, the fact that there may be little judicial oversight is one of the reasons that public access to the initial administrative proceedings is so critical. In any event, the loopholes in the directive simply cannot be justified on the ground

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[27] Moreover, contrary to the government's premise, the identities of numerous detainees and the circumstances of their arrest have been discussed in the press. No doubt many more have self-identified to friends and relatives.

that disclosure might not occur. Indeed, if that argument could save a categorical closure rule, then the statute in Globe Newspaper could have been upheld on the ground that the disclosure of sensitive information might not have occurred. Yet the Supreme Court emphasized that "[a]lthough [the statute] bars the press and general public from the courtroom . . . the press is not denied access to the transcript, court personnel, or any other possible source that could provide an account of the minor victim's testimony." Globe Newspaper, 457 U.S. at 610.

In addition, the government contends that it might seek to seal the records with protective orders in individual federal court proceedings. But that only proves the newspapers' point that closure can be handled on a case-by-case basis.[28]

In sum, the loopholes left after the Creppy directive belie the government's

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[28] The government suggests that the Creppy directive's failure to prevent disclosures by attorneys and detainees should not be fatal given that witnesses in grand jury proceedings may reveal their testimony. Gov't Br. at 55-56. Under the two-part Richmond Newspapers inquiry, however, there is no First Amendment right to attend grand jury proceedings because they have historically been closed and because openness would actually undermine, not further, the functioning of grand jury proceedings (which, unlike deportation proceedings, are investigatory, not adjudicatory). See Press-Enterprise II, 478 U.S. at 9-10. Consequently, grand jury proceedings need not meet First Amendment strict scrutiny, and the government's argument is therefore beside the point. Moreover, the analogy is inapt since any given grand jury witness will be present only for his or her own testimony and will thus not be in a position to reveal the testimony of other witnesses, much less to provide an account of the overall case. Under the Creppy directive, by contrast, the immigrants and their lawyers are present for the entire proceeding and may be free to reveal everything.

claim that every moment of every one of these immigration cases is truly as sensitive as it now contends, or, put differently, that the policy will in fact achieve the interests advanced. See Globe Newspaper, 457 U.S. at 610. Accordingly, for this reason alone, the Creppy memo cannot survive First Amendment scrutiny.

Moreover, as the district court also concluded, the Creppy directive is patently overbroad because it categorically closes all of the "special interest" immigration proceedings from beginning to end, without any particularized showing in a given case that closure is necessary to protect the government's interests. Indeed, given the relatively narrow issues addressed in deportation proceedings, it is likely that the government will frequently be able, if it wishes, to conduct such hearings -- or at least many portions of the hearing -- without revealing any sensitive information. In fact, as noted, the government did not even attempt to seek closure of the July 9, 2002, immigration hearing of Rabih Haddad (the alien whose proceedings are the subject of the parallel Detroit Free Press litigation), notwithstanding the government's assertion that it is necessary to close all of these cases irrespective of individual circumstances. As the district court properly found, the government has simply not made the showing necessary to justify the blanket and unilateral closure of hundreds of cases -- a procedure that would represent an extraordinary departure from First Amendment principles.

The government maintains, however, that the traditional case-by-case approach does not suffice and that the Creppy categorical directive is the least restrictive means of achieving the government's interests. The government further contends that the courts "should not lightly second-guess" this judgment, Gov't Br. at 57.

In fact, the district court did not "lightly second-guess" the government's judgment, but instead faithfully applied longstanding First Amendment precedents requiring a case-by case approach, even in the national security area. The government's suggestion that the courts should not provide meaningful scrutiny, but should abandon a time honored case-by-case approach simply because the government asserts national security concerns is both dangerous and unprecedented. See, e.g., In re Washington Post Company, 807 F.2d 383, 391 (4th Cir. 1986) (subjecting government's assertion that closure was warranted for national security reasons to scrutiny under Richmond Newspapers).

