

No. A-991

IN THE SUPREME COURT OF THE UNITED STATES

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JOHN ASHCROFT, ATTORNEY GENERAL, ET AL.,  
APPLICANTS

v.

NORTH JERSEY MEDIA GROUP, INC., ET AL.

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GOVERNMENT'S REPLY IN SUPPORT OF  
APPLICATION FOR A STAY PENDING APPEAL TO THE  
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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The district court has issued a nationwide injunction against implementation of a critical policy requiring the closure of immigration proceedings in particularly sensitive "special-interest" cases in order to protect the national security against future acts of terrorism and the government's investigation into the terrorist attacks on the Nation on September 11, 2001. That policy is an important part of the broad investigations undertaken by the Attorney General, the armed forces, and intelligence agencies, at the direction of the President, to thwart acts of terrorism that, Congress has found, "continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States." Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

The standards for the Court or the Circuit Justice to grant a stay pending appeal are plainly satisfied, especially at this time of urgent need to protect the national security and to prevent "an improper intrusion by a federal court into the workings of a coordinate branch of Government" that is responsible for administration of the immigration laws in the context of that urgent need. Compare INS v. Legalization Assistance Project, 510 U.S. 1301, 1306 (1993) (O'Connor, J., in chambers). First, there is at the very least a reasonable probability that the Court would grant certiorari if the Third Circuit affirmed the district court's injunction. Second, there is a high likelihood that this Court would reverse such a decision by the Third Circuit. Third, the stay equities weigh heavily in favor of a stay.

1. The district court's injunction is based on its unprecedented and unwarranted ruling that the First Amendment confers a general right of access for the public and press to an administrative hearing held within the Executive Branch, even where the responsible Executive Branch official has determined, in accordance with longstanding regulations, that the hearing should be closed to protect important public interests and the interests of the private participants themselves. Respondents strive to characterize that ruling as

a routine application of this Court's decisions that have articulated a First Amendment right of public access to criminal judicial proceedings. In fact, neither this Court nor any court of appeals has ever previously ruled that a First Amendment right of public access attaches to a federal administrative hearing, much less an immigration hearing.<sup>1</sup> The district court's ruling, which requires the government to satisfy strict scrutiny to close a removal hearing, constitutes a drastic incursion into the responsibilities of the Branch of the Government responsible for protecting the national security and enforcing the Nation's immigration and criminal laws, a sharp departure from the foundations of First Amendment doctrine, and a broad unsettling of established administrative practice.

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<sup>1</sup> The only appellate decision that respondents cite that has suggested that a First Amendment right of public access attaches to an administrative hearing of any kind is Whiteland Woods, L.P. v. Township of West Whiteland, 193 F.3d 177 (3d Cir. 1999). That decision is of no relevance here. There, state law required the proceedings of the municipal planning commission to be open to the public, and the only question therefore was whether the First Amendment conferred a right on a person attending the meeting to videotape it. Here, by contrast, no Act of Congress mandates that removal proceedings be opened, and indeed special-interest hearings have been properly closed under longstanding agency regulations. Moreover, the court's suggestion in Whiteland Woods that a First Amendment right of access existed was unnecessary to the decision in the case, as the court ultimately concluded that the First Amendment did not provide the plaintiffs with the right to videotape the planning commission's proceedings.

That injunction also casts a constitutional cloud on a longstanding regulation of the Attorney General -- which was the basis for Chief Judge Creppy's directive at issue in this case -- that allows removal proceedings to be closed to protect "witnesses, parties, or the public interest." 8 C.F.R. 3.27(b). As respondents concede (Resp. Opp. 14), that regulation confers broad discretion to close hearings -- including, in this case, the determination that all cases individually designated as falling into the class of particularly sensitive cases related to the ongoing terrorism investigations should be closed in light of the potentially serious implications for national security. Cf. Lopez v. Davis, 531 U.S. 230 (2001). That regulation does not require a showing that would satisfy strict scrutiny, at least as respondents perceive that standard.<sup>2</sup> See 8 C.F.R. 240.10(b)

