National Security and Access, a Structural Perspective

Matthew L. Schafer*

INTRODUCTION

All the President's Men and *Snowden* romanticize the tradecraft of national security reporters: shadowy parking garages and confidential sources; recently, encrypted communications and digital rendezvous. Another important tool, rarely seen and shrouded by much less intrigue, is public access to court proceedings.[1] Public access has uncovered spy swaps, exposed civil rights abuses in the war on terror, and unveiled attempts to sow discord around the world. Yet much remains trapped in courthouse vaults and behind courthouse doors. This article explains why, focusing on successful arguments made by the government in the past and on the current test employed by courts to decide whether to close proceedings or seal documents. It also suggests how courts might respond to these arguments and tweak the existing test for closure, especially, in litigation that implicates national security concerns.

Public access to court proceedings is a constitutional dictate. The United States has an "unbroken, uncontradicted history" of public access to court proceedings.[2] In 1907, the U.S. Supreme Court said that "the theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court."[3] It later said that a "trial is a public event" and "[w]hat transpires in the court room is public property."[4] And, in 1980, in *Richmond Newspapers, Inc. v. Virginia*, it held that the press and public have a First Amendment right of access to criminal trials: "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing."[5]

Access arrived late in the Court's First Amendment jurisprudence. By 1980, Justice Holmes' marketplace of ideas theory—the now-quaint belief that truth will win out over falsity if given the

* Adjunct Professor, Media Law, Fordham University School of Law. I appreciate the input of David A. Schulz, Lee Levine, Heidi Kitrosser, Jonathan Manes, Hannah Bloch-Wehba and others who provided useful comments on a version of this article presented at Yale Law School's Freedom of Expression Scholars Conference.

[1] Of course, *All the President's Men* does depict Bob Woodward in superior court sitting in on an initial appearance of the men arrested at the Watergate. *See* ALL THE PRESIDENT'S MEN (Wildwood Enterprises 1976).

[2] Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 573 (1980) (plurality opinion).

[3] Patterson v. Colorado, 205 U.S. 454, 462 (1907).

[4] Craig v. Harney, 331 U.S. 367, 374 (1947); *see also, e.g.*, Estes v. Texas, 381 U.S. 532, 541-42 (1965) ("[R]eporters of all media, including television, are always present if they wish . . . .").

[5] *Richmond Newspapers, Inc.*, 448 U.S. at 572 (plurality opinion).

chance—was already sixty years old.[6] Nearly twenty-years-old was *New York Times v. Sullivan*'s recognition that the "central meaning of the First Amendment" is ensuring free trade in political speech.[7] But the Court has never decisively linked the right of access to these or any other First Amendment theory. At worst, its case law can be read to eschew theory in favor of mechanical tests for determining when a right of public access applies and when it is overcome. At best, it can be read as suggesting that access exists to "ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government."[8] While the latter approach is the more faithful reading, the failure of the Court to address the right of access for nearly three decades has left lower courts without guidance on this point.[9] And it is an important point: *why* the right of access matters affects how courts enforce it.

Nearly twenty years after 9/11, the executive branch has weaponized this ambiguity in favor of secrecy.[10] Courts are without power, it argues, "'to compel a breach in the security which [the executive] branch is charged to protect.'"[11] The result is a war on terror that is covert on the battlefield and, many times, in the courtroom. This has led to frank assessments by Carol Rosenberg, the dean of Guantánamo Bay reporters: "Something Classified Was Scheduled at Guantánamo. A Judge Stopped It. What it was remains a mystery, and a federal court provided no information in halting it. Welcome to the military commission system."[12] Even when military commission transcripts and records are released, they are delayed for weeks and are replete with

[6] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[7] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 273-76 (1964).

[8] Globe Newspaper Co. v. Super. Ct., 457 U.S. 596, 604 (1982).

[9] *See* Mary-Rose Papandrea, *Under Attack: The Public's Right to Know and the War on Terror*, 25 B.C. THIRD WORLD L.J. 35, 36 (2005) (noting that there has been "long-standing doctrinal confusion" relating to the right of access).