Nor did the district err in concluding that the government's interests can be protected by a case-by-case approach.[29] For example, the government maintains

[29] The government suggests in passing that the Creppy directive does in fact incorporate a case-by case approach because the Justice Department makes "case-specific inquiries" regarding which aliens should be tried in closed hearings. Gov't

that a case-by-case approach would reveal the identities of the detainees. Gov't Br. at 57. However, the claim that deportation proceedings can be categorically closed to prevent terrorist organizations from learning who has been arrested is unpersuasive on its face. Special interest detainees have been permitted to receive visitors and make phone calls. The notion that a terrorist would not have disclosed the fact of his arrest in the intervening ten months defies common sense; that a detainee is, or is not, a "special interest" case might provide more powerful information to terrorists than anything that would be revealed in the routine immigration hearing.

The government further contends that a process of case-by-case adjudication "would itself be rife with potential for revealing critical information . . . ." Gov't Br. at 58. But as this Court explained in Publicker, 733 F.2d at 1071-72, there are numerous mechanisms for protecting information while the courts determine whether closure is warranted, including possible in camera inspection where necessary. See, e.g., In re the Application of the Herald Co., 734 F.2d 93,

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Br. at 57. But the government offers no proof that such case-specific inquiries are being made, nor does it provide the specific standard under which these inquiries are made. In any event, the First Amendment would be rendered a complete nullity if enforcement officials could unilaterally declare when closure should occur. The government apparently recognizes as much, and thus, relies principally on its contention that the events of September 11 justify a departure from the traditional First Amendment case-by-case approach.

101 (2d Cir. 1984) (district court's statement of reasons for closing a suppression hearing could be filed under seal); In re Washington Post Company, 807 F.2d at 391; In re Search Warrant for Secretarial Area Outside Office of Thomas Gunn, 855 F.2d 569, 574 (8th Cir. 1988). Indeed, even in the context of military courts martial, a trial judge must not "employ[] an ax in place of the constitutionally required scalpel." United States v. Grunden, 2 M.J. 116, 120 (CMA 1977).

Moreover, the government's concern may also be addressed through targeted protective orders, and indeed, the government has promulgated a new regulation providing immigration judges with additional powers to issue sealing and protective orders on a case-by-case basis where needed. See 67 Fed. Reg. 36799, 36799 (May 28, 2002). This new regulation strongly supports the newspapers' position that a case-by-case approach is appropriate and feasible, and that a blanket closure order is unnecessary.[30]

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[30] Insofar as the government suggests that some of these detainees may be would-be informants who are not known to the terrorist organizations, closure on a case-by-case basis might be warranted under the appropriate showing to protect their confidentiality. But, contrary to the government's assertion that "case-by-case closure would risk disclosure of the identities of aliens," Gov't Br. at 57, there is no necessary reason why confidentiality could not be protected in appropriate circumstances on a case-by-case basis, just as it is with informants in criminal cases. See Rovario v. United States, 353 U.S. 53 (1975). Unless the government is prepared to claim that all or most deportation proceedings in special interest cases involve informants, then a blanket closure order is plainly unwarranted on this ground.

The government also appears to argue that the categorical closure policy is for the benefit of the detainee, who could be subjected to "harm or intimidation" if his identity is disclosed. Gov't Br. at 53. But that is plainly an interest that can and should be protected on a case-by-case basis, since some detainees (such as the alien in the Detroit Free Press litigation), wish to have an open proceeding. See Globe Newspaper, 457 U.S. at 607-08 (striking down categorical closure rule designed to shield minor victims, emphasizing that some victims may want to publicly reveal their testimony).

Ultimately, the government's argument rests on the speculative claim that the most seemingly innocuous information disclosed at these hearings could, at some point, possibly prove useful to some organization if connected together with other unspecified information. If such speculation is sufficient to override the First Amendment, then the government could deprive individuals of liberty in virtual secrecy, whenever it chose to do so, simply by asserting that it was unable to determine in advance what information might have national security implications.

The sweep of the government's position is extraordinary. If the Creppy memo can satisfy strict scrutiny, then a categorical rule closing federal court proceedings involving these same "special interest" detainees would also necessarily survive strict scrutiny since the inquiry at this stage of the First

Amendment analysis would be the same. Yet even the government does not argue that a categorical rule like the Creppy memo could survive if it were applied to the federal courts. And, in fact, even the trials of those individuals who have actually been criminally charged with terrorism (such as Zacarias Moussaoui, the alleged 20th hijacker, and Richard Reid, the so-called "shoe bomber") are being conducted in open federal court and have not been subject to broad closure orders, much less categorical closure orders. There is, in short, no authority for the Creppy categorical directive at issue here.

