

NOTES

THE (UN)FAVORABLE JUDGMENT OF HISTORY: DEPORTATION HEARINGS, THE PALMER RAIDS, AND THE MEANING OF HISTORY

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As Americans respond to the events of September 11, 2001, they are being forced to contemplate their place in American history—past, present, and future. This has become particularly stark in the fight over secret deportation hearings. Following September 11, Attorney General John Ashcroft announced that the deportation hearings of “special interest” aliens would be closed to the public. Applying Richmond Newspapers’s two-pronged logic-and-experience test, the Third and Sixth Circuits subsequently split over the constitutionality of the blanket closure. At the heart of their disagreement was the scarce history of deportation hearings and whether such hearings had been closed in the past. In this Note, Harlan Grant Cohen argues that the “history” test applied by the two courts has been misconceived. Drawing upon the history of the Palmer Raids of 1919-1920 and the treatment of Russian and Eastern European immigrants during the first Red Scare, Cohen argues that in examining the secret deportation question, Americans must ask themselves not what they have done in the past, but instead what lessons they should learn from those historical practices. Only with this deeper understanding of the past will Americans truly be able to understand the difficult policy choices of the present.

INTRODUCTION

Emphatically condemning the Justice Department’s response to the terrorist acts of the prior year, a group of the country’s most respected lawyers wrote:

Under the guise of a campaign for the suppression of radical activities the office of the Attorney General acting by its local agents throughout the country, and giving express instructions from Washington has committed continual illegal acts. Wholesale arrests

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both of aliens and citizens have been made without warrant or any process of law; men and women have been jailed and held *incomunicado* [sic] without access of friends or counsel; homes have been entered without search-warrant and property seized and removed; other property has been wantonly destroyed; workingmen and workingwomen suspected of radical views have been shamefully abused and maltreated. Agents of the Department of Justice have been introduced into radical organizations for the purpose of informing upon their members or inciting them to activities; these agents have even been instructed from Washington to arrange meetings upon certain dates for the express object of facilitating wholesale raids and arrests. In support of these illegal acts, and to create sentiment in its favor, the Department of Justice has also constituted itself a propaganda bureau, and has sent to newspapers and magazines of this country quantities of material designed to excite public opinion against radicals, all at the expense of the government and outside the scope of the Attorney General's duties.¹

This statement, not written in the wake of September 11, but rather decades past, in May 1920, by, among others, Roscoe Pound, Felix Frankfurter, Zechariah Chafee, Jr., and Tyrell Williams, strikes an eerily resonant chord in a United States still coping with life after the terrorist attacks of September 11, 2001. The concerns of these respected members of the bar, addressing a world reacting to the threat of worldwide Bolshevism, seem to presage criticism of the current Bush administration's response to the threat of terrorism. Should the words of these men, written almost eighty years ago, give Americans pause today?

History has become a battleground as Americans grapple to find meaning in the terrorist attacks of September 11 and the changed world they now inhabit.² Immediately after the attacks, many Americans spoke of Pearl Harbor;³ in memories of the Japanese attack they saw not only a similarly shocking attack on American soil, but also a nostalgic vision of moral certainty, a reminder of a time

¹ The Nat'l Popular Gov't League, Report Upon the Illegal Practices of the United States Department of Justice 1-2 (1920).

² See, e.g., Michiko Kakutani, Struggling to Find Words for a Horror Beyond Words, N.Y. Times, Sept. 13, 2001, at E1.

³ See, e.g., R.W. Apple, Jr., Awaiting the Aftershocks, N.Y. Times, Sept. 12, 2001, at A1; Adam Clymer, In the Day's Attacks and Explosions, Official Washington Hears the Echoes of Earlier Ones, N.Y. Times, Sept. 12, 2001, at A20; Kevin Dobbs & Terry Woster, Attack More Cowardly than Pearl Harbor, Veterans Say, Argus Leader (Sioux Falls, S.D.), Sept. 12, 2001, at 10A; Like Pearl Harbor, This Attack Will Never Be Forgotten, Houston Chron., Sept. 12, 2001, at 18A; Diana Penner, Veterans Reminded of Pearl Harbor, Indianapolis Star, Sept. 12, 2001, at A5; Jacques Steinberg, "Worse Than Pearl Harbor," and the Words Ring True, N.Y. Times, Sept. 13, 2001, at A19; John Wilkens, It's Another Day of Infamy, Say S.D. Pearl Harbor Vets, San Diego Union-Trib., Sept. 12, 2001, at A10.

when the United States fought wars to defeat evil.⁴ Other Americans eschewed historical analogy, arguing that the world had never seen anything like September 11 or the threat of Al Qaeda-style terrorism. Notably, U.S. Secretary of Defense Donald Rumsfeld has warned critics of the Bush administration's domestic and international policies that September 11 has changed the world and that those seeking to apply the rules and lessons of past wars and past investigations are living in an irrelevant past.⁵

The stakes in this battle for history are not merely rhetorical or psychological. How we understand our history, and the place of September 11 within it, has very real policy implications. Our government and our society are in the midst of making momentous decisions about our role in the world and the proper balance between national security and civil rights. These decisions have and will continue to be shaped by our view of ourselves, of our values, of our history, and of our legacy.

The relevance of our history to these decisions was brought into particular focus in two recent circuit court decisions, *Detroit Free*

⁴ See, e.g., Jaymes Song, *America, Pushed into War Again, Pauses to Remember Pearl Harbor*, *Chattanooga Times/Chattanooga Free Press*, Dec. 8, 2001, at A5 ("As we come to this time, we are at war again, our homeland attacked. . . . It is time for us to rededicate our lives to the cause of freedom.") (quoting Adm. Vern Clark, chief of naval operations, at ceremony for Pearl Harbor survivors); Dan Uhlinger, *Veterans Liken Terrorist Attacks to Pearl Harbor*, *Hartford Courant*, Sept. 12, 2001, at B1 (quoting Dan Fruchter, Pearl Harbor survivor from Mt. Vernon, N.Y.: "We have people who don't want democracy to survive and we don't understand that. Other people want to take away the liberties we have."); George Will, *9/11 Lesson: America Is Not Immune*, *Chi. Sun-Times*, Sept. 8, 2002, at 35 ("In 1941, a mighty empire—an enemy with a serious if reckless geopolitical strategy—struck at real sinews of U.S. power. In 2001, a delusional, premodern enemy lashed out at American symbols—iconic buildings—and instantly magnified American power by dispelling an American mood—call it end-of-history complacency.").

It should not be surprising that Americans reached for this analogy. In the prior few years, American popular consciousness imbibed an unending series of books, television shows, and movies extolling the efforts of those who fought in World War II. Americans were primed to think of good and evil in historical terms. See generally Stephen E. Ambrose, *Band of Brothers: E Company, 506th Regiment, 101st Airborne From Normandy to Hitler's Eagle's Nest* (1992); Tom Brokaw, *The Greatest Generation* (1998); *Band of Brothers* (HBO television broadcast, Jan. 1, 2001); *Pearl Harbor* (Disney 2001); *Saving Private Ryan* (Dreamworks SKG 1999); *The Thin Red Line* (Twentieth Century Fox 1999); *Windtalkers* (MGM/UA 2002).

⁵ See, e.g., Maureen Dowd, *Culture War With B-2's*, *N.Y. Times*, Sept. 22, 2002, at A13 (quoting Rumsfeld's suggestion "that any who insist on perfect evidence are back in the 20th century and still thinking in pre-9/11 terms"). But see Will, *supra* note 4, at 35, stating that,

[t]he attack that came here 61 years ago . . . erased forever the belief that geography . . . confers permanent security on America. The attacks last year erased the comparably soothing belief that the logic of military technology (deterrence) and the march of modernity (the retreat of primitivism) had written an end to history, meaning the immunity of great powers to attacks.

*Press v. Ashcroft*⁶ and *North Jersey Media Group, Inc. v. Ashcroft*.⁷ Considering one of the Justice Department's new tactics in its war on terrorism, the Sixth and Third Circuits split over the constitutionality of secret deportation hearings.⁸ Following September 11, Attorney General John Ashcroft targeted immigration as a particular security concern. Along with the absconder apprehension initiative,⁹ voluntary interview program,¹⁰ and special registration requirements,¹¹ the Department of Justice imposed new restrictions on deportation hearings. Pursuant to a September 21, 2001 directive from Chief Immigration Judge Michael Creppy (the Creppy Directive), "special interest"¹² deportation hearings would be closed to the public, including family and friends. Notably, "[t]his restriction on information includes confirming or denying whether such a case is on the docket or scheduled for a hearing."¹³

This secret hearings policy was quickly challenged by groups of newspapers in both Michigan and New Jersey. The newspapers argued that the blanket closure violated the public's First Amendment right of access, as explicated by the U.S. Supreme Court in *Richmond*

⁶ 303 F.3d 681 (6th Cir. 2002).

⁷ 308 F.3d 198 (3d Cir. 2002), cert. denied, 2003 U.S. LEXIS 4082, at *1 (May 27, 2003).

⁸ See generally *id.*; *Detroit Free Press*, 303 F.3d 681.

⁹ Under the absconder apprehension initiative, the Department of Justice has ordered the apprehension of absconders, or aliens who have overstayed their visas. The initiative specifically instructs Department of Justice agents to focus their efforts on the approximately 6000 absconders from nations with an Al Qaeda presence. Susan Sachs, *Cost of Vigilance: This Broken Home*, N.Y. Times, June 4, 2002, at A15.

¹⁰ The Department of Justice has sought out 5000 Muslims on temporary visas for voluntary interviews. The program has been criticized for poisoning relations with the Muslim community, for intimidating potential interviewees, and for its appearance of racial profiling. See *Memo Adds to Suspicions of Immigrants on Interviews*, N.Y. Times, Nov. 29, 2001, at B6; *Jodi Wilgoren, 200 Muslims Are Sought in Michigan*, N.Y. Times, Dec. 12, 2001, at B8.

¹¹ According to one article describing the special registration requirements:

The detentions by the Immigration and Naturalization Service brought an avalanche of protests about the program, which focuses on men and boys from 20 countries, mostly Arab and Muslim. The so-called special registration program requires all men over 16 from these countries who are temporarily in the United States to appear before an I.N.S. officer to be interviewed, fingerprinted and photographed.

Immigration officers have arrested hundreds of men in the last week after they appeared voluntarily to register, with an unknown number still in custody today.

John M. Broder, *U.S. Starts Freeing Foreigners Detained in Antiterror Sweep*, N.Y. Times, Dec. 20, 2002, at A24.

¹² See *infra* note 55 and accompanying text for analysis of the precise meaning of this term.

¹³ *Detroit Free Press*, 303 F.3d at 684 (quoting Sept. 21, 2001 directive from Chief Immigration Judge Michael Creppy (the Creppy Directive)).

*Newspapers, Inc. v. Virginia*¹⁴ and its progeny. Applying the *Richmond Newspapers* two-part logic-and-experience test, the newspapers argued that deportation hearings historically had been open to the public and that openness plays a significant role in the process of deportation determinations. Further, they argued that the blanket closure was not narrowly tailored to serve a compelling government interest, as required by the *Richmond Newspapers* line of cases.

In applying the *Richmond Newspapers* test, both circuits were forced to consider the history of deportation hearings, its import, and its meaning. Struggling with the relative scarcity of evidence—the first general immigration act was enacted only in 1882—the two circuits came to starkly different conclusions. Whereas the Sixth Circuit noted the continuing legislative presumption that deportation hearings would remain open,¹⁵ the Third Circuit noted that anecdotal evidence implied that deportation hearings had, at times, been closed.¹⁶

This Note is about the meaning and use of history. In this Note, I look carefully at the “experience,” or “history” prong of the *Richmond Newspapers* test and its applicability to deportation hearings.¹⁷ I argue that the example of deportation hearings demonstrates that the prong has been either misconceived or misapplied; the test cannot be merely, “Is there a history of open proceedings?” For the test to have any meaning, I argue it must include not only “What is the history?” but also, “What are the lessons of that history?”¹⁸ Further, I

¹⁴ 448 U.S. 555, 575-80 (1980) (holding rights of free speech and press, which prevent government from excluding public from criminal trials, are guarantees that existed long before adoption of First Amendment).

¹⁵ *Detroit Free Press*, 303 F.3d at 701-02.

¹⁶ *N. Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002), cert. denied, 2003 U.S. LEXIS 4082, at *1 (May 27, 2003).

¹⁷ I will not comment at length here on the Third and Sixth Circuit Courts' application of the “logic” prong or their strict scrutiny analysis. A full Note could be written on either topic. Although my discussion will not provide a full and complete answer to the question presented to the courts, I believe that discussion of the history prong will aid an understanding of the case as a whole, coloring the view of the entire *Richmond Newspapers* test. Of course, even accepting my view of the history prong, a court could still find that a compelling government interest in fighting terrorism demands such restrictions and that secret deportation hearings are narrowly tailored to those ends.

¹⁸ This is particularly true in the deportation context. Criminal trials are a visible part of our everyday lives; as the Court notes in *Richmond Newspapers*, “a tradition of accessibility implies the favorable judgment of experience.” 448 U.S. at 589 (Brennan, J., concurring in judgment). In contrast, immigration cases, as the scarcity of evidence indicates, tend to remain hidden except in times of national crisis. If the question is merely “What is the history?” we are likely to obtain a skewed sample. This crisis bias can only be remedied by looking at the lessons learned after the crisis—the historical judgment of the restrictions enacted. *Korematsu v. United States*, 323 U.S. 214, 219 (1944), holding that the internment of Japanese Americans during World War II was constitutional, presents a good analogy. While technically still good law, the decision has been universally reviled; it

contend that this formulation is dictated by both the logic of the Supreme Court's earlier decisions and by a closer look at the history of American immigration policy. Taking a cue from the government's briefs in *Detroit Free Press* and *North Jersey Media Group*, I look at the context surrounding one of the cited "exceptions" to open deportation hearings—the deportation of Russian and Eastern European men in the 1920s.¹⁹

On May 1, 1919, Americans awoke to news of a "nation-wide bomb conspiracy."²⁰ Thirty-six small bombs had been mailed to prominent American citizens, from Alabama to San Francisco.²¹ The conspiracy was quickly associated with the newly apparent threat of international communism, and Russian and Eastern European immigrants immediately became suspect. Responding to heightening public fear of the Communist threat, a threat eventually remembered as the "Red Scare," then-Attorney General Mitchell Palmer led a year-long effort to arrest and deport alien "radicals," the so-called Palmer Raids.²² Although the history of the Palmer Raids and the Red Scare of 1919 and 1920 does not definitively answer the question asked by the two circuit courts—whether deportation hearings have been historically open to the public—it can enlighten our understanding of the role history should play in determining both the constitutionality of secret deportation hearings, specifically, and the balancing of national security and civil rights, more generally. The lesson of the Palmer Raids is that the history of American immigration policy is often written in times of national emergency. It is a history not written with "the favorable judgment of experience,"²³ but instead out of panic and fear. Al Qaeda is not the first international terrorist movement to threaten American institutions and strike fear

would be specious to argue that history shows that such a restriction is acceptable. See *infra* notes 225-26 and accompanying text.