[10] Meredith Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 ADMIN. L. REV. 131, 134-36 (2006).

[11] Opening Brief for the United States at 19, In re: Certification of Questions of Law to the Foreign Intelligence Surveillance Ct. of Rev., No. FISCR 18-01 (FISA Ct. Rev. Mar. 16, 2018) [hereinafter *Certification of Questions of Law*].

[12] Carol Rosenberg, *Something Classified Was Scheduled at Guantánamo. A Judge Stopped It.*, N.Y. TIMES (Sept. 26, 2019), https://perma.cc/4ESQ-X2ZA; *see also, e.g.*, Cameron Stracher, *Eyes Tied Shut: Litigating for Access Under CIPA in the Government's "War on Terror,"* 48 N.Y.L. SCH. L. REV. 173, 173 (2003-2004).

redactions even to public testimony.[13] The proceedings and records of Article III courts, while faring better, are not immune to metastasizing secrecy.[14]

The spread of secrecy in our courts—even in proceedings implicating national security concerns—runs counter to our tradition of public justice and make a reporter's job of informing the public about what its government is up to much more difficult if not impossible in some cases. As Judge Kaplan said in this Journal in advocating for Article III courts' ability to try terrorism cases, "One of the core values of this nation, whatever our faults, is our belief that no one may be punished unless there is a fair, *open*, and independent judgment of guilt."[15] It was not too long ago, after all, that the Supreme Court observed, "[W]e have been unable 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."[16] Publicity is, as Jeremy Bentham put it, "the soul of justice."[17]

While this tradition of access is widely recognized, the Supreme Court has never definitively explained *why* we have this tradition, nor why it should be enforced today. This article provides helpful principles to begin answering that question. Specifically, it suggests employing a structural approach to access that is guided by the interests that access plays throughout the Constitution. Stated simply, access should be understood as a tool for protecting other interests deemed important under the Constitution and the Bill of Rights.

Using this approach, courts should engage in an interest-based inquiry to determine whether a right of access applies to a particular proceeding by reference to the functions that access plays throughout the Constitution. If access applies, courts should then ask whether there is a compelling interest that is substantially likely to be harmed absent narrowly tailored closure. If such a showing is made, courts must then balance the likely harm to the compelling interest resulting from disclosure against the harm to interests protected by access. Only if the harm to the compelling interest outweighs the harm to the interests of access should closure be allowed. These are not

---

[13] Carol Rosenberg, *The Growing Culture of Secrecy at Guantánamo Bay*, N.Y. TIMES (Apr. 4, 2020), https://perma.cc/5DKS-32BU; Carol Rosenberg, *Guantánamo prosecutor defends retroactive censorship of public hearing in 9/11 case*, MIAMI HERALD (Feb. 4, 2016, 11:55 AM), https://perma.cc/2MND-KND7.

[14] *See, e.g.*, Sean Gallagher, *FBI misused surveillance data, spied on its own, FISA ruling finds*, ARS TECHNICA (Oct. 9, 2019, 10:21 AM), https://perma.cc/YVN7-DMX6; Mike Scarcella, *D.C. Circuit Abruptly Closes Courtroom in Guantánamo Case*, BLOG LEGALTIMES (Apr. 5, 2010, 12:51 PM), https://perma.cc/3LRL-FTSU.

[15] Hon. Lewis A. Kaplan, *The Implications of Trying National Security Cases in Article III Courts*, 8 J. NAT'L SECURITY L. & POL'Y 337, 346 (2016) (emphasis added).

[16] *In re* Oliver, 333 U.S. 257, 266 (1948).

[17] JEREMY BENTHAM, A TREATISE ON JUDICIAL EVIDENCE 67 (1825).

small, trivial concerns. Where the right of access is vindicated, our constitutional system itself is vindicated.