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<sup>2</sup> Respondents suggest (Resp. Opp. 14) that the regulation, which allows removal proceedings to be closed in the "public interest," is consistent with the constitutionalized "tradition of access" articulated in cases such as Richmond Newspapers v. Virginia, 448 U.S. 555 (1980). As pointed out in the text, however, the regulation vests discretion to close hearings under broad standards based on the responsible official's assessment of the "public interest" or measures appropriate to guard the privacy of the alien or the witnesses. The regulation has never contemplated the application of the strict scrutiny required by decisions such as Richmond Newspapers. Indeed, as explained in our stay application (at 18), and as respondents do not dispute, immigration proceedings are often closed by an immigration judge pursuant to that regulation for reasons that

(confirming that immigration judge “may, in his or her discretion, close proceedings” under 8 C.F.R. 3.27(b)). The potential for significant, nationwide disruption of the federal immigration process if the INS is required to satisfy strict scrutiny every time it seeks to close a removal hearing would alone warrant this Court’s review if the district court’s decision is not reversed by the court of appeals.

The need for this Court’s review should the district court’s injunction be affirmed on appeal (and, accordingly, the need for a stay pending appeal) is greatly magnified by the context in which this case arises. The district court’s injunction overrides the Attorney General’s considered judgment that the public interest requires that all proceedings in special-interest be closed to the public during the current emergency in order to protect the national security, public safety, and ongoing criminal investigations. As the government’s declarations submitted in this case make clear, if these proceedings are opened to the public during the critical phase of the urgent threat to national security,

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would not satisfy Richmond Newspapers, including embarrassment to the alien. This Court has consistently ruled that strict scrutiny under Richmond Newspapers requires a criminal judicial proceeding to be presumptively open even if the criminal defendant wishes the proceeding to be closed. See Press-Enterprise v. Superior Court, 478 U.S. 1, 7 (1986).

terrorist organizations will have direct access to information about the government's ongoing investigation -- including the identity of detainees, evidence of their links to terrorism, insights into the evidence that the government has and does not have, and other leads that may well not be discernable by the press, individual immigration judges, or even the individual aliens concerned.

Respondents attempt to discount the possibility that sensitive information could be disclosed in a removal proceeding brought against an alien in a special-interest case, and also suggest that other measures, such as protective orders, are sufficient to guard against any danger of disclosure of information that would be harmful to the national security. But as the government's declarations show, even the identities of aliens connected to the government's terrorism investigations are highly sensitive. Those identities form a critical part of the overall mosaic of the government's investigations.

Respondents offer no persuasive rebuttal of that point, speculating only that some aliens might not be troubled by public identification of their connection to the government's investigations into terrorist conspiracies. As explained in the Stay Application (at 31), however, the vast majority of

aliens whose cases have been designated as "special interest" have chosen not to identify themselves to the press or public. Nor do respondents suggest any measure other than closure of a removal proceeding that could effectively prevent public disclosure of the names of aliens who have been identified in connection with the terrorism investigations and placed in removal proceedings. In any event, the fact that an individual special-interest alien might choose to disclose his identity does not undermine the rationale for the policy as a constitutional matter. Indeed, the fact that the Creppy directive does not restrict speech by the aliens themselves in addition to limiting access by the public and the press supports the constitutionality of the directive.

Finally, quite aside from the prospect of public disclosure of the identities of special-interest aliens, a requirement of case-by-case showings by the INS and findings by an immigration judge that closure of a particular hearing is "absolutely necessary," as respondents urge (Resp. Opp. 5), would threaten to cause the very disclosure of further information about the government's investigation that the Creppy directive is designed to prevent. See Stay Appl. 7-11, 31-36.

2. a. In arguing for a right of access to removal proceedings, respondents rely on Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986) (Press-Enterprise II), where this Court held that the First Amendment right of access attached to the preliminary hearing stage of a state criminal case, and on appellate decisions holding that the First Amendment right of access attaches to certain civil judicial proceedings. Those decisions are inapposite. As this Court explained in Richmond Newspapers v. Virginia, 448 U.S. 555, 575 (1980), the distinctive First Amendment right to attend criminal judicial proceedings is rooted in the fact that the Bill of Rights "was enacted against the backdrop of the long history of trials being presumptively open" at early common law. See also id. at 580 n.17 (noting that "historically both civil and criminal trials have been presumptively open"). There is no such "backdrop of \* \* \* history" before the Bill of Rights establishing any common law right of access to federal administrative proceedings of any kind, much less immigration proceedings. Such proceedings are creatures of statute, not the common law.