¹⁹ See Brief for Appellants at 39-40 n.8, *N. Jersey Media Group v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002) (No. 02-2524) [hereinafter Government Brief] (citing Jane Perry Clark, *Deportation of Aliens from the United States to Europe* 9 (1931)). Technically, Clark's book describes deportation procedures in the mid-1920s, not the period of the Palmer Raids that occurred in 1919 and 1920. However, Clark herself implicitly recognizes that the policies of 1925 had been and continued to be shaped by the events of 1919-1920. See Clark, *supra*, at 9.

²⁰ Edwin P. Hoyt, *The Palmer Raids, 1919-1920: An Attempt to Suppress Dissent* 6 (1969) (quoting 36 *Were Marked as Victims by Bomb Conspirators*, *N.Y. Times*, May 1, 1919, at A1).

²¹ *Id.*

²² See generally *id.*; Charles H. McCormick, *Seeing Reds: Federal Surveillance of Radicals in the Pittsburgh Mill District, 1917-1921* (1997); Robert K. Murray, *Red Scare: A Study in National Hysteria, 1919-1920* (1955).

²³ *Richmond Newspapers*, 448 U.S. at 589 (Brennan, J., concurring in judgment).

in Americans; John Ashcroft is not the first Attorney General to make immigrants the focus of his war on terrorism.

This Note proceeds in two parts. Part I lays out the split between the Third and Sixth Circuits. Part I.A explores the limited First Amendment right of access to certain types of government proceedings that was first explicated in *Richmond Newspapers* and subsequently developed into a two-part test by the Supreme Court in *Globe Newspaper*,²⁴ *Press-Enterprise I*,²⁵ and *Press-Enterprise II*.²⁶ Part I.B describes the Creppy Directive and current Department of Justice policy. It also examines the diverging circuit opinions in *Detroit Free Press* and *North Jersey Media Group*.

Part II looks more closely at the meaning of the “history” prong of the *Richmond Newspapers* test. Part II.A revives the history of an earlier attempt to balance national security and civil rights: the first Red Scare and the Palmer Raids.²⁷ Part II.B ponders the meaning of the *Richmond Newspapers* history prong in light of the Palmer Raids. Wrestling with the purpose of history and the language of the Court’s opinion in *Richmond Newspapers*, Part II.B looks to a richer, fuller use of history and its lessons than that currently used by the courts. The revised history prong that emerges from this analysis revivifies the values articulated in *Richmond Newspapers* and deepens the inquiry into the proper balance between civil rights and national security in a time of crisis. While a deeper understanding of history does not tell our generation what balance to strike, it can help to put these decisions into historical context and to focus our views on the values at stake.

I

THE FIRST AMENDMENT RIGHT OF ACCESS

A. *Richmond Newspapers and Its Progeny*

The Supreme Court first identified a limited First Amendment right of access to certain governmental proceedings in *Richmond Newspapers, Inc. v. Virginia*.²⁸ At the beginning of the third retrial of a murder suspect, a Virginia trial judge granted the defense attorney’s motion to close the trial to the public. The prosecutor did not object.²⁹ Two reporters for *Richmond Newspapers*, however, did

²⁴ *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982).

²⁵ *Press-Enterprise Co. v. Superior Court (Press-Enterprise I)*, 464 U.S. 501 (1984).

²⁶ *Press-Enterprise Co. v. Superior Court (Press-Enterprise II)*, 478 U.S. 1 (1986).

²⁷ For more on how this discussion of the Palmer Raids builds on the literature, see *infra* note 101 and accompanying text.

²⁸ *Richmond Newspapers*, 448 U.S. at 575-80.

²⁹ *Id.* at 560.

object, and after the Virginia Supreme Court rejected their appeal, the two reporters sought U.S. Supreme Court review.³⁰

Although a strong majority of the Court—seven of the eight sitting justices³¹—agreed that the trial court judge’s order was unconstitutional, the six separate concurring opinions demonstrate their difficulty in articulating reasons or a test.³² Nevertheless, looking at both the long, “unbroken, uncontradicted history”³³ of public criminal trials in Anglo-American law and the purposes of the First Amendment,³⁴ the six concurring opinions agreed that “the right to attend criminal trials is implicit in the guarantees of the First Amendment; without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and ‘of the press could be eviscerated.’”³⁵

³⁰ *Id.* at 562-63.

³¹ Justice Powell did not take part in the case. *Id.* at 558.

³² *Richmond Newspapers* was decided against the backdrop of two other cases, *Gannett Co., v. DePasquale*, 443 U.S. 368 (1979), and *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978). In *Gannett*, the Court declined to find a Sixth Amendment public right of access to criminal proceedings. *Gannett*, 443 U.S. at 391. The Court held that the Sixth Amendment right to a public criminal trial was only a right of the accused, not of the public. *Id.* at 387. In *Houchins*, the Court held that the First Amendment “press clause” did not grant the media “a constitutional right of access to a county jail, over and above that of other persons, to interview inmates and make sound recordings, films, and photographs for publication and broadcasting by newspapers, radio, and television.” *Houchins*, 438 U.S. at 3.

³³ *Richmond Newspapers*, 448 U.S. at 573 (Burger, C.J., plurality opinion).

³⁴ Chief Justice Burger stated:

In guaranteeing freedoms such as those of speech and press, the First Amendment can be read as protecting the right of everyone to attend trials so as to give meaning to those explicit guarantees. “[T]he First Amendment goes beyond protection of the press and self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw.”

Id. at 575 (quoting *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978)). Justice Brennan’s concurrence, which has gained importance in subsequent cases, see *infra* notes 38-43 and accompanying text, contains the most extensive discussion of the First Amendment’s structural role:

But the First Amendment embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a *structural* role to play in securing and fostering our republican system of self-government. Implicit in this structural role is not only “the principle that debate on public issues should be uninhibited, robust, and wide-open,” but also the antecedent assumption that valuable public debate—as well as other civic behavior—must be informed. The structural model links the First Amendment to that process of communication necessary for a democracy to survive, and thus entails solicitude not only for communication itself, but also for the indispensable conditions of meaningful communication.

Richmond Newspapers, 448 U.S. at 587-88 (Brennan, J., concurring in judgment) (citations omitted).

³⁵ *Id.* at 580 (Burger, C.J., plurality opinion) (quoting *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972) (citations omitted)); see also Justice Stevens’s concurrence: “Today,

The Supreme Court quickly affirmed, clarified, and expanded this holding in a series of subsequent cases. In *Globe Newspaper Co. v. Superior Court*, the Court considered the constitutionality of a Massachusetts law requiring “trial judges, at trials for specified sexual offenses involving a victim under the age of 18, to exclude the press and general public from the courtroom during the testimony of that victim.”³⁶ Justice Brennan, writing for the *Globe* Court, held the Massachusetts law unconstitutional, reaffirming the *Richmond Newspapers* opinion.³⁷ More importantly, building on his prior concurrence in *Richmond Newspapers*, Justice Brennan laid out a rationale for the First Amendment right as well as a test for determining when it would apply. Holding that the right of access inhered in a structural understanding of the First Amendment’s role—an understanding of the Amendment’s role in the Constitution as a whole—Justice Brennan wrote:

Underlying the First Amendment right of access to criminal trials is the common understanding that “a major purpose of that Amendment was to protect the free discussion of governmental affairs.” By offering such protection, the First Amendment serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government. Thus to the extent that the First Amendment embraces a right of access to criminal trials, it is to ensure that this constitutionally protected “discussion of governmental affairs” is an informed one.³⁸

This rationale, based on the First Amendment protection of informed discussion of governmental affairs, helped shape the test that followed.

however, for the first time, the Court unequivocally holds that an arbitrary interference with access to important information is an abridgment of the freedoms of speech and of the press protected by the First Amendment.” *Id.* at 583 (Stevens, J., concurring).

Despite the confused result, *Richmond Newspapers* was, in the words of Justice Stevens, “a watershed case.” *Id.* at 582. As Justice Stevens noted, “Until today the Court has accorded virtually absolute protection to the dissemination of information or ideas, but never before has it squarely held that the acquisition of newsworthy matter is entitled to any constitutional protection whatsoever.” *Id.* at 582. One commentator has noted, “[T]he central premise of *Richmond Newspapers* is that meaningful self-government requires an informed electorate, and that where the representative government itself maintains control of information essential to such an informed public discourse, the government may be affirmatively required to provide that information to the public.” Eugene Cerruti, “Dancing in the Courthouse”: The First Amendment Right of Access Opens a New Round, 29 *U. Rich. L. Rev.* 237, 239 (1995).

³⁶ *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 598 (1982).

³⁷ *Id.* at 603 (“The Court’s recent decision in *Richmond Newspapers* firmly established . . . that the press and general public have a constitutional right of access [S]even Justices recognized that this right of access is embodied in the First Amendment, and applied to the States through the Fourteenth Amendment.”).

³⁸ *Id.* at 604-05 (citations omitted).

Justice Brennan explained that the public, open nature of criminal trials rested on two features of the criminal justice system: history and logic.³⁹ First, Justice Brennan noted that “the criminal trial historically has been open to the press and general public. . . . This uniform rule of openness has been viewed as significant in constitutional terms not only ‘because the Constitution carries the gloss of history,’ but also because ‘a tradition of accessibility implies the favorable judgment of experience.’”⁴⁰

Second, he stated:

[T]he right of access to criminal trials plays a particularly significant role in the functioning of the judicial process and the government as a whole. Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and to society as a whole. Moreover, public access to the criminal trial fosters an appearance of fairness, thereby heightening public respect for the judicial process. And in the broadest terms, public access to criminal trials permits the public to participate in and serve as a check upon the judicial process—an essential component in our structure of self-government.⁴¹

This exposition became the core of the two-part logic-and-experience test now used to determine whether various governmental proceedings must be presumptively open.⁴²

Finally, Justice Brennan held for the Court that once it has been determined that the public does have a constitutional right of access to a particular governmental proceeding, closure of that proceeding to the public must be “necessitated by a compelling governmental interest[] and . . . narrowly tailored to serve that interest.”⁴³

³⁹ *Id.* at 606 (“In sum, the institutional value of the open criminal trial is recognized in both logic and experience.”).

⁴⁰ *Id.* at 605 (quoting *Richmond Newspapers*, 448 U.S. at 589). Importantly, Justice Brennan rejected the State’s argument that at least some portions of rape trials had been historically closed. Justice Brennan asserted that for the purposes of finding a First Amendment right of access, the relevant sample was criminal trials, not some subset thereof. If a particular type of criminal trial requires closing, it is only because the state has a compelling interest that can override the First Amendment right.

In *Richmond Newspapers*, the Court discerned a First Amendment right of access to *criminal trials* based in part on the recognition that, as a general matter, criminal trials have been long presumptively open. Whether the First Amendment right of access to criminal trials can be restricted in the context of any particular criminal trial, such as a murder trial (the setting for the dispute in *Richmond Newspapers*) or a rape trial, depends not on the historical openness of that type of criminal trial, but rather on the state interests allegedly supporting the restriction. *Id.* at 605.

⁴¹ *Id.* at 606.

⁴² For applications of the test, see *infra* notes 47-53 and accompanying text.

⁴³ *Globe Newspaper*, 457 U.S. at 607.

Any doubt as to the scope of this finding was eliminated in the Court's subsequent decisions in *Press-Enterprise I*⁴⁴ and *Press-Enterprise II*.⁴⁵ In applying the logic-and-experience test to these cases, the Court held that the public had a right of access to voir dire examination and preliminary hearings. Notably, the Court made it clear that a history of openness dating to the Norman conquest (the case for criminal trials) was unnecessary. In *Press-Enterprise II*, the Court based its decision on exclusively post-Bill of Rights history.⁴⁶

These decisions were quickly followed by a series of circuit court decisions extending the right of access to bills of particulars,⁴⁷ pretrial suppression hearings,⁴⁸ pretrial motions for venue change,⁴⁹ bail reduction hearings,⁵⁰ post-trial examinations of jurors,⁵¹ and civil trials.⁵² Yet in other cases, the circuit courts have applied the *Richmond Newspapers* test to find that no public right of access applied.⁵³

⁴⁴ *Press-Enterprise I*, 464 U.S. 501 (1984).

⁴⁵ *Press-Enterprise II*, 478 U.S. 1 (1986).

⁴⁶ See *id.* at 10-12 (discussing history of preliminary hearings from trial of Aaron Burr to modern day). Notably, the Court may also have been rejecting the notion that the history had to be strictly "unbroken" and "uncontradicted." In his dissent, Justice Stevens noted evidence before the Court that preliminary hearings were not always open historically. *Id.* at 21-29 (Stevens, J., dissenting).

⁴⁷ See *United States v. Smith*, 776 F.2d 1104 (3d Cir. 1985).

⁴⁸ See *In re Application of The Herald Co.*, 734 F.2d 93 (2d Cir. 1984).

⁴⁹ See *In re Charlotte Observer*, 882 F.2d 850 (4th Cir. 1989).

⁵⁰ See *United States v. Chagra*, 701 F.2d 354 (5th Cir. 1983).

⁵¹ See generally *United States v. Simone*, 14 F.3d 833 (3d Cir. 1994).

⁵² Notably, despite Justice O'Connor's reluctance in her *Globe Newspapers* concurrence to extend the right of access beyond criminal trials, 457 U.S. at 611 (O'Connor, J., concurring), every court that has considered extending it to civil trials has done so. See, e.g., *Rushford v. New Yorker Magazine*, 846 F.2d 249, 252-54 (4th Cir. 1988); *Westmoreland v. CBS*, 752 F.2d 16, 23 (2d Cir. 1984); *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1066-71 (3d Cir. 1984); *In re Cont'l Ill. Sec. Litig.*, 732 F.2d 1302, 1308-16 (7th Cir. 1984); *Brown & Williamson Tobacco Co. v. FTC*, 710 F.2d 1165, 1176-81 (6th Cir. 1983); *Newman v. Graddick*, 696 F.2d 796, 800-02 (11th Cir. 1983). These developments were presaged by Chief Justice Burger's plurality opinion in *Richmond Newspapers*: "Whether the public has a right to attend trials in civil cases is a question not raised by this case, but we note that historically both civil and criminal trials have been presumptively open." *Richmond Newspapers*, 448 U.S. at 580 n.17 (Burger, C.J., plurality opinion).

