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UB Viewpoint – Dissolving the Shadows

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"Democracies die behind closed doors."Sometime this term, the U.S. Supreme Court may be asked to decide whether that proposition — so eloquently expressed by Judge Damon J. Keith of the Sixth Circuit Court of Appeals — can survive in a post-9/11 world.Ten days after the World Trade Center attack, Chief Immigration Judge Michael Creppy ordered all federal immigration judges to bar the press and public from deportation or "removal" proceedings involving persons of "special interest" — that is, persons possibly connected to terrorism.The order was challenged by the Detroit Free Press and others seeking access to a bond hearing for Rabih Haddad, a Lebanese native whom the government suspected of supporting terrorism through a charity he founded. It was also challenged by New Jersey newspapers who were denied access to hearings and docket information by the immigration court in Newark.Both district courts held that the closure order violated the First Amendment. The Sixth Circuit unanimously affirmed, but a Third Circuit panel voted 2-1 to reverse. All of the courts applied the analytical test of Richmond Newspapers v. Virginia and its progeny. Under that test, an adjudicatory proceeding is presumptively open if such proceedings have been historically open (the "experience" prong) and if openness serves important social values (the "logic" prong). The presumption may be rebutted, however, by findings that the government has an overriding interest at stake, that closure is essential to serve that interest, and that the closure order is narrowly tailored. While the Sixth Circuit agreed that the government had a compelling interest in preventing terrorism, it rejected the government's arguments at every other step. "The Executive Branch seeks to uproot people's lives, outside the public eye, and behind a closed door," the court said. "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."The Third Circuit, however, never reached the strict scrutiny analysis. Instead, it broke with its own precedents to read the logic prong as a balancing test. Rather than simply considering whether openness served important social values, the court balanced those values against the generalized and unsubstantiated fears expressed in an FBI report.National security is properly part of the closure analysis, but the Third Circuit's approach would give the Executive Branch unprecedented authority to operate in secrecy by blanket order with neither case-by-case findings nor judicial review. The Supreme Court must resolve this split in the circuits in favor of openness, for, in the words of the Sixth Circuit, "A government operating in the shadow of secrecy stands in complete opposition to the society envisioned by the Framers of our Constitution."

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