

**First Amendment Center  
Interview Hotsheet**

**Rights of Access to Information**

**Does the First Amendment’s protection of press freedom provide an affirmative “right of access” to government-controlled information, institutions and events?**

**The Aftermath of Sept. 11**

After the horrific events of Sept. 11, the executive and administrative branches of government instituted a series of actions and policies to control access to information, institutions and events deemed vital to the nation’s security.

As the government investigation of the terrorist attacks proceeded in secrecy, members of the press and various civil liberties groups complained that their ability to gather information was being severely restricted. Several lawsuits have challenged the restrictions on First Amendment grounds. The litigation has resulted in mixed decisions among the federal courts. Clearly, there is a struggle to reconcile the requirements of national security with the First Amendment guarantees of a free press and the importance of an informed electorate. First Amendment jurisprudence provides some guidelines, but the issue remains generally unresolved by the courts.

**Post-9/11 Federal Cases**

- The government detained more than 1,100 non-American citizens for alleged immigration violations or as “material witnesses” to the terrorist attacks of 9/11. On Sept. 21, 2001, Chief Immigration Judge Michael Creppy issued a directive mandating that deportation proceedings be conducted in secret without access by the press or public in all cases deemed by the Justice Department to be of “special interest” to the Sept. 11 investigation. Reporters and civil liberties groups sued the Justice Department, claiming the First Amendment prohibits the government from categorically barring them from deportation proceedings without a particularized showing in a given case that closure is necessary for security reasons. In *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002), the 6<sup>th</sup> Circuit held that the “Creppy directive” violates the First Amendment as interpreted in the *Richmond Newspapers* line of cases (*see below*) in that it does not obligate the hearing judge to make a particularized showing in each instance of a compelling reason for closure. But the 3rd Circuit upheld the directive, citing compelling national-security concerns, in *New Jersey Media Group v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002). Despite the conflict in the circuit court holdings, the Supreme Court denied an appeal from the 3<sup>rd</sup> Circuit by the New Jersey Media Group (May 27, 2003).

- On Oct. 12, 2001, U.S. Attorney General John Ashcroft issued a memorandum to federal agency heads that substantially broadened the agencies' discretion to deny access to information requested under the Freedom of Information Act. Ashcroft maintained that although the Department of Justice was committed to full compliance with the FOIA, it was nevertheless "equally committed" to protecting other "fundamental values," which included "safeguarding our national security." The memorandum has been controversial and has spawned several FOIA cases relating to post-9/11 issues.

On Oct. 29, 2001, various public-interest organizations submitted FOIA requests to the DOJ, INS, and FBI seeking disclosure of the identities, locations of arrest, current whereabouts, nature of charges, names of attorneys and similar information about the detainees. When the request was substantially denied by the agencies, citing security concerns, plaintiffs filed suit. The district judge ordered the government to release the names of the detainees and their attorneys, while denying access to information about the dates and locations of arrest, detention and release. *Center for National Security Studies v. Department of Justice*, 215 F.Supp.2d 94 (D.C. District Court 2002).

On appeal, the U.S. Circuit Court of Appeals for the District of Columbia overruled the district court decision (June 17, 2003). In a 2-to-1 opinion, the court held that the information was properly withheld from the press under the national-security exemptions in the Freedom of Information Act. Further, the court refused to "expand the First Amendment right of public access to require disclosure of information compiled during the government's investigation of terrorist acts." The Center for National Security Studies appealed to the Supreme Court but was denied certiorari (Jan. 12, 2004).

- The arrest and indictment of Zacarias Moussaoui on terrorism charges has spawned several access opinions. Most recently, the 4th Circuit denied the government's request to close a hearing on national-security grounds, stating that the "value of openness in judicial proceedings can hardly be overestimated."

In a further series of remarkable events in the case, U.S. District Judge Leonie Brinkema ruled that the government must allow Moussaoui access to interview as a witness an alleged al-Qaida member who was taken into U.S. custody in Pakistan as an enemy combatant. The 4th Circuit dismissed the government's appeal of the order despite the government's threat to abandon the judicial proceedings and to try Moussaoui as an enemy combatant in a military tribunal. *United States v. Moussaoui*, 333 F.3d 509 (4th Cir. 2003), *rehearing denied* 336 F.3d 279 (4th Cir. 2003). The government challenged the court by refusing to allow Moussaoui to depose the potential witness, but the court avoided the challenge to its

legitimacy by foregoing the usual sanction (dismissal) and by resorting instead to nontraditional sanctions. The district court barred the government from seeking the death penalty and from introducing any evidence related to the Sept. 11 attacks. *United States v. Moussaoui*, 282 F.Supp.2d 480 (E.D.Va. 2003). This kept the Moussaoui trial in the criminal justice system and allowed the government to present its conspiracy case against Moussaoui without restraining his Sixth Amendment right to present a witness in his defense.