In Press-Enterprise II, the Court concluded that the preliminary hearing stage of the criminal proceeding was such an "essential" part of the "proper functioning of the overall

criminal justice process" that it could not reasonably be separated from the criminal trial itself, and so the Richmond Newspapers rule of presumptive access to criminal proceedings should be extended to the preliminary hearing. See 478 U.S. at 12. It is quite another matter, however, to apply the Richmond Newspapers framework, as the district court has done, to an administrative hearing, when it is not conducted by a traditional court and is not an integral part of a judicial proceeding that the public has had a right to attend since the earliest days of our legal system.<sup>3</sup> Indeed, the Court made clear in Press-Enterprise II that the two-part "experience and logic" test on which respondents rely in this case (see Resp. Opp. 6-9, 10-18) was intended for "cases dealing with the claim of a First Amendment right of access to criminal proceedings." 478 U.S. at 8 (emphasis added). There was no suggestion that the same First Amendment analysis would apply where, as here, no common law right of access to the

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<sup>3</sup> Moreover, the Court observed in Press-Enterprise II that the presumptive rule of public access to preliminary hearings dated at least back to the 1807 criminal proceedings against Aaron Burr, during the earliest days of the republic. See 478 U.S. at 10. Even if the right of public access to preliminary hearings was not established at early common law, therefore, it was established roughly contemporaneously with the framing of the Bill of Rights. The same cannot be said of public access to administrative proceedings, which has no such venerable provenance.

particular kind of case had been established by the time the Bill of Rights was adopted. And it is particularly inappropriate to extend that constitutionalization of public access to immigration proceedings, which may disclose the government's sensitive "foreign-policy objectives and \* \* \* foreign-intelligence products and techniques." Reno v. American-Arab Anti-Discrimination Committee, 525 U.S. 471, 491 (1999).

Respondents evidently hold the view that the First Amendment right of access attaches to any kind of administrative proceeding that the responsible Executive Branch officials have generally or presumptively allowed to be open to the public by regulation or practice for a generation. Nothing in this Court's decisions suggests, however, that Congress and the Executive Branch agencies are relegated to such a one-way ratchet in the conduct of administrative proceedings. To the contrary, the Court has stressed that Congress and the agencies are and should be free to modify administrative practices in light of the lessons from experience, as well as extraordinary situations like the present one. Thus, the Court has observed that it is a "very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure." Vermont Yankee

Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 544 (1978). Respondents' approach, which would constitutionalize every regulation or practice extending public access to a government proceeding, might well discourage agencies from opening their proceedings, if the agencies feared that the Constitution would prohibit them from closing those proceedings again.<sup>4</sup>

It is also appropriate to recall that the First Amendment is fundamentally a prohibition against governmental restrictions of dissemination of information by private parties, not a guarantee of access to information held in the hands of the government. See Houchins v. KOED, Inc., 438 U.S. 1, 14 (1978). Although the Court found a narrow exception to

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<sup>4</sup> Respondents note that the Attorney General's regulation that permits public access to certain proceedings, subject to administrative closure authority, dates from the 1960s, but they suggest that a right of public access to deportation proceedings is of much older vintage, dating from immigration statutes and regulations of the 1890s and 1900s that required closure of exclusion proceedings. See Resp. Opp. 11-12. Respondents err, however, in attempting to draw a negative inference from the fact that Congress has historically mandated that exclusion, but not deportation, proceedings must be conducted "separate and apart" from the public. See Resp. Opp. 11. It does not follow that Congress intended to fashion a broad affirmative right of public access to deportation proceedings merely because it did not require that all deportation proceedings be closed, as it required with exclusion proceedings. Congress simply left the matter, like many others, to the Attorney General's very broad discretion in carrying out the Nation's immigration laws. See 8 U.S.C. 1103.