III. THE DISTRICT COURT'S INJUNCTION IS NOT OVERBROAD.

The government incorrectly maintains that the preliminary injunction should apply only to the named plaintiffs and only with respect to immigration proceedings in the District of New Jersey. Gov't Br. at 58-61. The district court did not abuse its discretion in issuing a nationwide injunction -- the Creppy directive is a national policy applied throughout the Nation, and was invalidated by the district court on its face. See, e.g., Washington v. Reno, 35 F.3d 1093, 1103-04 (6th Cir. 1994).

Nor is there any basis for limiting the injunction to the named plaintiff newspapers. Indeed, to do so would mean that other newspapers would be locked out of the courtroom and the named plaintiffs would have an exclusive on reporting quintessentially public -- and national -- news. See, e.g., Bresgal v. Brock, 843

F.2d 1163, 1169 (9th Cir. 1987) ("There is no general requirement that an injunction affect only the parties in the suit").

In sum, only a nationwide injunction enforceable by any member of the public adequately serves the fundamental First Amendment rights at issue here. See ACLU v. Reno, 31 F. Supp. 2d 473, 499 n.8 (E.D. Pa. 1999), aff'd 217 F.3d 162 (3d Cir. 2000), vacated on other grounds 122 S.Ct. 1700 (2002).[31]

IV. THE CREPPY MEMO VIOLATES INS REGULATIONS.

The Creppy directive's blanket closure policy also violates INS regulations, 8 C.F.R. §§ 3.27 and 240.10, quoted supra.[32] These regulations require case-specific consideration by an individual immigration judge to close a hearing, and prohibit the type of categorical closure mandated by the Creppy memo. See generally E.E.O.C. v. Waffle House, Inc., 122 S.Ct. 754, 763 (2002).[33]

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[31] The government's reliance on Reno v. American-Arab Anti-Discrimination Committee, 525 U.S. 471, 480 (1999) (AADC), and 8 U.S.C. § 1252(f)(1), is misplaced. That provision bars lower courts from enjoining the operation of 8 U.S.C. §§ 1221-31 on a classwide basis. Here, however, plaintiffs seek to enjoin a policy of the Chief Immigration Judge, not one of the listed statutory provisions.

[32] Contrary to the government's contention, plaintiffs need not have cross-appealed on this claim because it is simply an alternative ground of affirmance, and does not seek distinct or additional relief. Kontakis v. Beyer, 19 F.3d 110, 119 (3d Cir. 1994).

[33] The government argued below that the regulations vest the Chief Judge with the discretion to close proceedings, even though the regulations do not refer to the

The district court did not reach the merits of plaintiffs' regulatory claim, but held that no private right of action existed to enforce 8 C.F.R. §§ 3.27 and 240.10. Gov't App. 36. It is clear, though, that the immigration statutes must create such a right because the public's longstanding right to attend proceedings would otherwise be rendered wholly ineffective. See Oneida Indian Nation v. County of Oneida, 719 F.2d 525, 535 (2d Cir. 1983), aff'd in part and rev'd on other grounds in part, 470 U.S. 226 (1985). See Pechter, 441 F. Supp. at 118 (finding that public has standing to enforce INS openness regulations).[34]

Chief Judge. But where INS regulations give the Chief Judge power, they so state. See 8 C.F.R. § 3.9. Moreover, it appears that the Attorney General is actually the one deciding when to close proceedings. It is well established, however, that the Attorney General cannot preempt the discretion vested by regulation in lower administrative judges. See United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954).

[34] Neither Alexander v. Sandoval, 532 U.S. 275 (2001), nor South Camden Citizens in Action v. New Jersey Dep't of Environmental Protection, 274 F.3d 771 (3d Cir. 2001), support the district court's conclusion that plaintiffs have no cause of action to enforce the open hearing regulation. Sandoval turned on the fact that Congress had explicitly crafted an alternative enforcement remedy -- a funding cut-off. Furthermore, unlike Sandoval and South Camden, the federal government is the defendant in this case, not a putative ally in enforcing plaintiffs' claim.

CONCLUSION

The district court's decision should be affirmed.

Respectfully submitted,

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