⁵³ See, e.g., *United States v. Miami Univ.*, 294 F.3d 797, 815-16 (6th Cir. 2002) (finding no right of access to university student disciplinary board proceeding); *Capital Cities Media, Inc. v. Chester*, 797 F.2d 1164, 1166-76 (3d Cir. 1986) (finding no right of access to files and records of state environmental agency); *First Amendment Coalition v. Judicial Inquiry & Review Bd.*, 784 F.2d 467, 481 (3d Cir. 1986) (finding no right of access to judicial disciplinary board hearings). *Whiteland Woods, L.P. v. Township of West Whiteland*, 193 F.3d 177, 183-84 (3d Cir. 1999), is more complicated. In that case, applying the *Richmond Newspapers* test, the Third Circuit found no right of access to videotape a Township Planning Commission meeting. The court did, however, indicate that there was a constitutional right of access to attend the planning meeting. This holding appears to have been narrowed by the Third Circuit in its decision in *North Jersey Media Group*, where the

B. *The First Amendment Public Right of Access to Deportation Hearings*

1. *The Creppy Directive*

On September 21, 2001, just ten days after the terrorist attacks, Chief Immigration Judge Michael Creppy issued new instructions to all immigration judges.⁵⁴ The Creppy Directive, as the instruction came to be known, ordered immigration judges to close all hearings designated by the Department of Justice as “special interest” hearings.⁵⁵ Pursuant to the Directive, deportation hearings of “special interest” aliens are closed to the public, including family and friends. Immigration judges are to avoid discussing the cases with anyone outside the immigration courts; in fact, “the restriction even ‘includes confirming or denying whether such a case is on the docket or sched-

court announced that “[a]s the Planning Commission never actually denied Whiteland Woods the *access* guaranteed by state law, however, our broad statement was dicta and we do not follow it here.” *N. Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198, 214 (3d Cir. 2002), cert. denied, 2003 U.S. LEXIS 4082, at *1 (May 27, 2003).

⁵⁴ Deportation hearings are administrative hearings in front of administrative law judges; they are not criminal trials. Immigration judges operate under the authority of the Department of Justice. As the Third Circuit explained:

The Immigration and Nationality Act charges the Attorney General with the “administration and enforcement” of “all [] laws relating to the immigration and naturalization of aliens.” The Act authorizes the Attorney General to remove aliens from the United States for various reasons, including violation of the immigration laws. It also permits him to prescribe “such regulations . . . as he deems necessary for carrying out his authority,” and provides for removal proceedings to be conducted by immigration judges within the Executive Branch “under regulations prescribed by the Attorney General.”

Id. at 202 n.1 (citations omitted) (alteration in original). The Creppy Directive was issued under this authority.

⁵⁵ There appears to be some dispute as to the exact delimitations of the “special interest” category. See Government Brief, *supra* note 19, at 6. The government asserts that “[t]hese cases involve aliens who ‘might have connections with, or possess information pertaining to, terrorist activity against the United States.’” *Id.* (citation omitted). The government presents as an example “‘aliens who had close associations with the September 11 hijackers or who themselves have associated with al Qaeda or related terrorist groups.’” *Id.* (citation omitted). Further, the government asserts that “[a]s the investigation has progressed, special interest designations have been reevaluated and in many cases removed; thus, ‘[i]t is only those INS detainees about whom concerns remain who are included in the “special interest” category.’” *Id.* (citation omitted). However, the Sixth Circuit noted:

[N]o definable standards used to determine whether a case is of “special interest” have been articulated. Nothing in the Creppy Directive counsels that it is limited to “a small segment of particularly dangerous individuals.” In fact, the Government so much as argues that certain non-citizens known to have no links to terrorism will be designated “special interest” cases. Supposedly, closing a more targeted class would allow terrorists to draw inferences from which hearings are open and which are closed.

Detroit Free Press v. Ashcroft, 303 F.3d 681, 692-93 (6th Cir. 2002).

uled for a hearing.’”⁵⁶ “In short, the Directive contemplates a complete information blackout along both substantive and procedural dimensions.”⁵⁷ Rather than decide closure motions on a case-by-case basis, as had been done up to that point, immigration judges now must implement a blanket closure.

The Creppy Directive was quickly challenged by members of the press who had been barred from such hearings and denied information. In both the Third and Sixth Circuits, the government defended the blanket closures, arguing that there is no First Amendment right of access to administrative hearings, that the government has broad plenary power over immigration, and that the demands of national security warrant such restrictions. The government further argued that a terrorist group in possession of the names of those being investigated would be able to interfere in the investigations, change terrorist plans, or intimidate witnesses. In particular, the government laid out a “mosaic theory” that they believed made a case-by-case analysis of closure (allowed under relevant immigration regulations and *Richmond Newspapers*) impossible. The mosaic theory posits that various pieces of information, seemingly innocuous in and of themselves, when put together like pieces of a jigsaw puzzle can give an enterprising terrorist group important information as to the shape of government investigations. Thus, the identities of those subject to deportation hearings might give a terrorist group information about the government’s investigatory techniques and the progress of their investigations. Even the absence of information, contends the government, might be of use to a terrorist organization; it could use the absence of various names on the deportation docket as evidence that certain terrorist agents are still at large, or worse, that the government does not know about them.⁵⁸

⁵⁶ *N. Jersey Media Group*, 308 F.3d at 202-03 (quoting the Creppy Directive); see also *Detroit Free Press*, 303 F.3d at 683-84; Government Brief, *supra* note 19, at 1-2.

⁵⁷ *N. Jersey Media Group*, 308 F.3d at 203.

⁵⁸ In describing the mosaic theory, the Sixth Circuit stated:

Bits and pieces of information that may appear innocuous in isolation, but used by terrorist groups to help form a “bigger picture” of the Government’s terrorism investigation, would be disclosed. The Government describes this type of intelligence gathering as akin to the construction of a mosaic, where an individual piece of information is not of obvious importance until pieced together with other pieces of information. . . . The identifications of the detainees, witnesses, and investigative sources would be disclosed. Terrorist groups could subject these individuals or their families to intimidation or harm and discourage them from cooperating with the Government. Methods of entry to the country, communicating, or funding could be revealed. This information could allow terrorist organizations to alter their patterns of activity to find the most effective means of evading detection. Information that is *not* presented at the hearings also might provide important clues to terrorist [sic],

Arguing the unconstitutionality of the Creppy Directive's blanket closure, the newspapers asserted that the public enjoys a First Amendment right of access to deportation hearings. The newspapers argued that the *Richmond Newspapers* two-part test applies to deportation hearings, that deportation hearings have historically been open to the public, and that openness has played and continues to play an important safeguard role in ensuring the fairness of those hearings. They contend that openness is particularly important in the immigration context: Given the government's broad powers and the immigrant's fewer constitutional rights than American citizens enjoy, public scrutiny is the only safeguard against government abuse of power.⁵⁹ Lastly, the newspapers argued that the Creppy Directive failed the "strict scrutiny" test required under *Richmond Newspapers*; the blanket closure rule simply is not tailored narrowly enough to justify abridging the public's First Amendment rights. Case-by-case evaluation of secrecy concerns, in camera if necessary, can protect both the public's civil rights and national security.

Considering almost identical cases, district courts in New Jersey and Michigan held in favor of the newspapers. According to both courts, the public enjoyed a First Amendment right of access to deportation hearings, so blanket closure was not narrowly tailored to the government's national security concerns; the Creppy Directive was thus unconstitutional.⁶⁰

because it could reveal what the investigation has not yet discovered. The Government provides this example: If the government discloses the evidence it has about a particular member of a terrorist organization, but fails to mention that the detainee is involved in an impending attack, the other members of the organization may be able to infer that the government is not yet aware of the attack.

Detroit Free Press, 303 F.3d at 706-07 (quoting Brief for Appellants at 47-49 (internal quotations and citations omitted)).

⁵⁹ As the Sixth Circuit noted in *Detroit Free Press*:

While the Bill of Rights zealously protects citizens from such laws, it has never protected non-citizens facing deportation in the same way. In our democracy, based on checks and balances, neither the Bill of Rights nor the judiciary can second-guess government's choices. The only safeguard on this extraordinary governmental power is the public, deputizing the press as the guardians of their liberty.

Id. at 683.

⁶⁰ See generally *N. Jersey Media Group v. Ashcroft*, 205 F. Supp. 2d 288, 304 (D.N.J. 2002); *Detroit Free Press v. Ashcroft*, 195 F. Supp. 2d 937, 948 (E.D. Mich. 2002). The newspapers also asked the courts to enjoin the government from closing hearings under the Creppy Directive. The Eastern District of Michigan granted an injunction covering the Sixth Circuit; the District of New Jersey granted a nationwide injunction. See *N. Jersey Media Group*, 205 F. Supp. 2d at 305-06; *Detroit Free Press*, 195 F. Supp. 2d at 948. The U.S. Supreme Court eventually granted the government a stay of the nationwide injunction pending appeal. *Ashcroft v. N. Jersey Media Group*, 536 U.S. 954 (2002).

2. *The Sixth Circuit Opinion in Detroit Free Press v. Ashcroft*

Judge Keith, writing forcefully for the Sixth Circuit, upheld the decision of the Eastern District of Michigan finding the Creppy Directive unconstitutional.

Today, the Executive Branch seeks to take this safeguard away from the public by placing its actions beyond public scrutiny. Against non-citizens, it seeks the power to secretly deport a class if it unilaterally calls them “special interest” cases. The Executive Branch seeks to uproot people’s lives, outside the public eye, and behind a closed door. Democracies die behind closed doors. The First Amendment, through a free press, protects the people’s right to know that their government acts fairly, lawfully, and accurately in deportation proceedings. When government begins closing doors, it selectively controls information rightfully belonging to the people. Selective information is misinformation. The Framers of the First Amendment “did not trust any government to separate the true from the false for us.” They protected the people against secret government.⁶¹

First, Judge Keith affirmed that the *Richmond Newspapers* test is a test of general applicability, and thus, the correct means for determining whether deportation hearings must be presumptively open.⁶² He rejected the government’s assertion that *Richmond Newspapers* did not apply to administrative hearings generally, or deportation hearings specifically.⁶³

⁶¹ *Detroit Free Press*, 303 F.3d at 683 (quoting *Kleindienst v. Mandel*, 408 U.S. 753, 773 (1972)).

⁶² *Id.* at 694.

⁶³ A great deal could be written on the scope of the *Richmond Newspapers* test. Both the Third and Sixth Circuits agreed that that test was one of general applicability and cited extensive case law from the circuit courts to that effect. Also, as the Sixth Circuit notes, the recent Supreme Court decision in *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743 (2002), seems to cut against the government’s contention that administrative hearings generally should be immune. In that case,

the Court held that state sovereign immunity bars an administrative agency from adjudicating complaints filed by a private party against a non-consenting state because it concluded that such administrative proceedings bore a striking resemblance to civil litigation. The Court reached this conclusion although it assumed that the proceedings before the Federal Maritime Commission were not “judicial proceedings.” Nevertheless, the Court noted that the parties did not dispute the appellate court’s characterization that the Federal Maritime Commission proceedings “walked, talked, and squawked very much like . . . lawsuits.”

Detroit Free Press, 303 F.3d at 697 (quoting *Fed. Mar. Comm’n*, 535 U.S. at 751).

The circuit court’s judgment appears to be in line with the prevailing wisdom, and I will not go into the question in depth here. However, it is worth noting that there are at least practical arguments against applying *Richmond Newspapers* to administrative hearings. The strongest is that if Congress knew that any legislative presumption of openness might lead the court to find a right of access, Congress would be encouraged to make

Second, he rejected the government's argument that their plenary powers over immigration shielded them from a presumption of openness and from judicial review.⁶⁴ Applying the two-part test, Judge Keith found that "deportation proceedings historically have been open."⁶⁵ First, he rejected the government's argument that the history of formal immigration hearings, dating only from 1882, is insufficiently lengthy to pass the *Richmond Newspaper* test. *Press-Enterprises II*, looking only at post-constitutional history, eliminated any possibility that only a history dating to the Norman Conquest could be sufficient. Instead, looking at the statutes and regulations that have governed immigration hearings since 1882, Judge Keith found that deportation hearings had consistently enjoyed a legislative presumption of openness. He noted that in each statute, Congress specifically closed only *exclusion* hearings; Congress has never legislated the closing of *deportation* hearings. This distinction was not accidental: "Congress has long been aware that deportees are constitutionally guaranteed greater procedural rights than those excluded upon initial entry.

secrecy and closure the rule of thumb in agency-empowering statutes. See *N. Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198, 216 (3d Cir. 2002) ("Were we to adopt the Newspapers' view that we can recognize a First Amendment right based solely on the logic prong if there is no history of closure, we would effectively compel the Executive to close its proceedings to the public *ab initio* or risk creating a constitutional right of access that would preclude it from closing them in the future.").

⁶⁴ In summary, the court points out that although the government does possess considerable power with regard to substantive immigration law—i.e., who can come in, who can stay—they do not possess the same broad power with regard to immigration procedures. A long line of cases has recognized that government action in this area is limited by constitutional protections such as the Due Process Clause. See, e.g., *Detroit Free Press*, 303 F.3d at 687-88 ("The Supreme Court has always interpreted the Constitution meaningfully to limit non-substantive immigration laws, without granting the Government special deference."); see also *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306, 309 (1970) ("We extend to such an alien the same constitutional protections of due process that we accord citizens."); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) ("It is true that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law."); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 (1953) ("It is well established that if an alien is a lawful permanent resident of the United States and remains physically present there, he is a person within the protection of the Fifth Amendment. He may not be deprived of his life, liberty or property without due process of law."). Judge Keith goes into a lengthy discussion of the difference between deportation and exclusion hearings and the status of aliens already in the country as "persons" under the Bill of Rights. *Detroit Free Press*, 303 F.3d at 688-93. It is not clear, however, why this discussion is necessary, as the right in question—the First Amendment right of access—inheres in the public, and not the alien subject to deportation. The discussion may nonetheless buttress Keith's view that openness plays an important role in deportation hearings that it may not in exclusion hearings. Notably, the Third Circuit does not address the plenary powers over immigration at all, seemingly assuming that it is limited by the Constitution. See generally *N. Jersey Media Group*, 308 F.3d 198.

⁶⁵ *Detroit Free Press*, 303 F.3d at 701.