A few qualifications: Because five members of the Court have never recognized that the press has a superior right of access to the public, this article focuses on the right of access generally – as opposed to some special right of access of the press. But it should not be forgotten that the right of access is a *means* by which the public is informed, it is not the *ends*. It is the dogged national security reporters who play a lead role in taking that the means of access and turning it into something the public can act on. It is through this work that the public learns of both the right and the wrong done in its name. And it is through this reporting that the public may reward the right, and punish wrong, in the never-ending process of self-governance. Nor does this article focus on how far the right of access may stretch. Its focus is on the right of access to judicial or quasi-judicial proceedings, and not to other government proceedings or records.[18] Despite this, there are convincing arguments in favor of a right of access untethered from judicial or quasi-judicial proceedings.

With these qualifications out of the way, this article proceeds in six parts. Parts I and II trace the Supreme Court's access jurisprudence and identify the problems that have arisen out of it. Part III provides support for a structural approach to understanding the right of access and the interests it is meant to serve as informed by the Constitution and the Bill of Rights. Parts IV and V then isolate two such interests: a separation of powers role and an equipping role where access ensures that the electorate has information on which it can base democratic choice. Finally, Part VI suggests how courts can account for the importance of these constitutional interests in assessing whether a right of access should attach to a particular proceeding and, if it does, when it properly may be overcome.

I. A PRIMER ON THE COURT'S ACCESS JURISPRUDENCE

The meat of the Supreme Court's access jurisprudence spans just over ten years from 1974 to 1986.[19] Prior to 1974, lower courts were trending toward recognizing a First Amendment right of

[18] A structural theory of the right of access implicates access not only to judicial proceedings but to the government in general. *See, e.g.*, Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 584 (1980) (Stevens, J., concurring) ("I agree that the First Amendment protects the public and the press from abridgment of their rights of access to information *about the operation of their government*, including the Judicial Branch." (emphasis added)).

[19] Press-Enterprise Co. v. Super. Ct., 478 U.S. 1, 8-10 (1986) [hereinafter *Press-Enterprise II*]; Press-Enterprise Co. v. Super. Ct., 464 U.S. 501 (1984) [hereinafter *Press-Enterprise I*]; Globe Newspaper Co. v. Super. Ct., 457

access to certain government information based on it being a necessary "antecedent to . . . [the] First Amendment right to publish."[20] In its earliest cases on the issue, the Supreme Court arrested this development when it declined to recognize a free-floating right of access to certain information within the control of the executive. Still, those cases were decided by such thin margins (in one case, 3-1-3[21], in two others 5-4[22]) that their import is unclear.

Beginning in the late seventies and early eighties, however, the Court changed course and recognized for the first time a constitutional right of access to certain government proceedings and information under the First Amendment. Yet, these later decisions, the first of which produced only a plurality opinion and four concurring opinions, were marred by disputes over the nature of the newly recognized right and its scope. Moreover, subsequent opinions that did marshal a majority appeared contradictory. As a result, a primer on the Court's access jurisprudence is necessary to understand the individual justices' reasoning in these early cases and the state of the law today.

A. Early Access Jurisprudence

Access litigation began in the early 1970s with demands for press access to prisons during a time where prison conditions and rioting were at the center of the public's consciousness. In two cases decided by the Supreme Court on the same day, *Pell v. Procunier* and *Saxbe v. Washington Post*, the press challenged state and federal restrictions on interviews with inmates, seeking special access beyond that accorded the general public.[23] The Supreme Court rejected that idea. Emphasizing that none of the regulations at issue "conceal[ed] the conditions in its prisons or . . . frustrate[d] the press' investigation and reporting of those conditions" in light of alternative avenues of access, the Court found that the "Constitution does not . . . require government to accord the press *special access* to information not shared by members of the public generally."[24]

U.S. 596 (1982); *Richmond Newspapers, Inc.*, 448 U.S. 555 (plurality opinion); Houchins v. KQED, Inc., 438 U.S. 1 (1978) (3-1-3) (plurality opinion); Pell v. Procunier, 417 U.S. 817 (1974); Saxbe v. Wash. Post Co., 417 U.S. 843 (1974); *see also* El Vocero de Puerto Rico (Carribean Intern. News Corp.) v. Puerto Rico, 508 U.S. 147 (1993) (per curiam).