that limited scope of the First Amendment in Richmond Newspapers, the Court laid great stress in that decision on the antiquity of the common law right of the public to attend criminal trials. Outside that narrow exception, the Court has never abandoned its understanding that the First Amendment generally does not secure a right of public access to government operations. See Los Angeles Police Dep't v. United Reporting Publ. Corp., 528 U.S. 32, 40 (1999) (upholding restrictions on the commercial use of the names and addresses of arrestees, explaining that it was "nothing more than a governmental denial of access to information in its possession," and that "California could decide not to give out arrestee information at all without violating the First Amendment") (citing Houchins).

b. It would be particularly unsound to apply the Richmond Newspapers line of cases to proceedings for the removal of an alien. This Court has stressed that immigration matters are "vitally and intricately interwoven with contemporaneous practices in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government," and for that reason are "so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference."

Harisiades v. Shaughnessy, 342 U.S. 580, 589 (1952). The Richmond Newspapers framework that the district court has imposed on the exercise of the power over immigration can scarcely be described as satisfying that requirement of deference. Under the Richmond Newspapers framework, each decision of each immigration judge to close any particular immigration hearing could be subject to reexamination by the federal courts whenever the press sought to challenge a closure decision. That collateral litigation could cause serious delays in removal proceedings as the courts resolved whether the closure decision was warranted under strict scrutiny. It also bristles with the possibility of unwitting disclosures and inappropriate judicial second-guessing of the Executive Branch's judgment that sensitive law enforcement or national security information should be shielded from public disclosure. Cf. American-Arab Anti-Discrimination Committee, 525 U.S. at 490-491 (relying on similar concerns to reject First Amendment-based "selective prosecution" defense to deportation).

Moreover, as the Court further explained in American-Arab Anti-Discrimination Committee, removal proceedings are not punitive in nature: "Even when deportation is sought because of some act the alien has committed, in principle the alien is

not being punished for that act (criminal charges may be available for that separate purpose) but is merely being held to the terms under which he was admitted." 525 U.S. at 491. That central premise of the Nation's immigration laws undermines respondents' argument that extension of Richmond Newspapers to immigration proceedings is necessary to ensure the proper functioning of those laws.

In Richmond Newspapers, the Court rested its conclusion that the First Amendment secured a right of public access to criminal trials in large part on the fact that criminal trials seek to right a wrong done to particular victims and the public and serve a function of catharsis, thus precluding the possibility of vigilante justice. See 448 U.S. at 571. Immigration proceedings, by contrast, do not seek to right a wrong in that way. Rather, they are intended to give effect to a sovereign determination that the presence of a particular kind of alien in the United States does not promote the public interest. These are not circumstances occasioning a need for public catharsis. Many (perhaps most) aliens who are placed in removal proceedings are out of status or were never lawfully present in this country in the first place. Where an alien is charged with removal for having committed a criminal offense, the forum for public catharsis was the criminal

prosecution itself, not the subsequent removal proceeding. The facts rendering the alien removable are often not even disputed, and frequently the only issue is whether the alien will be granted discretionary relief from removal. That sort of discretionary determination by the Executive, which is akin to granting a pardon, see INS v. Yueh-Shaio Yang, 519 U.S. 26, 30 (1996), is far removed from a criminal trial, which Richmond Newspapers addressed.

c. Relying on Zadvydas v. Davis, 121 S. Ct. 2491 (2001), respondents argue that the courts' caution about interfering with the authority of the political Branches in immigration matters extends only to "substantive" determinations about the classes of aliens who are and are not permitted to enter the United States, and not to "procedural" matters such as closure of immigration hearings. As an initial matter, the soundness of respondents' purported distinction between substance and procedure in this context is doubtful, because it fails to acknowledge that procedural requirements often reflect, and encompass, substantive choices. Here, the Attorney General, acting through his delegates, has made a policy decision that the government's interest in protecting the Nation against future acts of terrorism and the effectiveness of the government's ongoing

terrorism investigations requires closure of removal proceedings instituted against aliens in special-interest cases.