Therefore, Congress likely legislated key differences between both procedures accordingly.”⁶⁶ Further, “[s]ince 1965, INS regulations have explicitly required deportation proceedings to be presumptively open,”⁶⁷ and Congress appears to have approved of these regulations. “Since that time, Congress has revised the Immigration and Nationality Act at least 53 times without indicating that the INS had judged their intent incorrectly.”⁶⁸

Moreover, Judge Keith rejected the government’s contention that, notwithstanding the legislative presumption, deportation hearings had in practice been closed. The government pointed to “a single passage in a study about deportation of noncitizens to Europe during the 1920s and a single Second Circuit case, for the proposition that deportation hearings took place in a variety of settings, including prisons, hospitals, and homes.”⁶⁹ Judge Keith found this evidence unpersuasive. First, there was no reason to believe that such hearings were anything other than exceptional. Second, “neither of these sources even hint that the public could not attend a hearing at a prison, hospital, or home. Certainly, one could imagine family and friends being present at some of these places.” Third, “the study cited by the Government points out that members of Congress, like Plaintiff Conyers, sometimes attended, or sent representatives to, such hearings.”⁷⁰ Judge Keith concluded:

At best, the Government’s claimed “historical proof” shows only that in some cases, there may not be much historical record. This does not mean, however, that there was not a historical practice of one kind or the other. In such cases, it makes more sense to look to more recent practice, similar proceedings, and concentrate on the “logic” portion of the test.⁷¹

Deportation hearings also passed the logic test. Judge Keith concluded that “[p]ublic access undoubtedly enhances the quality of deportation proceedings.”⁷² First, openness plays an important role in protecting against government abuse. “In an area such as immigra-

⁶⁶ Id. at 702.

⁶⁷ Id. at 701.

⁶⁸ Id. (citing U.S. Dep’t of Justice, Immigration and Naturalization Serv., Immigration and Naturalization Legislation from the Statistical Yearbook, available at <http://www.ins.usdoj.gov/graphics/aboutins/statistics/legishist/index.htm> (last modified May 28, 2002)).

⁶⁹ *Detroit Free Press*, 303 F.3d at 703 (referring to government reliance on Clark, *supra* note 19, at 363, and United States ex rel. Cicerelli v. Curran, 12 F.2d 394, 396 (2d Cir. 1926) (finding that deportation hearings may be held in prison)).

⁷⁰ *Detroit Free Press*, 303 F.3d at 703 (citing Clark, *supra* note 19, at 368 n.14). Plaintiff Conyers is Representative John Conyers, Jr., congressman from Michigan).

⁷¹ Id. at 703 n.14.

⁷² Id. at 703.

tion, where the government has nearly unlimited authority, the press and the public serve as perhaps the only check on abusive government practices.”⁷³ “Second, openness ensures that government does its job properly; that it does not make mistakes.”⁷⁴ Third, open hearings have therapeutic value for a wounded community: “[A]fter the devastation of September 11 and the massive investigation that followed, the cathartic effect of open deportations cannot be overstated. They serve a ‘therapeutic’ purpose as outlets for ‘community concern, hostility, and emotions.’”⁷⁵ “Fourth, openness enhances the perception of integrity and fairness.”⁷⁶ Finally, “public access helps ensure that ‘the individual citizen can effectively participate in and contribute to our republican system of self-government.’”⁷⁷

Finding a right of access to deportation hearings, Judge Keith next determined that the blanket closure rule could not pass strict scrutiny analysis. Although Judge Keith recognized that “[t]he Government certainly has a compelling interest in preventing terrorism,”⁷⁸ he found that case-by-case determination of the secrecy requirements of each individual case should suffice. He found the government’s argument that harmful information would be released in making the determination unpersuasive.⁷⁹

[T]here seems to be no limit to the Government’s argument. The Government could use its “mosaic intelligence” argument as a justification to close any public hearing completely and categorically, including criminal proceedings. The Government could operate in virtual secrecy in all matters dealing, even remotely, with “national security,” resulting in a wholesale suspension of First Amendment rights. By the simple assertion of “national security,” the

⁷³ *Id.* at 704.

⁷⁴ *Id.*

⁷⁵ *Id.* (citing *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 571 (1980)).

⁷⁶ *Id.* (“The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known.” (quoting *Press-Enterprise I*, 464 U.S. 501, 508 (1984))).

⁷⁷ Judge Keith added:

“[A] major purpose of [the First Amendment] was to protect the free discussion of governmental affairs.” Public access to deportation proceedings helps inform the public of the affairs of the government. Direct knowledge of how their government is operating enhances the public’s ability to affirm or protest government’s efforts. When government selectively chooses what information it allows the public to see, it can become a powerful tool for deception.

Id. (quoting *Globe Newspaper*, 457 U.S. at 604).

⁷⁸ *Id.* at 706.

⁷⁹ To the extent that “special interest” aliens were allowed to inform anyone they wanted of their impending hearing, Judge Keith found the government’s position illogical. *Id.* at 708.

Government seeks a process where it may, without review, designate certain classes of cases as “special interest cases” and, behind closed doors, adjudicate the merits of these cases to deprive non-citizens of their fundamental liberty interests.⁸⁰

3. *The Third Circuit Opinion in North Jersey Media Group v. Ashcroft*

Judge Edward R. Becker, writing for the Third Circuit in *North Jersey Media Group*, agreed with the Sixth Circuit that the *Richmond Newspapers* test was applicable to deportation hearings.⁸¹ Nevertheless, he found neither a history of open deportation hearings nor the requisite positive role for openness. Determining that special interest deportation hearings⁸² do not pass the two-part test and are thus not subject to a constitutional right of access, Judge Becker found the Creppy Directive constitutional; no strict scrutiny analysis was necessary.⁸³

Looking at the same historical evidence presented by the parties in *Detroit Free Press*, Judge Becker found that “the tradition of open deportation hearings is too recent and inconsistent to support a First Amendment right of access.”⁸⁴ The court found the legislative presumption unpersuasive, particularly in light of the evidence presented by the government that “from the early 1900s, the government has often conducted deportation hearings in prisons, hospitals, or private

⁸⁰ Id. at 709-10.

⁸¹ *N. Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198, 209 (3d Cir. 2002) (“In this one respect we note our agreement with the Sixth Circuit’s conclusion in their nearly identical case.”).

⁸² The Third Circuit seems to be confused as to exactly what set or subset of cases it is analyzing. The court looks at the history of deportation hearings generally. See id. at 209-11. Speaking explicitly of deportation hearings generally, the court seems to apply the logic test to special interest hearings in particular. See id. at 216-18. Then, in summing up its conclusions, the court limits its finding to special interest hearings:

We do not decide that there is no right to attend administrative proceedings, or even that there is no right to attend any immigration proceeding. Our judgment is confined to the extremely narrow class of deportation cases that are determined by the Attorney General to present significant national security concerns. In recognition of his experience (and our lack of experience) in this field, we will defer to his judgment.

Id. at 220. The confusion seems to flow from a flaw in the court’s application of the logic prong noted in Judge Anthony J. Scirica’s dissent. Id. at 224-25 (Scirica, J., dissenting). As will be discussed, *infra* note 93, the Court’s application of the logic test to the subset of special interest deportation hearings runs counter to Justice Brennan’s *Globe Newspaper* opinion. There, Justice Brennan specifically declined to look at the subset of rape trials, emphasizing that the relevant analysis was all criminal trials. See *Globe Newspaper*, 457 U.S. at 605 n.13.

⁸³ See *N. Jersey Media Group*, 308 F.3d at 221.

⁸⁴ Id. at 211.

homes, places where there is no general right of public access.”⁸⁵ The court recognized that those hearings might still have been open to the public, but it placed the burden on the newspapers to prove that they were.⁸⁶ The court also noted that various particular types of deportations have been statutorily closed, for example, those involving abused alien children and spouses.⁸⁷ Further, working hard to distinguish its own case law, and seemingly vitiating the need for a history of openness at common law,⁸⁸ the court seemed to revive the requirement for a “1000-year tradition of public access.”⁸⁹ In sum, “[d]eportation proceedings’ history of openness is quite limited, and their presumption of openness quite weak. They plainly do not present the type of ‘unbroken, uncontradicted history’ that *Richmond Newspapers* and its progeny require to establish a First Amendment right of access.”⁹⁰

Nor did Judge Becker find the logic prong satisfied.⁹¹ Judge Becker did agree with the Sixth Circuit that openness for deportations would serve a variety of salutary functions, including:

[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.⁹²

⁸⁵ *Id.* at 212.

⁸⁶ *Id.* at 212 n.11.

⁸⁷ *Id.* at 212.

⁸⁸ In *United States v. Criden*, 675 F.2d 550, 554 (3d Cir. 1982), the court found a right of access to pretrial hearings even though no right existed at common law. Judge Edward R. Becker distinguished that case as decided before *Press-Enterprise II* and as specifically limited to criminal trials. In *United States v. Simone*, 14 F.3d 833, 838 (3d Cir. 1994), the court found a right although no history predated 1980. Judge Becker distinguished that case by characterizing it as specifically criminal (and thus tangentially supported by the long history cited in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980)) and by differentiating between no history (which might be ignored) and unclear history (which cannot be ignored). Finally, Judge Becker distinguished the court’s opinion in *Whiteland Woods, L.P. v. Township of West Whiteland*, 193 F.3d 177, 181 (3d Cir. 1999) (finding “tradition of accessibility” for local planning board meetings by founding its opinion in guarantee of statute (citing *Press-Enterprise II*, 478 U.S. 1, 8 (1986))). See *N. Jersey Media Group*, 308 F.3d at 213-14.

⁸⁹ *N. Jersey Media Group*, 308 F.3d at 220 (internal quotations omitted).

⁹⁰ *Id.*

⁹¹ *Id.* at 216 (“Even if we could find a right of access under the *Richmond Newspapers* logic prong, absent a strong showing of openness under the experience prong, a proposition we do not embrace, we would find no such right here.”).

⁹² *Id.* at 217 (quoting *Simone*, 14 F.3d at 839).

However, Judge Becker argued that in determining whether openness would play a positive role, the court must consider detrimental as well as beneficial effects. The government cited ways in which enterprising terrorists might use unconcealed deportation information to endanger the country.⁹³ Balanced against the benefits of openness, Judge Becker found the argument that openness plays an overall positive role unpersuasive.⁹⁴ Echoing the tone of the entire decision, Judge Becker concluded:

We are keenly aware of the dangers presented by deference to the executive branch when constitutional liberties are at stake, especially in times of national crisis, when those liberties are likely in greatest jeopardy. On balance, however, we are unable to conclude that openness plays a positive role in special interest deportation hearings at a time when our nation is faced with threats of such profound and unknown dimension.⁹⁵

II

FINDING MEANING IN HISTORY

Although arriving at vastly different conclusions, both the Third and Sixth Circuits struggled with the scarcity of historical evidence regarding deportation hearings. Rather than the deep, long, anec-

⁹³ As Judge Scirica explains in his vigorous and persuasive dissent, this inclusion of the government's arguments for secrecy in these "special interest" cases is simply wrong. *Id.* at 225 (Scirica, J., dissenting). The court appears to be considering the subset of special interest deportation hearings rather than the larger set of deportation hearings generally. The *Richmond Newspapers* test, however, applies to the larger group, here, deportation cases. Once a First Amendment right of access is found to inhere in those proceedings, the government could show that compelling interests require presumptive closure of a smaller subset, here, special interest deportation cases. Justice Brennan makes this very clear in *Globe Newspaper*:

In *Richmond Newspapers*, the Court discerned a First Amendment right of access to *criminal trials* based in part on the recognition that as a general matter criminal trials have long been presumptively open. Whether the First Amendment right of access to criminal trials can be restricted in the context of any particular criminal trial, such as a murder trial (the setting for the dispute in *Richmond Newspapers*) or a rape trial, depends not on the historical openness of that type of criminal trial but rather on the state interests assertedly supporting the restriction.

Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 605 n.13 (1982).

⁹⁴ Judge Becker stated:

In this case, the Government presented substantial evidence that open deportation hearings would threaten national security. Although the District Court discussed these concerns as part of its strict scrutiny analysis, they are equally applicable to the question whether openness, on balance, serves a positive role in removal hearings. We find that upon factoring them into the logic equation, it is doubtful that openness promotes the public good in this context.

N. Jersey Media Group, 308 F.3d at 217.

⁹⁵ *Id.* at 220.

dotal history of open criminal proceedings stretching back through the centuries, the courts were faced with small shards of immigration's past legislative presumptions and elliptical references in forgotten books and cases. The actual practice of deportation hearings since 1882 seems to have been left largely unrecorded, lost to history. Confronted with so little information, it is perhaps not surprising that the courts came to such different conclusions. But were the courts looking in the right place?

Among the small pieces of evidence presented to the courts was a passage in a 1931 book describing the deportation of European aliens during the 1920s.⁹⁶ In trying to demonstrate that deportation hearings had been closed in the past, the government seized upon a passage noting that deportation hearings could be held in "a county jail, hospital, or prison or at [the deportee's] own home."⁹⁷ The government contended that these places are generally not open to the public and that it could thus be presumed that these hearings had been closed. This is a controversial claim: As the Sixth Circuit pointed out, this neither proved that they had been closed, nor that they were anything other than exceptional.⁹⁸ But looking closer at the book cited, the first few passages present a deeper question. The book begins: "Periods of war hysteria and economic depression generate a fear of sudden ruin and a desire for panaceas. In the decade from 1920 to 1930 a nostrum often advocated for the ills of the United States was the removal of aliens from the country."⁹⁹ Is this really "the favorable judgment of experience"¹⁰⁰ sought in *Richmond Newspapers*?

The systematic targeting of immigrants during the Palmer Raids and the Red Scare of 1919-1920 pose this question starkly.¹⁰¹ The

⁹⁶ See generally Clark, *supra* note 19.

⁹⁷ See Government Brief, *supra* note 19, at 40 n.8 (citing Clark, *supra* note 19, at 363).

⁹⁸ *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 703 n.14 (6th Cir. 2002).

⁹⁹ Clark, *supra* note 19, at 9.

¹⁰⁰ *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 589 (1980) (Brennan, J., concurring in judgment).

¹⁰¹ Surprisingly little has been written on the Palmer Raids. Although the Raids are often mentioned in American history textbooks, there are very few full-length scholarly discussions. Among the few exceptions are Hoyt, *supra* note 20; McCormick, *supra* note 22; Murray, *supra* note 22; Louis F. Post, *The Deportations Delirium of Nineteen-Twenty: A Personal History of an Historic Official Experience* 96-133 (1923). Those that are available are difficult to find.

This trend is amplified in the legal literature, in which the Raids are frequently mentioned to describe the excesses of the government in previous decades, but are never explained or described in full. The legal literature simply refers to the Raids as symbolic of past mistakes without any discussion of how or why we can or should learn from them. See, e.g., William C. Banks & M.E. Bowman, *Executive Authority for National Security Surveillance*, 50 *Am. U. L. Rev.* 1, 24-25 (2000) (making glancing, disfavorable reference to Palmer Raids); Kevin R. Johnson, *Los Olvidados: Images of the Immigrant, Political*

history of the Palmer Raids does not answer the question of whether deportation hearings were or were not presumptively open, but this well-recorded, deeply condemned history of government abuse seems nonetheless relevant.¹⁰² Can a test so concerned with history ignore history's judgments of disfavor?