[20] *See, e.g.*, Washington Post Co. v. Kleindienst, 494 F.2d 994, 998 (D.C. Cir. 1974); McMillan v. Carlson, 369 F. Supp. 1182, 1188 (D. Mass. 1973) ("The Bureau's total ban policy of personal interviews of an inmate by an author is an invalid restriction of First Amendment rights of freedom of speech."); Houston Chron. Publ'g Co. v. Kleindienst, 364 F. Supp. 719, 731 (S.D. Tex. 1973).

[21] *Houchins*, 438 U.S. 1.

[22] *Pell*, 417 U.S. 817; *Saxbe*, 417 U.S. 843.

[23] *Pell*, 417 U.S. at 829; *Saxbe*, 417 U.S. at 849.

[24] *Pell*, 417 U.S. at 830, 834 (emphasis added).

Four justices disagreed. As Justice Powell put it, "At some point official restraints on access to news sources, even though not directed solely at the press, may so undermine the function of the First Amendment that it is both appropriate and necessary to require the government to justify such regulations in terms more compelling than discretionary authority."[25] Justice Douglas, joined by Justices Brennan and Marshall, also dissented, observing that the news organizations were not seeking to vindicate their own rights, "but rather the right of the people, the true sovereign under our constitutional scheme, to govern in an informed manner."[26] As such, the ban amounted to "an unconstitutional infringement on the public's right to know protected by the free press guarantee of the First Amendment."[27] Prisons, "like the economy, health, education, defense, and the like, [are] a matter of grave concern in our society," making the "public's interest in being informed about prisons . . . paramount."[28]

Five years later in *Houchins v. KQED, Inc.*, a San Francisco radio station requested and was denied permission to take photographs of certain parts of the Santa Rita jail.[29] The station sued, and, thereafter, the warden instituted a public tour program that restricted interaction with inmates, any audio/visual recording, and access to particular parts of the prison the press wished to visit.[30] Reversing the Ninth Circuit's opinion finding that members of the press had a constitutional right of access in excess of what the public tours provided, a three-judge plurality found that "[n]either the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control."[31]

Relying on *Pell* and *Saxbe*, Chief Justice Burger, writing for the plurality on behalf of himself and Justices White and Rehnquist, said that the "Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act."[32] Instead, the plurality saw the issue as a matter of

---

[25] *Saxbe*, 417 U.S. at 860 (Powell, J., dissenting); *see also id.* at 862 ("What is at stake here is the societal function of the First Amendment in preserving free public discussion of governmental affairs."); *Pell*, 417 U.S. at 835 (Powell, J., dissenting in relevant part) ("California's absolute ban against prisoner-press interviews impermissibly restrains the ability of the press to perform its constitutionally established function of informing the people on the conduct of their government.").

[26] *Pell*, 417 U.S. at 839-40 (Douglas, J., dissenting).

[27] *Id.* at 841.

[28] *Id.* at 840.

[29] Houchins v. KQED, Inc., 438 U.S. 1, 3 (1978) (plurality opinion). Justice Marshall did not participate in light of the involvement of the NAACP in the case. Justice Blackmun did not participate as he was recovering from an operation.

[30] *Id.* at 4.

[31] *Id.* at 15.

[32] *Id.* at 14 (quoting Potter Stewart, *Or of the Press*, 26 HASTINGS L. J. 631, 636 (1975)).

policy: "Whether the government should open penal institutions in the manner sought by respondents is a question of policy which a legislative body might appropriately resolve one way or the other."[33] At any rate, alternatives existed by which prison conditions could be monitored, including citizen task forces, prison visitation committees, and grand juries that could investigate abuses.[34] Moreover, journalists themselves had other avenues of access to information: they could attend the public tours, correspond with inmates, interview inmates' legal counsel, and gather information from "former inmates, visitors to the prison, public officials, and institutional personnel."[35]