### Supreme Court

**“... the public’s interest in knowing about its government is protected by the guarantee of a Free Press, but the protection is indirect. The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act.” *Houchins v. KQED*, 438 U.S. 1, 15 (1978)**

The post-9/11 access cases presently in the federal courts present the controversy: Does the First Amendment provide some protection for news and information gathering, and to what extent may the government restrict access to information by alleging national-security interests or intelligence concerns? The courts are looking to settled bodies of First Amendment law to piece together a framework for balancing security concerns with constitutional freedoms.

There is no Supreme Court case holding that the First Amendment guarantees a general “right of access” to government information. The first Supreme Court case on the issue was *Zemel v. Rusk*, 381 U.S. 1 (1965), in which the Court held that “the right to speak and publish does not carry with it the unrestrained right to gather information.” There is, however, a patchwork of Supreme Court and lower court decisions concerning press and public access to specific types of government-controlled information, institutions, and events. In only a few matters have the courts been willing to grant an unqualified First Amendment right of access to the press or public. The Supreme Court has nevertheless recognized that freedom of the press would be “eviscerated” without some form of protection for gathering information and news. See *Branzburg v. Hayes*, 408 U.S. 665 (1972).

### Access to Judicial Proceedings

**“People in an open society do not demand infallibility from their institutions, but it is difficult to accept what they are prohibited from observing.” *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980)**

Perhaps the most well-developed law governing information and press access is that relating to access to criminal judicial proceedings. In *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980), newspaper reporters filed suit after being denied access to a

criminal murder trial. The Court held that although such a right of access was not specifically enumerated in the Constitution, the right to attend criminal trials was “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 would be eviscerated.”

The Court noted that historically, criminal trials were open to the public, “thus giving assurance that the proceedings were conducted fairly to all concerned and discouraging perjury, the misconduct of participants, or decisions based on secret bias or partiality.” The appearance of justice, the Court said, can best be satisfied when people are allowed to observe the process. Unless an “articulated finding” of an “overriding interest” is made (such as protecting the defendant’s right to a fair trial), the trial of a criminal case must be open to the public.

Subsequent Supreme Court trial-access cases affirmed that trial (and preliminary hearings) may be closed only upon a showing that closure is essential to a “higher interest” and narrowly tailored to serve that interest. Unless there is a “substantial probability” that access would deprive a defendant of a fair trial, the proceedings must remain open to the press. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982); *Press Enterprise Co. v. Superior Court of California*, 478 U.S. 1 (1986).

The *Globe Newspaper* case infers a three-part test to determine whether the press is entitled to access to government-controlled information, activities, or events. First, the government activity or event must have a history of being open to the press. Second, press access must play a significant role in the function of the government activity. Finally, even if the first two prongs are met, press access can nevertheless be limited if a compelling government interest exists and the limits are narrowly tailored to meet the compelling interest.

In open proceedings in the post-9/11 cases regarding press access to government activities and information, *Richmond Newspapers* and its progeny are cited as key precedents. However, there is no way of knowing if the government was held to these standards in closed proceedings, particularly in the case of post-9/11 detainees. In *M.K.B. v. Warden*, the Supreme Court denied certiorari for a detainee and also denied a media motion to intervene in the case, all without citing precedent or allowing the movants to read the government’s brief. 124 S.Ct. 1405 (2004).

### **Access to Institutions**

In *Pell v. Procunier*, 417 U.S. 817 (1974), however, the Court found that the press did not have a constitutional right of access greater than that afforded to the public. In *Pell*, reporters sued to gain access to a prison to freely interview certain inmates. The Court noted that the press did have some rights of access to visit the prisons and to freely interview random prisoners, but it could not demand face-to-face interviews with specifically designated inmates. The Court went on to note that the press and the public are regularly excluded from grand jury proceedings, judicial conferences, scenes of crime or disaster, meetings of some official bodies, and meetings of private organizations. The

Constitution does not impose upon government “the affirmative duty to make available to journalists sources of information not available to members of the public generally.”

### Sources

*Houchins v. KQED*, 438 U.S. 1 (1978)

*Zemel v. Rusk*, 381 U.S. 1 (1965)

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Department of Justice FOIA Memorandum posted at:

[www.usdoj.gov/oip/foiapost/2001foiapost19.htm](http://www.usdoj.gov/oip/foiapost/2001foiapost19.htm)