A. *The Palmer Raids and the Red Scare of 1919-1920*

1. *Background*

On or around May 1, 1919 (May Day), *The New York Times* announced the existence of a "nationwide bomb conspiracy, which the police authorities sa[id] ha[d] every earmark of International Workers of the World-Bolshevik origin."¹⁰³ The story revealed that thirty-six small bombs¹⁰⁴ had been mailed to prominent American citizens living from Georgia to San Francisco.¹⁰⁵ May Day was an international labor holiday, and Americans were readying themselves for a

Power of Noncitizens, and Immigration Law and Enforcement, 1993 B.Y.U. L. Rev. 1139, 1166 n.98 (same); Kevin R. Johnson, *The Antiterrorism Act, the Immigration Reform Act, and Ideological Regulation in the Immigration Laws: Important Lessons for Citizens and Noncitizens*, 28 St. Mary's L.J. 833, 835, 846-50 (1997) (same). I hope that this Note helps to alleviate rather than exacerbate that problem.

¹⁰² See Murray, *supra* note 22, at ix. Its relevance was well stated by one author: Nonetheless, to American history the Great Red Scare remains important—important because it provides us with a concrete example of what happens to a democratic nation and its people when faith and reason are supplanted with fear. Moreover, it demonstrates clearly how easily the seeds of excessive hate and intolerance, which for the most part have remained dormant in modern American society, can suddenly develop into dangerous malignancies that spread with lightning rapidity through the whole social system.

Id.

¹⁰³ Hoyt, *supra* note 20, at 6 (quoting 36 *Were Marked as Victims by Bomb Conspirators*, *supra* note 20, at A1) (describing International Workers of the World-Bolshevik origin as "left-wing radical origin"). Another newspaper announced that "'Reds Planned May Day Murders.'" Murray, *supra* note 22, at 71 (quoting *Reds Planned May Day Murders*, *Chi. Trib.*, May 1, 1919, at 1).

¹⁰⁴ Although thirty-six is the number most commonly cited, the exact number seems to be in controversy. McCormick writes of thirty bombs, see McCormick, *supra* note 22, at 98, and Murray writes that "[t]he numbers vary slightly, the total given by the Justice Department being only twenty-nine," Murray, *supra* note 22, at 71 n.6; see also Attorney General A. Mitchell Palmer on Charges Made Against Department of Justice by Louis F. Post and Others, Hearing Before the House Comm. on Rules, 66th Cong. 157 (1920) [hereinafter *Palmer Statement I*] (statement of A. Mitchell Palmer, Attorney General). Among those targeted were the Postmaster General (charged with interdicting seditious materials), the Secretary of Labor, the Commissioner General of Immigration, four U.S. senators, the mayors of New York and Seattle, Supreme Court Justice Oliver Wendell Holmes, John D. Rockefeller, J.P. Morgan, and Attorney General Palmer himself. See *Palmer Statement I*, *supra*, at 157-58.

¹⁰⁵ Hoyt, *supra* note 20, at 6; McCormick, *supra* note 22, at 98; Murray, *supra* note 22, at 70-71.

day of rallies, protests, marches, and riots.¹⁰⁶ It was obvious from the list of those targeted “and from the timing of the mailings that whoever had sent the bombs hoped to rid the nation . . . of government officials and important industrialists suspected of being intensely antiradical.”¹⁰⁷ On June 2, nine bombs exploded at the homes of various prominent citizens and a Philadelphia church.¹⁰⁸ Congressmen, public officials, and the general press all “clamored for immediate punitive action.”¹⁰⁹ Rushing to react, government officials and ordinary people launched a nationwide assault on left-wing groups that would later be titled the “Red Scare.”¹¹⁰

The bomb scare was not seen as an isolated incident. To many Americans, the bombs were merely proof that their fears of Bolshevism, radicalism, and left-wing revolution were well founded. Bolsheviks had seized power in Russia in 1917, apparently demonstrating the dangerous revolutionary power of a handful (11,060) of Communists;¹¹¹ “[t]he Bolshevik notion spread . . . like wildfire.”¹¹² As Bolshevik Parties threatened to take control in Germany,

¹⁰⁶ Murray, *supra* note 22, at 73-76. Riots broke out at many May Day events that year, including events in Boston, New York, and Cleveland. *Id.*; see also Palmer Statement I, *supra* note 104, at 157 (“There was serious rioting, particularly in New York, Boston, and Cleveland.”).

¹⁰⁷ Murray, *supra* note 22, at 71.

¹⁰⁸ See Palmer Statement I, *supra* note 104, at 158-59. Palmer was again among those targeted. *Id.*

¹⁰⁹ See Murray, *supra* note 22, at 72. Assistant Secretary of Labor Louis F. Post described the press’s treatment of the bombings as “the newspaper drive that was made to create a great terroristic scare in the country.” Investigation of Administration of Louis F. Post, Assistant Secretary of Labor, In the Matter of Deportation of Aliens, Hearing on H.R. 522 Before the House Comm. on Rules, 66th Cong. 70 (1920) [hereinafter Post Investigation] (statement of Louis F. Post, Assistant Secretary of Labor).

¹¹⁰ Palmer described his mandate as follows:

A year ago, or thereabouts, when the country was ringing with reports of actual violence directed against officials of the Government in many parts of the country, and on every hand appeared the unmistakable evidence of serious plottings against our peace and safety by enemies of the Government, the public demand for prompt counteraction on the part of the Government was reflected in the action of the Congress in making generous appropriation to the Department of Justice to support the thorough reorganization of our Bureau of Investigation, which was then inaugurated, and to proceed, with all the diligence and thoroughness to cope with the apparent evil.

Palmer Statement I, *supra* note 104, at 7.

¹¹¹ Hoyt, *supra* note 20, at 14-15.

¹¹² Palmer Statement I, *supra* note 104, at 14-15, 17; see also *id.* at 15-16 (“[A] small group of determined men, knowing exactly what they wanted and driving ruthlessly for it without hesitation or scruple, . . . wield[ed] the whole engine of power, . . . crush[ed] every obstacle of resistance, and . . . w[o]n the most singular victory of minority dictatorship the world has ever witnessed.”).

Hungary, and other parts of Europe,¹¹³ Americans became aware of the threats of radicalism at home. This “radical” danger, first demonstrated by the assassination of President William McKinley by anarchist Leon Czolgosz in 1901, took on new relevance in 1919 as a series of violent events took place across the country. On January 15, forty-six members of the International Workers of the World (the I.W.W. or “Wobblies”), a radical labor organization, were connected with the bombing of the home of the Governor of California. On February 12, the Secret Service arrested Pietro Pierre, who was “identified as the leader of an anarchist plot to assassinate President Wilson.”¹¹⁴ Even before the May bomb scare, government leaders and officials were reporting “that I.W.W.’s, anarchists, radical socialists, and Bolsheviks in the United States were trying to overthrow the government in bloody revolution” and were calling for a halt to all immigration into the United States.¹¹⁵

American society and politics in 1919 were highly volatile, waiting for a spark to set things off.¹¹⁶ World War I had ended with an armistice in November of 1918, and the United States quickly found itself caught in the chaos of demobilization.¹¹⁷ Discharged soldiers began pouring back into the country.¹¹⁸ Wartime price controls were canceled by the government, causing rapid inflation.¹¹⁹ Most notably, labor unions, which had stayed quiet during the war, began to reassert themselves.¹²⁰ In January of 1919, New York harbor workers and dressmakers went on strike. In February, a general strike was called in Seattle¹²¹ and a national packinghouse strike “was narrowly averted.”¹²² In March, New Jersey rail workers struck as well.¹²³ In the months following the bombings, New York cigar workers, Boston

¹¹³ See Murray, *supra* note 22, at 43 (“Germany was being rent with Spartacist revolts, Poland was badly infected with the Bolshevik virus, and both Hungary and Bavaria temporarily established soviet-type regimes.”); see also Palmer Statement I, *supra* note 104, at 17-18 (detailing apparent spread of communism to Germany, Hungary, Bulgaria, Turkey, Poland, Austria, Serbia, Holland, France, Portugal, Italy, China, Korea, Japan, India, Canada, and others).

¹¹⁴ Hoyt, *supra* note 20, at 15.

¹¹⁵ *Id.* at 15-16 (internal quotations omitted).

¹¹⁶ See Murray, *supra* note 22, at 57 (“As we have seen, however, conditions were anything but normal in 1919.”).

¹¹⁷ See *id.* at 5-9.

¹¹⁸ Hoyt, *supra* note 20, at 8; Murray, *supra* note 22, at 6.

¹¹⁹ Hoyt, *supra* note 20, at 10; Murray, *supra* note 22, at 7.

¹²⁰ Murray, *supra* note 22, at 8-9 (“Great industrial unrest resulted. Major strikes, which had been relatively few, now became prevalent.”).

¹²¹ See *id.* at 58-66 for a more detailed account of the Seattle strike and its connection with Bolshevism in the popular imagination.

¹²² Hoyt, *supra* note 20, at 10-11.

¹²³ *Id.* at 11.

policemen, national railroad and subway workers, and most notably, the United Mine Workers, would all strike.¹²⁴ Many of the strikes were accompanied by violence.

The May bomb scare focused American attention on radicals, immigrants, and labor unrest, all of which became inexorably intertwined in the public's imagination of left-wing revolution and terrorism.¹²⁵ Labor Secretary William B. Wilson told a group of businessmen that the rash of strikes was the work of Bolsheviks seeking to spur revolution.¹²⁶ Cleveland's mayor proposed deporting all foreigners who failed to become Americans as soon as they possibly could. *The New York Times* "devoted a full half front page of one of its major Sunday sections to translations of various Bolshevik papers," and ran an article under the headline: "Russian Reds are Busy Here: Workers Union has 500 Agents Spreading Bolshevism in the United States."¹²⁷ On June 13, New York state authorities raided the official New York office of the Russian Bolshevik Mission to the United States.¹²⁸ And as President Wilson toured the country to advocate membership in the League of Nations, he warned audiences of "the dangers of revolution in the United States."¹²⁹

Responsibility for quashing the "radical" threat was thrust upon, and seized by, Attorney General A. Mitchell Palmer.¹³⁰ One of Palmer's first acts was the creation of the General Intelligence

¹²⁴ *Id.* at 41.

¹²⁵ Murray, *supra* note 22, at 16.

[T]he assumption that the country was under serious attack by the Reds found wide acceptance. In the long run, each social and industrial disturbance was received as prima-facie evidence of the successful spread of radicalism. Even the temporary instability arising from demobilization and reconversion, and the many justified protests concerning high prices, were traced to the Reds.

Id. Further,

by late 1919, a radical was anyone suspected of being pro-German, a Russian or other foreigner, a person who sent bombs through the mails, a believer in free love, a member of the I.W.W., a Socialist, a Bolshevik, an anarchist, a member of a labor union, a supporter of the closed shop, or anyone who did not particularly agree with you.

Id. at 167. Palmer himself connected all of these elements in his testimony before Congress. Among the elements he cited were the steel and coal strikes of 1919, the railroad strike of 1920, investigations of the Union of Russian Workers, El Ariete Society, Communist Party of America, Communist Labor Party, the I.W.W., and "the negro agitation." See Palmer Statement I, *supra* note 104, at 155.

¹²⁶ Hoyt, *supra* note 20, at 39.

¹²⁷ *Id.* at 35-36.

¹²⁸ *Id.* at 37.

¹²⁹ *Id.* at 42.

¹³⁰ In October of 1919, the U.S. Senate voted unanimously in favor of a resolution calling on Attorney General Palmer to inform the Senate what actions he was taking against the radicals. *Id.* at 48. Others have noted, however, that Palmer was also a frontrunner for the Democratic presidential nomination and may have seen such action as a

Division of the Department of Justice, tasked with collecting information about various radical groups and assisting the Bureau of Investigation (BI).¹³¹ Palmer had a number of legal instruments at his disposal—the wartime Espionage Act of 1917 and the Sedition Act of 1918 were still in effect. But given that a large percentage of the “radicals” in the United States were foreign-born and often not naturalized, immigration laws became the most potent weapon in Palmer’s arsenal. Under the Alien Control Act of 1918, any foreigners who believed in the violent overthrow of the U.S. government were excluded from entering the country.¹³² Palmer used the 1918 Act to arrest suspected radicals and to have them deported from the country.

2. *The Palmer Raids*

Egged on by a fearful public, Palmer launched an all-out assault on foreign “radicals.”¹³³ During nationwide raids in November 1919 and January 1920, Justice Department agents were specifically instructed to look for noncitizens:

If a person claims American citizenship, he must produce documentary evidence of the same. If native-born, through birth records. If naturalized, through producing for agent copy of naturalization papers. Be sure that these papers are final papers, containing words “and is hereby admitted to become a citizen of the United States.” . . . Only aliens should be arrested; if American citizens are taken by mistake, their cases should be immediately referred to the local authorities.¹³⁴

political opportunity. See Murray, *supra* note 22, at 192; see also *supra* note 110 and accompanying text.

¹³¹ Hoyt, *supra* note 20, at 39-40.

¹³² According to section 1 of the Act: “[A]liens who are members of or affiliated with any organization that entertains a belief in, teaches, or advocates the overthrow by force or violence of the government of the United States shall be excluded from admission into the United States.” *Colyer v. Skeffington*, 265 F. 17, 21 (D. Mass. 1920), *rev’d sub nom. Skeffington v. Katzeff*, 277 F. 129 (1st Cir. 1922) (citing Comp. St. Ann. Supp. 1919, § 4289 1/4b[1]). “Section 2 provide[d] for the deportation of such aliens, irrespective of the time of their entry.” *Id.* (citing Comp. St. Ann. Supp. 1919, § 4289 1/4b[2]).

On December 19, 1919, the U.S. House of Representatives actually approved an amendment to the Alien Control Act, which would have further excluded “any group which did not believe in organized government, and any group that would seek overthrow of the government or sabotage of government or even advocate unlawful destruction of property.” Hoyt, *supra* note 20, at 76.

¹³³ See Palmer Statement I, *supra* note 104, at 166 (“The results of the investigations conducted by the Bureau of Investigation of radical activities showed that the predominating cause of the radical agitation in the United States was the alien population in this country.”); *id.* at 26 (“Most of the individuals involved in this movement are aliens or foreign-born citizens.”).