Concurring in the judgment, Justice Stewart agreed that there was no First Amendment "right of access to information generated or controlled by government," nor did the First Amendment "guarantee the press any basic right of access superior to that of the public generally."[36] Stewart "part[ed] company" with the plurality, however, in applying those principles.[37] News organizations, unlike private citizens, did not tour jails for their own "edification."[38] They are "there to gather information to be passed on to others, and [this] mission is protected by the Constitution for very specific reasons."[39] The press, Stewart said, "awaken[ed] public interest in governmental affairs, expos[ed] corruption among public officers and employees and generally inform[ed] the citizenry of public events and occurrences."[40] Because of the importance of these functions, the "Constitution requires sensitivity to that role, and to the special needs of the press in performing it effectively."[41] As such, Stewart would have afforded some injunctive relief, allowing, for example, audio/visual recording because the First Amendment required the prison administration "to give members of the press *effective* access."[42] Because he agreed that the injunction below was too broad, however, he concurred in the judgment vacating the order and left it to the lower court to decide on remand whether some limited injunctive relief would be proper.[43]

---

[33] *Id.* at 12.
[34] *Id.* at 12-13.
[35] *Id.* at 15.
[36] *Id.* at 16 (Stewart, J., concurring in judgment).
[37] *Id.*
[38] *Id.* at 17.
[39] *Id.*
[40] *Id.* (quoting Estes v. Texas, 381 U.S. 532, 539 (1965)).
[41] *Id.* at 17.
[42] *Id.*
[43] *Id.* at 18.

Justice Stevens, along with Justices Brennan and Powell, dissented. They observed that, despite *Pell*, "the Court has never intimated that a nondiscriminatory policy of excluding entirely both the public and the press from access to information about prison conditions would avoid constitutional scrutiny."[44] At no point did *Pell* "imply that a state policy of concealing prison conditions from the press . . . could have been justified simply by pointing to like concealment from . . . the general public."[45] Yet, in case before the Court, "broad restraints on access to information" existed, which offended the "core objective" of the First Amendment to preserve "the full and free flow of information to the general public."[46] This free flow of information was vital to a "system of self-government": "Without some protection for the acquisition of information about the operation of public institutions such as prisons by the public at large, the process of self-governance contemplated by the Framers would be stripped of its substance."[47]

This logic was especially applicable to prisons. Prisons are "public institutions, financed with public funds and administered by public servants" and are an "integral component of the criminal justice system."[48] Further, the Sixth Amendment requires a "public trial," and the public interest in monitoring the judiciary "survives the judgment of conviction and appropriately carries over to an interest in how the convicted person is treated during his period of punishment and hoped-for rehabilitation."[49] Prisons also were home to pretrial detainees in whom "[s]ociety has a special interest in assuring that unconvicted citizens are treated in accord with their status."[50] For all these reasons, the dissenters would have affirmed the Ninth Circuit.[51]

Finally, in 1979, the Court considered the bookend to these early cases: whether the press and the public, under the First or Sixth Amendments, had a right of access to a pre-trial suppression proceeding.[52] In a 5-4 decision, the Court rejected the idea that such a right existed under the Sixth Amendment. While the Sixth Amendment protected the right to a public trial, that right was

---

[44] *Id.* at 27-28 (Stevens, J., dissenting). Unlike the plurality and concurring opinions, Stevens believed that the Court should have assessed the amount of access that existed prior to the lawsuit being filed and not, for example, the public tours that were instituted in the wake of the lawsuit.

[45] *Id.* at 29; *see also id.* ("If that were not true, there would have been no need to emphasize the substantial press and public access reflected in the record of that case.").

[46] *Id.* at 30.

[47] *Id.* at 31-32.

[48] *Id.* at 36.

[49] *Id.* at 36-37.

[50] *Id.* at 37-38.

[51] *Id.* at 40.

[52] Gannett Co. v. DePasquale, 443 U.S. 368, 370-71 (1979).

