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SMU Law Review

Volume 56 | Issue 2 Article 16

2003

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THE SIXTH CIRCUIT HOLDS THAT THE FIRST AMENDMENT PROVIDES A LIMITED RIGHT OF PUBLIC ACCESS TO DEPORTATION HEARINGS—*DETROIT FREE PRESS V. ASHCROFT*

*William Taylor**

"DEMOCRACIES die behind closed doors . . . . When government begins closing doors, it selectively controls information rightfully belonging to the people. Selective information is misinformation."[1] Although these words from the Sixth Circuit's decision in *Detroit Free Press v. Ashcroft* are both powerful and poetic, they are not necessarily correct. The government routinely closes many doors and selectively disseminates much information without endangering the life of our democracy.[2] Nevertheless, by holding that the First Amendment conveys a limited right of public access to deportation hearings, the Sixth Circuit propped open a door that is essential to the functioning of American democracy. A contrary holding would have removed the right of access to virtually all administrative hearings, which would have devastating effects far beyond immigration law.

Under the authorization of Attorney General John Ashcroft, the Office of the Chief Immigration Judge designates certain cases to be "special interest cases."[3] On September 21, 2002, Chief Immigration Judge Michael Creppy issued a directive (Creppy directive) to all Immigration Judges requiring that all such cases be closed to the press and the public, including family members and friends of deportees.[4]

On December 19, 2002, Immigration Judge Elizabeth Hacker conducted a bond hearing for Rabih Haddad, who was subject to deportation for overstaying his visa.[5] The government suspected that an Islamic charity operated by Haddad supplied funds to terrorist groups, and Haddad's

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1. Detroit Free Press v. Ashcroft, 303 F.3d 681, 683 (6th Cir. 2002).

2. *See, e.g.*, Michael Kelly, *Secrecy, Case By Case*, WASH. POST, Aug. 28, 2002, at A23 (noting that schools and courts select information for students and jurors, respectively, that the President's national security briefings are held behind "those democracy-killing closed doors," and that court proceedings involving national security are frequently not open to the public at large).

3. *Detroit Free Press*, 303 F.3d at 683.

4. *Id.* at 683-84.

5. *Id.* at 684.

case was designated a special interest case.[6] Haddad's family, members of the public, Congressman John Conyers, and several newspapers sought to attend the deportation hearing.[7] On the day of the hearing—without prior notice to the public, Haddad, or his attorney—security officers announced that the hearing was closed to the public and the press.[8] Subsequent hearings were also closed.[9]

Several newspapers, in addition to joining Haddad and Congressman Conyers in filing other claims, sought (1) a declaratory judgment from the United States District Court for the Eastern District of Michigan that the Creppy directive violated their First Amendment right of access to Haddad's deportation proceedings, (2) an injunction against subsequent closure of proceedings in Haddad's case, and (3) a release of all transcripts and documents from previous proceedings.[10] The district court granted the newspapers' motion, finding that the newspapers had a First Amendment right of access to deportation hearings.[11] The government filed an appeal to the Sixth Circuit Court of Appeals; in the interim, the Sixth Circuit granted a temporary stay of the district court's order.[12] The Sixth Circuit then dissolved the temporary stay and denied the government's motion for a stay pending appeal.[13]

On appeal, the Sixth Circuit unanimously affirmed the district court's injunction.[14] Writing for the court, Judge Keith first decided that the Creppy directive involved non-substantive[15] immigration law and did not require special deference to the government.[16] Although the government has plenary power over substantive immigration issues,[17] political discretion over non-substantive issues is limited if a fundamental right is implicated.[18] The court then held that the First Amendment conveyed a limited right of access to deportation hearings under the two-part "experience and logic" test of *Richmond Newspapers, Inc. v. Virginia*[19] and its

6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.* at 685.
13. *Id.*
14. *Id.* at 711.
15. "The difference between substantive and non-substantive immigration law is that substantive immigration law answers the questions, 'who is allowed entry' or 'who can be deported.'" *Id.* at 686 n.6.
16. *Id.* at 685-93.
17. *See, e.g.*, Kleindiest v. Mandel, 408 U.S. 753 (1972) (holding there is no First Amendment bar to excluding people because of their beliefs); Wong Wing v. United States, 163 U.S. 228, 237 (1896) (holding that courts cannot limit Congress from expelling "aliens whose race or habits render them undesirable as citizens").
18. *Detroit Free Press*, 303 F.3d at 693; *see, e.g.*, Zadvydas v. Davis, 533 U.S. 678, 695 (2001) (noting that the plenary power was "subject to important constitutional limitations"); INS v. Chadha, 462 U.S. 919, 940-41 (1983) (noting that Congress has plenary authority where it has substantive legislative jurisdiction, "so long as the exercise of that authority does not offend some other constitutional restriction").
19. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980).