¹³⁴ *Colyer*, 265 F. at 37-38 n.2.

The main target of the raids and arrests were Russians and Eastern Europeans.¹³⁵ This captured the general fear of Bolshevism and the free association of Bolshevism with Russians. This targeting also captured the widely held belief that it was recent Eastern European immigrants who were behind the labor unrest.¹³⁶ Among the initial targets were the Union of Russian Workers, the Russian Mission in New York, and the Russian People's House.¹³⁷ Anecdotal evidence demonstrates that those undertaking the raids believed that it was specifically Russians they were looking for.¹³⁸ Later raids included the Lithuanian Socialist Choir and assaults on other suspected communist meeting places.¹³⁹

Palmer used every legal mechanism at his disposal to help find and arrest these alleged foreign radicals. The Justice Department adopted a BI rule stating that mere membership in various groups—such as the Union of Russian Workers, the Communist Party, and the Communist Labor Party—was enough to qualify for deportation under the Alien Control Act.¹⁴⁰ A Justice Department agent could thus look to group membership rolls to identify candidates for arrest and deportation.¹⁴¹ Palmer was also successful in amending the Immigration Bureau rules concerning when aliens would have access to counsel.¹⁴² Prior to the first set of raids in November 1919,

¹³⁵ McCormick notes that the majority of those deported aboard the *Buford* in December 1919 were alleged members of the Union of Russian Workers. See McCormick, *supra* note 22, at 164.

¹³⁶ McCormick notes that various local officials took advantage of the situation and sought to use the raids as a means to break organized labor. One Bureau of Investigations (BI) agent leading raids in the mining regions of Pennsylvania appears to have “belatedly . . . realized that mine owners had used the BI to settle a score against an unruly community of foreigners.” *Id.* at 154. Further, at least one memo “shows that government officials understood deportation primarily as a device to tame rebellious industrial workers—native and immigrant—not an emergency measure to save the country from revolution.” *Id.* at 150-51.

¹³⁷ See *id.* at 153-55 (recounting raids at Russian boarding houses with predominantly Russian populations and rumors that Russians planned to march on Washington).

¹³⁸ See *supra* note 137 and accompanying text.

¹³⁹ See McCormick, *supra* note 22, at 167-87 (describing broad-based assault on Communists toward end of Red Scare).

¹⁴⁰ See *id.* at 155. “For your confidential information, the Bureau has to state that the Department holds the Communist Party of America to be an organization mere membership in which brings an alien within the purview of the Act of October 16, 1918.” *Colyer v. Skeffington*, 265 F. 17, 33 (D. Mass 1920), *rev'd sub nom. Skeffington v. Katzeff*, 277 F. 129 (1st Cir. 1922) (quoting letter from A. Caminetti, Commissioner General of Immigration, to Commissioner of Immigration at Boston).

¹⁴¹ The instructions given to agents bear this out. See, e.g., *Colyer*, 265 F. at 37 n.2. (“Upon taking person into custody try to obtain all documentary evidence possible to establish membership in the Communist Party, including membership cards, books, papers, correspondence, etc.”).

¹⁴² See McCormick, *supra* note 22, at 158.

Immigration Bureau Rule 22, subdivision 5(b), read, "At the beginning of the hearing under the warrant of arrest the alien shall be allowed to inspect the warrant of arrest and all the evidence on which it was issued, and shall be apprised that he may be represented by counsel."¹⁴³ Thus, many of those arrested after the first set of raids secured counsel, refused to talk about their views, and had to be released for lack of evidence. Prior to a second set of raids in January 1920, however, the Bureau modified the rule to read:

Preferably at the beginning of the hearing under the warrant of arrest or at any rate as soon as such hearing has proceeded sufficiently in the development of the facts to protect the Government's interests, the alien shall be allowed to inspect the warrant of arrest and all the evidence on which it was issued and shall be apprised that thereafter he may be represented by counsel.¹⁴⁴

The practical result of this changed rule was to cut the alien off from any representation by counsel until the inspector, cooperating with or advised by the agent of the Department of Justice, was of the opinion that the "hearing had proceeded sufficiently in the development of the facts to protect the government's interests."¹⁴⁵

Even with the vast powers given to authorities under existing laws, various new laws were proposed to extend government authority even further. Palmer proposed a new sedition law that would provide for automatic deportation of aliens who belonged to "[R]ed" organizations.¹⁴⁶ Further, the law would denaturalize and deport any naturalized citizen convicted of "[R]ed" activity.¹⁴⁷ The proposed law defined sedition extraordinarily broadly, including:

to oppose, prevent, hinder, or delay the execution of any law of the United States, or the free performance by the United States government, or any one of its officers, agents, or employees of its or his public duty, commits or attempts, or threatens to commit any act of force against any person or any property, or any act of terrorism, hate, revenge, or injury against the person or property of any officer, agent or employee of the United States¹⁴⁸

¹⁴³ *Colyer*, 265 F. at 46.

¹⁴⁴ *Id.*

¹⁴⁵ See *id.*

¹⁴⁶ Hoyt, *supra* note 20, at 65.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 66.

The House of Representatives considered a similarly harsh bill, the Graham Bill,¹⁴⁹ which would have imposed the death penalty for insurrection or the aid of insurrection.¹⁵⁰

On November 7, 1919, the second anniversary of the Russian Revolution, Palmer took action. Targeting the Union of Russian Workers, Justice Department agents, with the help of local authorities, raided meeting places in eleven cities, arresting 250 people.¹⁵¹ The raid of the Union of Russian Worker headquarters in New York was particularly massive and violent. Knocking doors off their hinges and swinging clubs and nightsticks, the raiders stormed the building. Those found there, including a group then learning English, were lined up against the wall.¹⁵² “[Two hundred] men and women were violently assisted out of the building by a special riot squad and driven away to Justice Department headquarters . . . for questioning.”¹⁵³ According to *The New York Times*, some of those arrested had been “badly beaten by the police . . . their heads wrapped in bandages testifying to the rough manner in which they had been handled.”¹⁵⁴ After questioning, only thirty-five of those arrested in New York that night were held. State and local officials followed with their own raids. On November 8, 700 New York City police officers raided seventy-three radical centers, arresting 500 people.¹⁵⁵ This pattern repeated itself elsewhere in the country.

On December 21, 1919, 249 of the arrested “radicals” were loaded onto a ship, the *Buford*, and deported.¹⁵⁶ The general press lauded the deportations, expressing hope that the *Buford* would be quickly followed by more “Soviet Arks.”¹⁵⁷ Starting on January 2, 1920, Palmer launched a second set of raids, this time aimed at the

¹⁴⁹ Id. at 98, 130 (citing Graham Bill, To punish offenses against the existence of the Government of the United States, and for other purposes, H.R. 11430, 66th Cong. § 2 (1920)).

¹⁵⁰ Id. at 98-100.

¹⁵¹ See Hoyt, *supra* note 20, at 52-53; Murray, *supra* note 22, at 196-97. Palmer explained that he targeted the Union of Russian Workers “because their organization and its tenets, its purposes, its plans, its beliefs, brought them within the language of the deportation statute.” Charges of Illegal Practices of the Department of Justice: Hearings Before a Subcomm. of the Senate Comm. on the Judiciary, 66th Cong. 8 (1921) [hereinafter Palmer Statement II] (statement of A. Mitchell Palmer, Attorney General).

¹⁵² See Hoyt, *supra* note 20, at 87.

¹⁵³ Murray, *supra* note 22, at 197.

¹⁵⁴ Id. (quoting 200 Caught in New York, N.Y. Times, Nov. 8, 1919, at A1).

¹⁵⁵ See *id.*; Hoyt, *supra* note 20, at 57-58. Palmer sets the number at 247. Palmer Statement I, *supra* note 104, at 28.

¹⁵⁶ See Hoyt, *supra* note 20, at 77-78; Murray, *supra* note 22, at 207.

¹⁵⁷ Murray, *supra* note 22, at 207-09; see also Hoyt, *supra* note 20, at 79; cf. Scores of Pakistanis Are Deported by U.S., N.Y. Times, July 10, 2002, at A10 (noting mass deportation of 131 Pakistanis picked up in post-September 11 dragnets on single chartered flight).

Communist and Communist Labor Parties. More than 4000 active and passive party members in thirty-three cities were arrested as authorities “entered bowling alleys, pool halls, cafes, club rooms, and even homes, and seized everyone in sight.”¹⁵⁸ Men were “taken out of their beds at 3 o’clock in the morning in their homes.”¹⁵⁹ “[D]azzled” by the nationwide raids, the public hailed Palmer as “the savior of the nation.”¹⁶⁰

The crisis had reached its peak, and fear of the Red menace began to wane.¹⁶¹ By May 1920, just a year after its start, the crisis was over. The Justice Department had predicted that the radicals would undertake massive operations on May 1, 1920 in order to spark a full-scale uprising against the U.S. government.¹⁶² May 1 came and went without event. The failure of the Department’s warnings—combined with mounting criticism of the raids, of Palmer, and of his techniques—began to change the mood of the country and fear of radical revolution waned.¹⁶³ As the feeling of fear subsided, it nonetheless left an indelible mark on the country. “Civil liberties were left prostrate, the labor movement was badly mauled, the position of capital greatly enhanced, and complete antipathy towards reform was enthroned.”¹⁶⁴

3. *Condemning the Raids*

The criticism of Palmer and his tactics that emerged from the year of fear was deep and scathing. In May 1920, the National Popular Government League published a sixty-seven-page report condemning the Palmer Raids.¹⁶⁵ The report, signed by leading scholars and

¹⁵⁸ Murray, *supra* note 22, at 213; see also Palmer Statement II, *supra* note 151, at 8. All the worst features of the November raids reoccurred, but on a much larger scale. There was the knock on the door, the rush of the police. In meeting houses, all were lined up to be searched; those who resisted often suffered brutal treatment. Except for a few who carried documentary proof of citizenship[,] all were taken to police headquarters for intensive questioning; usually they received a confession to sign, and often were threatened or beaten if they refused to comply. Prisoners were put in overcrowded jails or detention centers where they remained, frequently under the most abominable conditions, until called for deportation.

Hoyt, *supra* note 20, at 87 (quoting Stanley Coben, A. Mitchell Palmer: Politician 110 (1963)).

¹⁵⁹ Post Investigation, *supra* note 109, at 71 (statement of Louis F. Post, Assistant Secretary of Labor).

¹⁶⁰ Murray, *supra* note 22, at 217.

¹⁶¹ See *id.* at 239.

¹⁶² See Hoyt, *supra* note 20, at 108.

¹⁶³ See *id.* at 111-19.

¹⁶⁴ Murray, *supra* note 22, at 17.

¹⁶⁵ See *supra* note 1 and accompanying text.

lawyers, as well as Francis Cane, who had resigned from the Department of Justice in protest over the Palmer Raids, concluded:

American institutions have not in fact been protected by the Attorney General's ruthless suppression. On the contrary, those institutions have been seriously undermined and revolutionary unrest vastly intensified. No organization of radicals acting through propaganda over the last six months could have created as much revolutionary sentiment in America as has been created by the Department of Justice itself.¹⁶⁶

The publication of the report roughly coincided with the Congressional testimony of Assistant Secretary of Labor Louis Post. Although Palmer had taken control of the raids, it was the Department of Labor that had actual authority over immigration. As Acting Secretary of Labor,¹⁶⁷ Post had final authority over deportation cases.¹⁶⁸ As he investigated the cases of those who had been arrested, he found that "[v]ery few, if any, . . . were the kind of aliens that Congress could in reasonable probability have intended to comprehend in its anti-alien legislation."¹⁶⁹ Reviewing the cases, Post eventually cancelled 2202 of the warrants, upholding only 556.¹⁷⁰

A still-fearful public was aghast at Acting Secretary Post's apparent sympathy for the Reds.¹⁷¹ As Congress considered his impeachment, Post was forced to testify and defend his actions.¹⁷² His testimony proved to be a turning point. Post told Congress about the Justice Department's wide-scale abuse of power and about warrantless searches and arrests. Moreover, the criteria used by the Department of Justice to determine whom to deport simply was irrational: "[I]t is almost impossible to believe that the men knew they were doing anything but going to school or going to a social club of men from their own country and of their own speech."¹⁷³ In particular, Post noted that "[w]ith all these sweeping raids all over the country," agents found only three pistols—hardly evidence of plans for a radical

¹⁶⁶ Hoyt, *supra* note 20, at 116-17.

¹⁶⁷ Secretary of Labor William B. Wilson was ill at the time. See *id.* at 107.

¹⁶⁸ Murray, *supra* note 22, at 210, 247.

¹⁶⁹ *Id.* at 248 (citing Post Investigation, *supra* note 109, at 79, 209).

¹⁷⁰ See Murray, *supra* note 22, at 251; see also Hoyt, *supra* note 20, at 105.

¹⁷¹ See Murray, *supra* note 22, at 248.

¹⁷² See Post Investigation, *supra* note 109, at 6 (statement of Rep. Homer Hoch of Kansas) (noting that "if the charges are found to be true, [they] call[] for an impeachment resolution"). At the outset, Palmer himself told Congress that Acting Secretary Post had always been sympathetic to Post's own impeachment and Palmer cited Post's "stubborn incapacity." Palmer Statement I, *supra* note 104, at 20.

¹⁷³ Post Investigation, *supra* note 109, at 71 (statement of Louis F. Post, Assistant Secretary of Labor).

revolution.¹⁷⁴ He also noted that only forty to fifty of the thousands arrested had actually admitted favoring the overthrow of the U.S. government.¹⁷⁵

These concerns were echoed in a June 23, 1920 decision by District Court Judge George W. Anderson. In *Colyer v. Skeffington*, Judge Anderson held that the decision to treat all Communist Party and Communist Labor Party members as radicals was misguided and overbroad. He wrote, "These two organizations [the Communist and Communist Labor Parties], proscribed by the Department of Justice, [were] the result of a factional split or row in the summer of 1919 in the old Socialist Party."¹⁷⁶ Judge Anderson found that most of the alleged radicals had little idea what the new organizations stood for. "Social, educational purposes, and race sympathy, rather than political agitation, constituted the controlling motives with a large share of them. They joined the local Russian or Polish or Lithuanian Socialist or Communist Club, just as citizens join neighborhood clubs, social or religious, or civic, or fraternal."¹⁷⁷ As historians have noted, many of the people on the membership rolls did not even realize that they were on them. After the Bolshevik Revolution, many smaller groups of similar stripes affiliated with the Communist Party; the Communist Party immediately transferred those groups' membership rolls to their own.¹⁷⁸

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 71-72.