"personal to the accused," despite the "strong societal interest in public trials."[53] While the presence of the press and the public could "improve the quality of testimony," "induce unknown witnesses to come forward," and "cause all trial participants to perform their duties more conscientiously," those interests were "a far cry . . . from the creation of a constitutional right on the part of the public."[54]

As to the First Amendment argument, the Court observed that in *Pell*, *Saxbe*, and *Houchins*, it had "upheld prison regulations that denied to members of the press access to prisons superior to that afforded to the public generally."[55] Citing to the dissenters in those cases, it noted, however, that members of the Court believed that "the First and Fourteenth Amendments do guarantee to the public in general, or the press in particular, a right of access that precludes their complete exclusion in the absence of a significant governmental interest."[56] Nevertheless, the Court declined to expressly "narrow" those cases at that time.[57] Even assuming that the First and Fourteenth Amendments protected a right of access, the trial court gave that right "all appropriate deference" in the case before it.[58] Thus, the Court affirmed the lower court's opinion.

Justice Powell concurred to address the First Amendment question that the majority reserved.[59] Invoking his prior opinion in *Saxbe*, Powell said he would have recognized a First Amendment right of access based on the "importance of the public's having accurate information concerning the operation of its criminal justice system."[60] Because the task of deciding whether a right of access should be enforced was a trial court decision, he said, it was vital that the Court "identify for the guidance of trial courts the constitutional standard by which they are to judge whether closure is justified."[61] Access was a question of "striking th[e] balance" between the First Amendment's guarantee and the defendant's fair trial rights under the Sixth Amendment.[62]

The remainder—Justices Blackmun, Brennan, White, and Marshall—would have recognized a public right of access under the Sixth Amendment. The First Amendment avenue, Blackmun

---

[53] *Id.* at 380-83; *see also id.* ("Our cases have uniformly recognized the public-trial guarantee as one created for the benefit of the defendant.").
[54] *Id.* at 383.
[55] *Id.* at 391.
[56] *Id.* at 391-92.
[57] *Id.* at 392.
[58] *Id.*
[59] *Id.* at 397 (Powell, J., concurring).
[60] *Id.*
[61] *Id.* at 398.
[62] *Id.* at 399.

wrote, seemed to be foreclosed by *Pell* and *Saxbe*: "this Court heretofore has not found . . . any First Amendment right of access to judicial or other governmental proceedings."[63] The Sixth Amendment's public trial provision, however, "embodie[d] our belief that secret judicial proceedings would be a menace to liberty."[64] Tracing the history of public trials at common law, Blackmun concluded that the Sixth Amendment, adopted against that backdrop, protected not just the accused's right to a public trial but also society's interests in seeing justice done—an interest that "exists separately from, and at times in opposition to, the interests of the accused."[65]

B. Richmond Newspapers, Inc. *and Its Progeny*

1. *Richmond Newspapers, Inc. v. Virginia*

In his concurring opinion in *Gannett*, Justice Powell suggested that the Court would eventually recognize a constitutional right of access based on his views and those of the Justice Blackmun in that case.[66] He was right. One year after *Gannett*, the Court would do just that in *Richmond Newspapers, Inc. v. Virginia*. There, Virginia tried to convict John Stevenson three separate times—each time, the verdict was either reversed or a mistrial declared.[67] At his fourth trial, the defense counsel made a motion to close the courtroom, which the court granted.[68] Richmond Newspapers, Inc. then made a motion to vacate the closure order.[69] The trial court, however, found that if the "rights of the defendant are infringed in any way," it was inclined to close the courtroom and, thus, denied the motion.[70]

After the Virginia high court declined review, the Supreme Court took up the case because it was "reasonably foreseeable that other trials may be closed by other judges without any more showing of need than is presented on this record."[71] The Court reversed the trial court and recognized by a 7-1 margin a right of access to a criminal trial under the First Amendment.[72]

---

[63] *Id.* at 411 (Blackmun, J., concurring in part and dissenting in part).
[64] *Id.* at 412.
[65] *Id.* at 427.
[66] *Id.* at 398 (Powell, J., concurring).
[67] Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 559 (1980) (plurality opinion).
[68] *Id.* at 559-60.
[69] *Id.* at 561.
[70] *Id.*
[71] *Id.* at 563.
[72] *Id.* at 580-81; *id.* at 581-82 (White, J., concurring); *id.* at 582-84 (Stevens, J., concurring); *id.* at 584-98 (Brennan, J., concurring in judgment); *id.* at 598-601 (Stewart, J., concurring in judgment); *id.* at 601-04 (Blackmun, J., concurring in judgment).