progeny.[20] Finally, since a limited right of access existed, the court held that the government failed to show that its denial of access was narrowly tailored to meet a compelling state interest.[21] The Creppy directive failed to require specific findings, on the record, so that a reviewing court could determine whether closure was appropriate.[22] Furthermore, the Creppy directive was both under-inclusive and over-inclusive.[23] The court did not hold that deportation hearings must remain open, but that closure on a case-by-case basis, as required prior to the Creppy directive, would be a less restrictive means of achieving the government's desired ends.[24]

In *Richmond Newspapers*, the Supreme Court held that there is a First Amendment right of access to criminal trials.[25] Justice Brennan, in a concurring opinion later adopted by the Court,[26] set forth the two-part "experience and logic" test to determine if a fundamental right of access exists.[27] Under the "experience" prong, the Court looks at "whether the place and process have traditionally been open to the press and general public."[28] The "logic" prong addresses whether public access plays a "significant positive role in the functioning of the particular process in question."[29] If these prongs are met, then a qualified First Amendment right of access attaches. This right can only be overcome by a showing that closure is narrowly tailored to achieve an overriding interest, based on findings specific enough for a reviewing court to determine if closure was appropriate.[30] Using the "experience and logic" test, the Supreme Court has since extended the right of access to include aspects of criminal cases outside of the trial phase.[31]

Other courts have also applied the "logic and experience" test outside of the criminal context. Although the Supreme Court has not yet addressed the issue of whether there is a First Amendment right to attend civil proceedings, several circuit courts (including the Second, Third, Fourth, Sixth, Eighth, Ninth, Tenth, and Eleventh) have addressed the issue.[32] All have agreed that the governing test is the two-part *Richmond Newspapers* test and that the press and public have a First Amendment right to attend civil proceedings.[33]

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20. *Detroit Free Press*, 303 F.3d at 694-96.
21. *Id.* at 705-10.
22. *Id.* at 707.
23. *Id.* at 710.
24. *See id.* at 707-10.
25. *Richmond Newspapers*, 448 U.S. at 580.
26. *See* Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 8 (1986) (adopting Justice Brennan's test) [hereinafter *Press-Enterprise II*].
27. *Richmond Newspapers*, 448 U.S. at 558.
28. *Press-Enterprise II*, 478 U.S. at 8.
29. *Id.*
30. *Id.* at 9.
31. *See id.* at 13 (holding that a limited right of access existed with regard to preliminary hearings); Press-Enterprise v. Superior Court, 464 U.S. 501, 501-04 (1984) (holding that the limited right of access existed with regard to voir dire and jury selection) [hereinafter *Press-Enterprise I*].
32. *See Detroit Free Press*, 303 F.3d at 696 n.11.
33. *Id.*

In addition to its application in civil trials, the "logic and experience" test has been applied to administrative hearings. The Sixth Circuit previously applied the test to determine if there was a right of access to a university's student disciplinary board proceedings.[34] The court held that there was no right of access; however, the decision was based on the fact that disciplinary proceedings are often not conducted in accordance with cherished judicial principles, with key elements being that the proceedings did not "afford the student the opportunity to secure counsel, to confront and cross-examine witnesses . . ., or to call his own witness to verify his version of the incident."[35] Likewise, the Third Circuit used the "experience and logic" test to find a right of access to municipal planning commission meetings.[36]

The Sixth Circuit was correct in using the "experience and logic" test to determine whether the right of access applies to deportation hearings for several reasons. First, although Justice O'Connor has said in a concurring opinion that *Richmond Newspapers* does not have any implication beyond criminal trials,[37] the Supreme Court has since applied the "experience and logic" test to additional proceedings beyond the traditional trial.[38] Likewise, every circuit court to address the issue has applied this test to civil trials as well as criminal.[39] Furthermore, recent, unrelated Supreme Court cases have inquired into the substance of administrative proceedings and their adjudicative characteristics rather than simply disposing of the cases by determining that the proceedings were administrative.[40] Deportation hearings, like the proceedings in *Federal Maritime Commission v. South Carolina State Ports Authority*, "walk, talk, and squawk" like a trial.[41] Most importantly, Sixth Circuit precedent has conclusively established that the "experience and logic" test applies not only to criminal trials, but to civil trials and administrative hearings as well.[42]

Likewise, the Sixth Circuit was correct in its conclusion that deportation hearings meet the "experience and logic" test. Deportation hearings have been presumptively open by statute since 1965.[43] Furthermore, since 1893, only eleven years after the enactment of the first general im-

34. United States v. Miami Univ., 294 F.3d 797 (6th Cir. 2002).

35. *Id.* at 822.

36. Whiteland Woods, L.P. v. W. Whiteland, 193 F.3d 177 (3d Cir. 1999).

37. *Compare* Globe Newspaper v. Superior Court, 457 U.S. 596, 611 (1982) (O'Connor, J., concurring) (arguing that the "experience and logic" test is limited to criminal trials), *with Richmond Newspapers*, 448 U.S. at 599 (Stewart, J., concurring in judgment) (arguing that a right of access applies to both civil and criminal trials).

38. *See, e.g., Press-Enterprise II*, 478 U.S. at 7-10.

39. *See Detroit Free Press*, 303 F.3d at 695 n.11.