¹⁷⁶ *Colyer v. Skeffington*, 265 F. 17, 50 (D. Mass 1920), rev'd sub nom. *Skeffington v. Katzeff*, 277 F. 129 (1st Cir. 1922). Judge Anderson continued:

The result was that the rank and file of the less educated membership knew little or nothing about the controversy, or the nature and extent of the change, if any, in the Program and principles of the party. Some of them regarded it simply as a change of name; others knew there was some sort of little understood change in Program and purpose. But the great mass of the former Socialists who had thus become alleged Communists had no real comprehension of any important or material change either in their associations or in the political or economic purposes sought to be achieved by their negligibly weak organizations.

Id. Notably, Judge Anderson's decision was submitted into the Congressional record in its entirety. See Palmer Statement II, *supra* note 151, at 38-82.

¹⁷⁷ *Colyer*, 265 F. at 50. Anderson noted that few of those arrested appeared to be radicals at all. For instance, the police in Lynn, Massachusetts, acting under the instructions of the Department of Justice, raided a hall where thirty-nine people, half of them citizens, were holding a meeting to discuss the formation of a cooperative bakery. The police arrested all thirty-nine, held them overnight in cells at the police station, and had them docketed as "suspects," though thirty-eight of the thirty-nine people were later discharged. *Id.* at 43-44.

¹⁷⁸ Hoyt, *supra* note 20, at 90-91. One historian notes that although the Union of Russian Workers did have a radical anarchist platform, the organization's "people's houses," "[m]ore than revolutionary centers, . . . were social gathering places for Russian immigrant male laborers excluded from American life by barriers of language, culture,

Judge Anderson further condemned the Justice Department's tactics, in particular the changed rule with regard to counsel.¹⁷⁹ According to Judge Anderson, the new rule granting counsel to the potential deportees only after the government had made its case put frightened, non-English-speaking aliens at a serious disadvantage.

In cases of doubt, aliens, already frightened by the terroristic methods of their arrest and detention, were, in the absence of counsel, easily led into some kind of admission as to their ownership or knowledge of communistic or so-called seditious literature. The picture of a non-English-speaking Russian peasant arrested under circumstances such as described above, held for days in jail, then for weeks in the city prison at Deer Island, and then summoned for a so-called "trial" before an inspector, assisted by the Department of Justice agent under stringent instructions emanating from the Department of Justice in Washington to make every possible effort to obtain evidence of the alien's membership in one of the proscribed parties, is not a picture of a sober, dispassionate, "due process of law" attempt to ascertain and report the true facts.¹⁸⁰

Judge Anderson also condemned the squalid conditions in which the arrestees were kept and the Justice Department's apparent disregard for their safety and well-being.¹⁸¹ Summing up what he saw in Boston, Judge Anderson wrote:

prejudice, and indifference and cut off from family and friends in Russia by war and revolution." McCormick, *supra* note 22, at 146. This is borne out by a study of those actually arrested by the Federal Council of the Churches of Christ in America presented to the Senate Judiciary Committee. See generally Constantine M. Panunzio, *The Deportation Cases of 1919-1920*, reprinted in Palmer Statement II, *supra* note 151, at 308. Aliens told Constantine M. Panunzio, author of the report, that they believed that the Union of Russian Workers "is an organization for teaching culture and education," and "[a] union for the purpose of teaching illiterate people by blackboards," and that "they are helping the laborers, those who are in need and out of work; they are helping each other." *Id.* at 68, reprinted in Palmer Statement II, *supra* note 151, at 331.

¹⁷⁹ See *supra* notes 142-45 and accompanying text.

¹⁸⁰ *Colyer*, 265 F. at 47.

¹⁸¹ In particular, Anderson noted the plight of one woman arrested with her eldest daughter. At about midnight, the police sent the daughter home alone to a remote part of the city. The woman was taken the next day to the wharf where she was confined in a dirty toilet room. Afterward she spent thirty-three days at Deer Island. *Id.* at 43-44. Of the prison, he wrote:

At Deer Island the conditions were unfit and chaotic. No adequate preparations had been made to receive and care for so large a number of people. Some of the steam pipes were burst or disconnected. The place was cold; the weather was severe. The cells were not properly equipped with sanitary appliances. . . .

In the early days at Deer Island one alien committed suicide by throwing himself from the fifth floor and dashing his brains out in the corridor below in the presence of other horrified aliens. One was committed as insane; others were driven nearly, if not quite, to the verge of insanity.

Id. at 45.

I refrain from any extended comment on the lawlessness of these proceedings by our supposedly law-enforcing officials. The documents and acts speak for themselves. It may, however, fitly be observed that a mob is a mob, whether made up of government officials acting under instructions from the Department of Justice, or of criminals, loafers, and the vicious classes.¹⁸²

As the condemnations continued to roll in, former Senator Albert J. Beveridge told a meeting of the American Bar Association that “[t]he manner in which the official machinery was set in motion to effect these arrests, seizures, and searches reveals a startling and serious defect in our laws.”¹⁸³ He worried:

Under the statutory provision that any alien must be deported who belongs to an organization that advocates or believes in the violent overthrow of our Government the decision as to whether an organization is of the kind described in the statute can only be made by a single administrative official of the National Government. Thus the power of determining the meaning of party platforms and proscribing, in mass, great numbers of individuals because of mere nominal membership in those parties is exercised exclusively and definitely by the Secretary of Labor. No court in the land has, in practical effect, a small fraction of the judicial authority which is thus exercised by this administrative official.¹⁸⁴

4. *Lasting Impact*

By the middle of 1920, the paranoia of the Red Scare was on the wane, and a serious critique of the civil rights violations of the Palmer Raids began to emerge.¹⁸⁵ Nonetheless, the general fear of Bolshevism and radicalism, and the American people’s association of them with Southeastern and Eastern European immigrants, did not disappear.¹⁸⁶ Out of the wartime anti-German spy-hunting and the postwar, anti-Bolshevik Red-hunting came a sense that the “trouble must come . . . from the tenacity and secret cunning of alien influences, together with a lack of sufficient solidarity on the part of true

¹⁸² *Id.* at 43.

¹⁸³ Palmer Statement II, *supra* note 151, at 86 (statement of Sen. Walsh) (quoting Albert J. Beveridge, *The Assault upon the American Fundamentals*, Address Before the American Bar Association (Aug. 1920), in Report of the Forty-Third Annual Meeting of the American Bar Association (1920)).

¹⁸⁴ *Id.* at 86-87.

¹⁸⁵ See *supra* notes 161-84 and accompanying text.

¹⁸⁶ See, e.g., Robert A. Divine, *American Immigration Policy, 1924-1952*, at 8 (1972) (discussing lingering fear of foreign radicals in country); John Higham, *Strangers in the Land: Patterns of American Nativism, 1860-1925*, at 265-66 (1994) (documenting revival of nativist, racist, and anti-radical traditions in 1920s).

Americans in resisting them.”¹⁸⁷ Together with the labor unrest of 1919, a brief depression in 1920, and a resurgence in immigration following the end of the war, these trends convinced many Americans that they were in the process of being flooded with inassimilable Eastern European immigrants who came to the United States not to become Americans, but to take advantage of American prosperity and to spread the chaos of Europe to American shores.¹⁸⁸ The Ku Klux Klan,¹⁸⁹ the eugenics movement,¹⁹⁰ and anti-Semitism¹⁹¹ all grew in strength over the course of the 1920s. Bowing to this nativist pressure, Congress passed a new immigration law in 1924 designed to stem the “alien flood,” “barbarian horde,” and “foreign tide”¹⁹² by decreasing the number of Eastern and Southeastern Europeans who would be allowed into the country.¹⁹³ Eventually these quotas would make escape impossible for European Jews living under Hitler’s increasingly oppressive and eventually murderous control.

B. History Matters

So what? As the *Richmond Newspapers* test is currently applied, the story of the Palmer Raids is an irrelevant tangent. The history of the Palmer Raids provides little insight into whether deportation hearings have been historically open to the public; it provides no answers to *Richmond Newspapers*’s historical inquiry. Nonetheless, this history must give us pause. Can a test so deeply concerned with history completely disregard this past attempt to balance immigrant rights and national security? Can a test so deeply concerned with history disregard the lessons of our past?

1. Criticizing the Current History Test

Both the Third and Sixth Circuits, in line with the case law, asked the question: Is there a history of open proceedings? Both circuits struggled with the paucity of historical evidence surrounding deporta-

¹⁸⁷ Higham, *supra* note 186, at 270.

¹⁸⁸ Divine, *supra* note 186, at 6-8 (noting fear of “alien flood” and “alien indigestion”). As one letter-writer told the *New Republic*, “The old Americans are getting a little panicky, and no wonder. . . . America, Americans and Americanism are being crowded out of America.” He continued, “It is inevitable that there should be silly forms of protest and rebellion. But the Ku Klux Klan and the hundred percenters are fundamentally right from the standpoint of an American unity and destiny.” Higham, *supra* note 186, at 264 (quoting Raymond G. Fuller, Letter to the Editor, *Immigration and Americanism*, 39 *New Republic* 48, 48 (1924)).

¹⁸⁹ Higham, *supra* note 186, at 290-91.

¹⁹⁰ Divine, *supra* note 186, at 10-15.

¹⁹¹ See Higham, *supra* note 186, at 279.

¹⁹² Divine, *supra* note 186, at 6.

¹⁹³ *Id.* at 17.

tion hearings. But the history of the Palmer Raids raises the question of whether the rigid test applied by the courts is reconcilable with either reason or the Supreme Court's original logic in *Richmond Newspapers*.

The rigidity of the history prong as it is currently applied raises a number of concerns. First, the history analyzed rarely presents the long, unbroken, consistent history presented in *Richmond Newspapers*.¹⁹⁴ What should a court do when, as with deportation hearings, the history is ambivalent or uncertain? Some courts have followed the lead of the Supreme Court¹⁹⁵ by papering over inconsistent evidence and presenting the legal fiction of a history (usually one of openness).¹⁹⁶ Other courts essentially have abandoned the history prong, relying almost entirely on the logic prong.¹⁹⁷ Still others have taken the view presented by the Sixth Circuit in *Detroit Free Press* that in cases where the historical record is lacking, "it makes more sense to look to more recent practice, similar proceedings, and concentrate on the 'logic' portion of the test."¹⁹⁸ Thus a strong logical argument for openness can make up for deficiencies in the historical record.

¹⁹⁴ See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980) (Burger, C.J., plurality opinion) (stating that historical record shows "presumption of openness" in criminal trials).

¹⁹⁵ Judge Kimba M. Wood has sharply criticized the Court's opinion in *Press-Enterprise II*. See Kimba M. Wood, *The 1995 Justice Lester W. Roth Lecture: Reexamining the Access Doctrine*, 69 S. Cal. L. Rev. 1105, 1116 (1996). Although the Court proclaimed that the near-uniform practice of state and federal courts had been to conduct preliminary hearings, *Press-Enterprise II*, 478 U.S. 1, 10 (1986), it is obvious from Justice Stevens's dissent that the Court was actually presented with a great deal of evidence tending to show that preliminary hearings had often been closed, *id.* at 15-29 (Stevens, J., dissenting).

¹⁹⁶ Although some courts have simply given up on the history prong when faced with these situations, many courts have instead come up with awkward analogies between traditional proceedings and contemporary proceedings. As Judge Wood notes, "Courts act as if they must find a historical process to learn from in order to apply the history prong, even when there was no comparable process at common law." Wood, *supra* note 195, at 1115 (referring to *United States v. Haller*, 837 F.2d 84 (2d Cir. 1988) and *Press-Enterprise II* as examples of overstretched history). Wood further posits that history often appears equivocal such that "courts tend either to rely more heavily on analogies to proceedings the history of which *is* clear, or to find in history whatever is needed to justify the result." *Id.* at 1115-16.

¹⁹⁷ Today, however, the so-called history prong of the test has essentially been abandoned by the access doctrine. The right of access, as developed and expanded in recent case law, relies almost exclusively on the "functional utility" prong of the original test. Historical practice no longer operates to establish or corroborate a putative entitlement to access to judicial information. Cerruti, *supra* note 35, at 308-09 (arguing for new access doctrine that refines logic test but abandons history); see also *United States v. Simone*, 14 F.3d 833, 842 (3d Cir. 1994) (finding First Amendment right of access despite no history of such).

¹⁹⁸ *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 703 n.14 (6th Cir. 2002).

Both possibilities diminish the importance of the history test; the first diminishing it to the point of a practical nullity.¹⁹⁹ Papering over inconsistent history, in particular, also threatens to distort the lessons of our past and enshrine understandings of our history that simply may be wrong.

Another concern arising out of a rigid reading of the *Richmond Newspapers* history test is that it simply does not make sense. Aside from some possible reliance concern, it is not clear why the mere presence of a history of openness should establish a First Amendment right of access.²⁰⁰ Even less clear is how a right of access can be denied merely because that right has never been recognized. The example of the Palmer Raids demonstrates this problem perfectly. Under the current understanding of the history prong, the Palmer Raids would only be relevant insofar as they might demonstrate that deportation hearings have at times been closed, or at the very least, that during times of national crisis the government has taken liberties with immigrant rights and immigration procedure. Leaving aside the still very open question of whether there is any evidence of closure during the Palmer Raids,²⁰¹ it simply seems nonsensical to find that the deeply and roundly criticized history of civil rights abuse during the Palmer Raids should serve as proof that the public has no right of access to deportation hearings. To the extent that the history test focuses on historical facts rather than historical lessons, it makes a mockery of the use and study of history.

¹⁹⁹ Many commentators have argued for the elimination of the history test. See, e.g., Cerruti, *supra* note 35, at 319 (suggesting new test that “reduces itself to a single question: Is the information in question relevant to the court’s official exercise of judicial authority?”); Wood, *supra* note 195, at 1120 (“I believe that our courts need to refocus the analysis away from history.”). This is certainly preferable to an irrational application of history, but to the extent that it eliminates an important limit on the scope of the First Amendment right of access, it must be rejected. A better, fuller understanding of history can perform this limiting function and at the same time inform our understanding of the logic prong. See discussion *infra* notes 217-28 and accompanying text.

²⁰⁰ See *N. Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198, 216 (3d Cir. 2002), cert. denied, 2003 U.S. LEXIS 4082, at *1 (May 27, 2003) (expressing concern that this would lead Congress to enact new administrative legislation with presumptions of closure lest they inadvertently create right of access); see also Wood, *supra* note 195, at 1116 (criticizing *Press-Enterprise II* interpretation that there was constitutional *right* to attend probable cause hearing in Aaron Burr treason trial because many people did *in fact* attend).