Zadvydas does state that the political Branches' authority over immigration is subject to certain constitutional constraints, but that decision does not draw a line between substantive legislative classifications of aliens and other, procedural rules established by the Attorney General. To the contrary, Zadvydas reaffirms that deference extends to "executive \* \* \* decisionmaking" and to procedures adopted by the Attorney General for holding, supervising, and removing aliens. 121 S. Ct. at 2501 (emphasis added); see also Mathews v. Diaz, 426 U.S. 67, 82 (1976) (noting "narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization") (emphasis added); Yamataya v. Fisher, 189 U.S. 86, 97 (1903) (deference extends to executive officers' "enforcement of \* \* \* provisions, conditions, and regulations" for "sending out of the country such aliens as come here in violation of law").

Thus, in Reno v. Flores, 507 U.S. 292 (1993), this Court rejected a challenge to the INS's policy of refusing to consider on a case-by-case basis whether to release minor

aliens into private custody, on the ground that the agency's blanket approach was within its plenary authority over immigration matters. Id. at 305-306, 308. In Flores, the challenged policy implemented and enforced Congress's statutory directive to the Attorney General to determine the conditions under which aliens would be released, and was clearly "procedural" in the sense that respondents use that term. Id. at 294-295 & n.1. The Court nonetheless applied the deferential standard of review accorded immigration regulations to reject a due process challenge and uphold the policy as "advancing [a] legitimate governmental purpose." Id. at 305-306.

Similarly, in Landon v. Plasencia, 459 U.S. 21 (1982), this Court considered a due process challenge to the summary procedures under which a permanent resident alien was denied reentry to the United States. The Landon Court emphasized that the determination of what procedures to provide was "a sovereign prerogative, largely within the control of the executive and the legislature," and thus was subject to deferential review. Id. at 34. Here, too, deference is appropriate, whether the closure requirement is deemed substantive or procedural.

In any event, in Zadvydas itself the Court carefully and

specifically distinguished the situation before it from "terrorism or other special circumstances where special arguments might be made \* \* \* for heightened deference to the judgments of the political branches with respect to matters of national security." 533 U.S. at 696. That is this case.

3. Concerning the stay equities, we have explained that the potential threat to national security from disclosure of sensitive information related to the government's terrorism investigations, including the identities of special-interest aliens, weighs powerfully in favor of a stay. See pp. 5-7, supra; Stay Appl. 7-11, 31-34. Respondents offer no practical mechanism by which the identities of those aliens could be maintained in confidence under the district court's injunction.

On the other side of the scale, a stay would merely defer the newspapers' opportunity to gain access to the removal proceedings that are closed under the Creppy directive until the expedited appellate proceedings in this case are completed. Citing Elrod v. Burns, 427 U.S. 347, 373 (1976) (plurality opinion of Brennan, J.), respondents assert that "even the temporary loss of First Amendment rights constitutes irreparable injury." That assertion of urgent and irreparable injury is substantially undermined by respondents' own delay

of more than three months between the time that one of their reporters was first denied access to a proceeding covered by the Creppy directive on November 22, 2001, and their filing suit on March 6, 2002. See Resp. Opp. 2-3.

Moreover, there is no question here of preventing anyone from exercising any of the long-recognized First Amendment rights to speak, or publish, or conduct political activity. Rather, respondents seek to establish a new First Amendment right of access to Executive Branch proceedings. That asserted right has gone unrecognized for two centuries of this Nation's constitutional history, and it is incompatible with longstanding administrative rules and practices, including the conduct of special-interest cases connected to the ongoing terrorism investigations since September 11. The asserted right of access also is incompatible with the substantial interest in protecting the safety and privacy of the vast majority of special-interest aliens who have chosen not to disclose their status to the press or public.

If a stay is denied, the harms that would result from disclosure can never be undone. In view of the potentially drastic consequences of opening removal proceedings in special-interest cases, including disclosing the aliens' identities, a brief stay of the district court's injunction

that enforces that newly-discovered constitutional right is warranted.

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For the foregoing reasons, as well as those set forth in our application, the preliminary injunction entered on May 28, 2002, by the United States District Court for the District of New Jersey in this case should be stayed pending the final disposition of the government's appeal of that injunction to the United States Court of Appeals for the Third Circuit.

Respectfully submitted.

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