40. *See* Sims v. Apfel, 530 U.S. 103 (2000) (concluding that social security proceedings were inquisitorial rather than adversarial); Fed. Mar. Comm'n v. S.C. State Ports Auth., 122 S. Ct. 1864 (2002) (noting that Federal Maritime Commission proceedings "walk[ed], talk[ed], and squawk[ed] very much like . . . lawsuits).

41. For an in-depth discussion of the quasi-judicial aspects of deportation hearings, see *Detroit Free Press*, 303 F.3d at 696-700.

42. *See Miami Univ.*, 294 F.3d at 824; Brown & Williamson Tobacco Corp. v. FTC, 710 F.2d 1165, 1177-79 (6th Cir. 1983).

43. *See* 8 C.F.R. § 3.27 (2002).

migration act, Congress has required that exclusion hearings (which determine whether an alien can be admitted into the country) be held "separate and apart from the public," while making no mention of requiring that deportation hearings (determining if an alien should be removed form the country) be closed.[44] In fact, even deportation hearings in a recently created anti-terrorism court are presumptively open to the public.[45] In contrast to the government's argument that the "experience" test should be judged against the tradition of the common law, the Supreme Court and circuit courts have looked to more recent history as well.[46] Furthermore, common law history does not provide guidance, since formalized administrative adjudications were all but unheard of in the late eighteenth and nineteenth centuries, and "[t]he Framers . . . could not have anticipated the vast growth of the administrative state."[47] Thus, for the relevant time period since 1893, deportation hearings have been open to the public and meet the test of "experience."

With regard to "logic," the court's reasons why openness benefits deportation—which included (1) providing a check on Executive power and (2) ensuring that the individual citizen can participate in and contribute to our republican form of government—do not appear to be seriously challenged by the government. Therefore, the "experience and logic" test was correctly applied by the court.

The significance of the Sixth Circuit's decision goes far beyond the scope of deportation hearings. The Creppy directive, even if allowed to stand, was but a small, incremental assault on the individual liberties guaranteed to each person by the Constitution. In contrast, the government's argument that a First Amendment right of access never applies to administrative hearings, if accepted, would have had a disastrous effect on both the liberty interests protected by the Constitution and the separation of powers that provides the greatest check against abuse of power. With the increase in administrative regulation over the past century, virtually all areas of American life are governed by administrative agencies. Without at least a limited right of access to administrative proceedings, large sections of the government could operate in virtual secrecy. Furthermore, since many proceedings have limited rights of appeal, public scrutiny may be the only check on potential abuses by these agencies. Finally, "[d]rawing sharp lines between administrative and judicial proceedings would allow the legislature to artfully craft information out of the public eye."[48] Although placing adjudication into an administrative proceeding rather than a court will not circumvent the Eleventh Amend-

44. *Detroit Free Press*, 303 F.3d at 701.

45. *See* 8 U.S.C. §§ 1531-35 (1999).

46. *See Press-Enterprise II*, 478 U.S. at 10-12 (looking exclusively at post-Bill of Rights history); NBC v. Presser, 828 F.2d 340, 344 (6th Cir. 1987) (finding a First Amendment right of access while reviewing history from 1924 to 1984).

47. *Fed. Mar. Comm'n*, 122 S. Ct. at 1872.

48. *Detroit Free Press*, 303 F.3d at 696.

ment,[49] the absence of a right of access to administrative hearings would be an invitation to circumvent the First Amendment by just such a method.

Likewise, the government's argument that deportation hearings lack the required tradition to meet the "experience and logic" test would have an equally disastrous effect on fundamental liberty. If the First Amendment does not convey a right of access on deportation hearings—which have a century-old tradition of openness, have many of the hallmarks of judicial proceedings but lack some of the protections, and which affect the very physical liberty of their subjects—then what administrative proceedings does it protect? Such a decision would amount to a de facto rejection of the right to public access, with the First Amendment conveying a theoretical right of access to administrative hearings that would never be applied in practice. The results of such a scenario would be just as devastating to personal liberty as an outright rejection of the right of access to administrative proceedings.

Ultimately, the Supreme Court may have to decide how far the right of public access extends, perhaps sooner rather than later.[50] In doing so, the Court should follow the reasoning of the Sixth Circuit to avoid a catastrophic reduction of the right of public scrutiny. While democracies do not necessarily die behind closed doors, the loss of public access to administrative hearings would result in the death of public oversight of the government as we know it.

49. *See Fed. Mar. Comm'n*, 122 S. Ct. at 1869-70.

50. During oral arguments concerning the appeal of an almost identical case, *N. Jersey Media Group, Inc. v. Ashcroft*, 205 F. Supp. 2d 288 (D.N.J. 2002), Judge Becker of the Third Circuit is quoted as saying "I understand that this case is headed to a higher court, but we are bound by 3rd Circuit precedent." Shannon P. Duffy, *Arguments Made on Deportation Hearing Regs*, LEGAL INTELLIGENCER, Sept. 18, 2002, at 1.

Articles


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