²⁰¹ As described *supra* notes 69 and 97 and accompanying text, the only evidence presented by the government that hearings were closed during this period is a single passage in a single book noting that deportation hearings could be held in “a county jail, hospital, prison or at his own home.” Clark, *supra* note 19, at 363. A similarly ambiguous piece of evidence can be found in Palmer Statement II, *supra* note 151, at 785 (citing John Lord O’Brian’s reference to “private hearing” in *The Menace of Administrative Law*, Proceedings of the Twenty-Fifth Annual Meeting of the Maryland State Bar Association (1920)).

History is not a parlor game. Constitutional rights should not be decided by a game of Trivial Pursuit. History is not merely an antiquarian collection of facts—here, instances of closed or open deportation hearings—but rather a process of interpretation and reinterpretation.²⁰² As E.H. Carr wrote, “The belief in a hard core of historical facts existing objectively and independently of . . . the historian is a preposterous fallacy, but one which it is very hard to eradicate.”²⁰³ History, like law, is a conversation with the past.²⁰⁴ It is a dialectic between ourselves and those who have thought and acted before us. To inform our present choices, we often seek the advice of our parents, grandparents, teachers, and mentors. We seek answers in their experiences. History and law give us a framework to ask for advice from those long past, to expand our group of advisors beyond time and place.²⁰⁵ History is “the means by which a culture sees beyond the limits of its own senses.”²⁰⁶

History is a process of learning, not a database to be mined.²⁰⁷ Understanding the lessons of the past requires care, humility, and engagement. It is a method for applying the experience of our forebears, no less delicate than that of the law itself.

2. *Rereading Richmond Newspapers*

This understanding of the meaning and role of history is not necessarily at odds with the Court’s original understanding of the history test. There is no doubt that the Justices writing in *Richmond Newspapers* were deeply concerned with history; their concurring

²⁰² See, e.g., E.H. Carr, *What Is History?* 20 (1961) (“Of course, facts and documents are essential to the historian. But do not make a fetish of them. They do not by themselves constitute history; they provide . . . no ready-made answer to this tiresome question: What is history?”).

²⁰³ *Id.* at 10.

²⁰⁴ See, e.g., *id.* at 35 (“[History] is a continuous process of interaction between the historian and his facts, an unending dialogue between the present and the past.”); *id.* at 164 (“When, therefore, I spoke of history . . . as a dialogue between past and present, I should rather have called it a dialogue between the events of the past and progressively emerging future ends.”).

²⁰⁵ See, e.g., John Lewis Gaddis, *The Landscape of History: How Historians Map the Past* 149 (2002) (“It’s the basis, across time, space, and scale, for a wider view. A collective historical consciousness, therefore, may be as much a prerequisite for a healthy well-rounded society as is the proper ecological balance for a healthy forest and a healthy planet.”).

²⁰⁶ *Id.*

²⁰⁷ See, e.g., Carr, *supra* note 202, at 5 (“When we attempt to answer the question, What is history?, our answer, consciously or unconsciously, reflects our own position in time, and forms part of our answer to the broader question, what view we take of the society in which we live.”); Gaddis, *supra* note 205, at 22 (“In the historian’s method of time travel, though, you impose significances on the past, not the other way around.”).

opinions are steeped in it. Chief Justice Burger wrote that “[t]he origins of the proceeding which has become the modern criminal trial in Anglo-American justice can be traced back beyond reliable historical records.”²⁰⁸ Justice Brennan wrote that “[t]o resolve the case before us, therefore, we must consult historical and current practice with respect to open trials, and weigh the importance of public access to the trial process itself.”²⁰⁹ And Justice Blackmun wrote that “[i]t is gratifying, first, to see the Court now looking to and relying upon legal history in determining the fundamental public character of the criminal trial.”²¹⁰ They cite English history before and after the Norman Conquest and American history from colonial times to the present. The opinions record an unending list of observations from the sixteenth-, seventeenth-, eighteenth-, nineteenth-, and twentieth-centuries. Chief Justice Burger’s opinion concludes: “From this unbroken, uncontradicted history, supported by reasons as valid today as in centuries past, we are bound to conclude that a presumption of openness inheres in the very nature of a criminal trial under our system of justice.”²¹¹ Why were these Justices so concerned with history? Can a mere history of openness create a public right of access?

There are two ways to understand the relevance of history presented in the concurring opinions. The first, hinted at by Chief Justice Burger’s opinion, relies on the intent of the Constitution’s authors. The fact that criminal proceedings are presumptively open to the public today is because they were presumptively open at the founding of the Republic; the authors of the First Amendment assumed the existence of such a right.²¹² This understanding has been rejected by the Court. In a subsequent case, *Press-Enterprise II*, the Court found that the experience prong did not require a pre-Bill of Rights history of openness in order to be satisfied.²¹³ The second possible understanding is that of Justice Brennan, eventually accepted by

²⁰⁸ *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 564 (1980) (Burger, C.J., plurality opinion).

²⁰⁹ *Id.* at 589 (Brennan, J., concurring in judgment).

²¹⁰ *Id.* at 601 (Blackmun, J., concurring in judgment).

²¹¹ *Id.* at 573 (Burger, C.J., plurality opinion). Chief Justice Burger also quoted Justice Black’s opinion in *In re Oliver*, 333 U.S. 257, 266 (1948), in which Justice Black recorded the Court’s inability to find a single instance of a criminal trial conducted in camera “in any federal, state, or municipal court during the history of this country. Nor have we found any record of even one such secret criminal trial in England since abolition of the . . . Star Chamber. . . .” *Id.* at 266 n.9.

²¹² As Chief Justice Burger wrote, “The Bill of Rights was enacted against the backdrop of the long history of trials being presumptively open.” *Id.* at 575.

²¹³ See *Press-Enterprise II*, 478 U.S. 1, 11-12 (1986) (finding history of openness in preliminary hearings based solely on post-Bill of Rights history).

the Court in *Globe Newspaper*.²¹⁴ Justice Brennan founded his right of access in a functional, or structural, understanding of the First Amendment.²¹⁵ As interpreted by Brennan, the various protections of the First Amendment assume an active and informed citizenry that can participate and challenge its government.²¹⁶

Justice Brennan recognized that the scope of such an argument is endless since “[t]here are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow.”²¹⁷ Access to government proceedings must be balanced against competing concerns for secrecy. Justice Brennan sketched two guiding principles: First, the case for a right of access has special force when drawn from an enduring and vital tradition of public entree to particular proceedings or information.²¹⁸ More importantly, a tradition of accessibility implies the favorable judgment of experience.²¹⁹

History is important because it carries the wisdom of experience. “Second,” wrote Justice Brennan, “the value of access must be measured in specifics. Analysis is not advanced by rhetorical statements that all information bears upon public issues.”²²⁰ Thus, for Justice Brennan, historical practice is not important in and of itself. Rather, a history of open proceedings is probative evidence that openness serves a positive role in the functioning of the proceeding; it gives the argument for access “special force.”²²¹ The history prong thus buttresses the logic prong, demonstrating that the apparent logic of public access has passed the test of time—that our reason is uncontradicted by the wisdom of the ages. Thus, although the formulation of the history prong has always preceded the formulation of the logic prong in the text of cases, the relationship between the two prongs must be reversed. The relevant inquiry for Justice Brennan—and after *Globe Newspaper*, for the Court—is whether openness plays an important

²¹⁴ See *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604-06 (1982) (Brennan, J.) (“[T]o the extent that the First Amendment embraces a right of access to criminal trials, it is to ensure that this constitutionally protected ‘discussion of governmental affairs’ is an informed one. . . . In sum, the institutional value of the open criminal trial is recognized in both logic and experience.”).

²¹⁵ It is not clear that Chief Justice Burger would necessarily reject Justice Brennan’s analysis, even though it does not make up the core of his reasoning in the plurality opinion. See *Richmond Newspapers*, 448 U.S. at 580 (Burger, C.J., plurality opinion) (“We hold that the right to attend criminal trials is implicit in the guarantees of the First Amendment; without the freedom to attend such trials . . . important aspects of freedom of speech and of the press could be eviscerated.”) (citations and quotations omitted).

²¹⁶ *Id.* at 587 (Brennan, J., concurring in judgment) (citations and quotations omitted).

²¹⁷ *Id.* at 588 (citation and quotations omitted).

²¹⁸ *Id.* at 589.

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*

role in the particular type of proceedings in question. An appeal to history is made to see if this judgment matches the lessons of experience.

Understood this way, there is no reason that the test must be formulated as asking: Is there a history of openness? In *Richmond Newspapers*, this formulation explained the relevance of the evidence there present—a long, unbroken history of openness since the Norman Conquest.²²² In that case, the tradition of openness demonstrated that the logic of open criminal trials had stood the test of time. But the existence of different cases with different types of evidence may require that the test be formulated differently. Where secrecy in the past has led to government abuse, a history of closure may dictate a right to openness. The relevant question should be: What can the history of these proceedings tell us about the need for openness?²²³

3. *The Lessons of the Palmer Raids and Open Deportation Hearings*

Judge Kimba M. Wood notes “that events recorded in history may be recorded not because they are typical, but, in some cases, because they are *atypical*, or *sensational*.”²²⁴ The history of deportation hearings and immigration policy is a history of the atypical. It is a history written largely in times of crisis and fear, not in times of peaceful contemplation. The lessons we can draw from our experience will not be found in the actions we have taken in times of crisis, but rather in our judgments of those actions in times of peace. Thus, the lesson of *Korematsu v. United States*,²²⁵ which notoriously upheld the World War II internment of Japanese Americans and is technically still good law, is not that such actions are acceptable. Rather, that decision is seen as a black stain on our country’s legal history.²²⁶

²²² For a broad discussion of *Richmond Newspapers*, see *supra* Part I.A. For a more detailed account of the long historical record before the court in that case, see *supra* notes 208-12 and accompanying text.

²²³ This assessment is in line with that of Judge Wood, who argues for eradication of the history prong because she thinks history divorced from context leads to perverse results in right-of-access cases. Wood, *supra* note 195, at 1109 (“[T]he Court has given insufficient weight to the dramatic changes in the criminal judicial process since the drafting of the First Amendment—changes that make historical experience, divorced from its context, misleading rather than enlightening.”). Judge Wood also fears that the Court’s “heavy emphasis on history encourages a reliance on analogy at the expense of principled reasoning.” *Id.*

²²⁴ *Id.* at 1116.

²²⁵ 323 U.S. 214 (1944).

²²⁶ See, e.g., Kathleen M. Sullivan & Gerald Gunther, *Constitutional Law* 631-32 n.4 (14th ed. 2001) (“*Korematsu* is a case that has come to live in infamy.”); Jerry Kang, *Thinking Through Internment: 12/7 and 9/11*, 9 *Asian L.J.* 195, 196 (2002) (“For that, all

Thus it is the negative lessons of the Palmer Raids that must impact the decision whether deportation hearings should be constitutionally open to the public. The Palmer Raids provide a cautionary tale of what can happen in times of national crisis. The history teaches how quickly wartime hysteria can produce nativism and fear of others. It teaches how easily the government, often with popular support, can take away important liberties and rights in the name of national security.²²⁷ Most of all, the Palmer Raids experience teaches that government actions against the society's most vulnerable and marginalized members must be subjected to the highest scrutiny.

All these lessons demonstrate the strength and wisdom of open proceedings. They buttress the courts' assessments under the logic test that open deportation hearings will help protect against government abuse, enhance the perception of fairness, insert accountability, and provide a therapeutic safety valve for a deeply wounded society to see that justice is being done.²²⁸ These lessons are evidence that the public should have a right of access to deportation hearings and that such hearings can only be closed when narrowly tailored to serve a compelling government interest.

CONCLUSION

Neither reinterpreting the history test nor learning the lessons of the Palmer Raids can definitively determine the constitutionality of

branches of the U.S. government have apologized."'). One could also look at the Espionage and Sedition Acts, widely used to prosecute dissenters, radicals, and communists during World War I and the Red Scare that followed. See *supra* note 132 and accompanying text. Although convictions were upheld at the time, see generally *Whitney v. California*, 274 U.S. 357 (1927); *Abrams v. United States*, 250 U.S. 616 (1919); *Debs v. United States*, 249 U.S. 211 (1919); *Frohwerk v. United States*, 249 U.S. 204 (1919); *Schenck v. United States*, 249 U.S. 47 (1919), those prosecutions and statutes have since been held to violate the First Amendment, see, e.g., *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969) ("The contrary teaching of *Whitney v. California* cannot be supported, and that decision is therefore overruled."). Notably, it is Justice Holmes's and Justice Brandeis's dissents in those early cases that are remembered and continue to carry weight. See, e.g., *Whitney*, 274 U.S. at 372-73 (Brandeis, J., concurring in judgment) (suggesting that correct measure for limiting speech is evidence of clear and imminent danger); *Gitlow v. New York*, 268 U.S. 652, 672 (1925) (Holmes, J., dissenting) (same); *Abrams*, 250 U.S. at 624 (Holmes, J., dissenting) (same).

²²⁷ See *supra* notes 92-95 and accompanying text.

²²⁸ See *N. Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198, 217 (3d Cir. 2002), cert. denied, 2003 U.S. LEXIS 4082, at *1 (May 27, 2003) (recognizing that openness would serve these values in deportation hearings); *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 703-04 (6th Cir. 2002) (same). Although the Third Circuit disagreed that the logic prong was satisfied, it agreed that all of these purposes were fulfilled by openness. See *supra* notes 92-95 and accompanying text.

the Justice Department's blanket closure of deportation hearings.²²⁹ As Judge Anthony J. Scirica noted in *North Jersey Media Group*, "The stakes are high. Cherished traditions of openness have come up against the vital and compelling imperatives of national security," and "the countervailing positions of the parties go to the heart of our institutions, our national values, and the republic itself."²³⁰ Deciding the constitutionality of the Creppy Directive and the blanket closure of deportation hearings is a difficult and unenviable task. History alone will not and should not dictate the decisions. But history can inform them; it can help us to better understand the importance of the values at stake and the dangers involved in restricting them.

The Palmer Raids provide us with a real, rather than hypothetical, picture of what can happen when immigrants' rights are pushed aside in favor of national security. Our history must be a consideration as we make difficult decisions about our future. As noted historian John Lewis Gaddis writes: "If we can widen the range of our experience beyond what we as individuals have encountered, if we can draw upon the experiences of others who've had to confront comparable situations in the past, then—although there are no guarantees—our *chances* of acting wisely should increase proportionately."²³¹

²²⁹ A fuller understanding of our history seems to demonstrate that there is a constitutional right of access to deportation hearings. See *supra* Part II.B. Nonetheless, the *Richmond Newspapers* test still requires a judge to decide whether the government has shown that the blanket closure ruling was narrowly tailored to the state's interest.

²³⁰ *N. Jersey Media Group*, 308 F.3d at 220, 228 (Scirica, J., dissenting).

²³¹ Gaddis, *supra* note 205, at 9.