Despite that spread, there was no majority opinion. Chief Justice Burger wrote the plurality opinion for himself and Justices White and Stevens. Both White and Stevens wrote their own concurring opinions. Justice Brennan, joined by Justice Marshall, concurred in judgment, while Justices Stewart and Blackmun separately did the same. Only Justice Rehnquist rejected the First Amendment right of access.[73]

While the plurality found the right of access to be rooted in the First Amendment, it spent little time on that Amendment. Instead, it focused on the centuries-old public nature of criminal trials at common law, which extended to the colonies: "openness of trials was explicitly recognized as part of the fundamental law of the Colony."[74] It was the Continental Congress that singled out the trial, among other "'fundamental rights of the colonists,'" as occurring "'in open Court, before as many of the people as chuse to attend.'"[75] It next turned to the reasons behind that history. An open trial was "no quirk of history; rather, it has long been recognized as an indispensable attribute of an Anglo-American trial."[76] It "gave assurance that the proceedings were conducted fairly to all concerned, and it discouraged perjury, the misconduct of participants, and decisions based on secret bias or partiality."[77] It also benefitted the community by allowing it to see justice be done.[78] As Burger put it for the plurality, "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing."[79]

Only then did Burger finally turn to the First Amendment.[80] The First Amendment, he wrote, has the "purpose of assuring freedom of communication on matters relating to the functioning of government."[81] That Amendment then "can be read as protecting the right of everyone to attend trials so as to give meaning to those explicit guarantees."[82] But Burger was unwilling to go any further: "It is not crucial whether we describe this right to attend criminal trials to hear, see, and communicate observations concerning them as a 'right of access' or a 'right to gather

[73] *Id.* at 606 (holding that neither the "First, Sixth, Ninth, or any other Amendment to the United States Constitution" requires a public trial).
[74] *Id.* at 565 (plurality opinion).
[75] *Id.* at 568-69.
[76] *Id.* at 569.
[77] *Id.*
[78] *Id.* at 571.
[79] *Id.* at 572.
[80] *Id.* at 575.
[81] *Id.*
[82] *Id.*

information,'" because the Court had previously found that "'without some protection for seeking out the news, freedom of the press could be eviscerated.'"[83]

Burger did, however, offer an analog in the Court's First Amendment jurisprudence—almost as an afterthought. Invoking the Court's public forum cases, courtrooms for criminal trials, he wrote, were similar to other "places traditionally open to the public," like streets and sidewalks, that are subject to "the traditional time, place, and manner restrictions."[84] Just like those places, "a trial courtroom also is a public place where the people generally—and representatives of the media—have a right to be present."[85] As the trial judge had failed to consider any alternatives to closure, Burger announced the order of the Court reversing the exclusion order.[86]

Justice Brennan, joined by Justice Marshall, wrote separately in an attempt to harmonize *Richmond Newspapers, Inc.* with the Court's prior precedent in *Pell*, *Saxbe*, and *Houchins*, which Burger had largely ignored.[87] Brennan admitted, based on these precedents, that the Court had not always viewed the First Amendment as protecting the "freedom of access to information" in the same way as it had the "freedom of expression."[88] Still, it had never ruled out a right of access in "in every circumstance," and *Pell*, *Saxbe*, and *Houchins* stood only for the proposition that a right of access "is subject to a degree of restraint dictated by the nature of the information and countervailing interests in security or confidentiality."[89] The First Amendment, according to Brennan, protected both freedom of expression *and* the freedom of access to information: it "has a structural role to play in securing and fostering our republican system of self-government."[90] It protected the "'principle that debate on public issues should be uninhibited, robust, and wide-open," *and* "the antecedent assumption that valuable public debate—as well as other civic behavior—must be informed."[91] In other words, the First Amendment protected not just communication, but "conditions of *meaningful* communications."[92]

---

[83] *Id.* at 576 (citations omitted).
[84] *Id.* at 577-78.
[85] *Id.* at 578.
[86] *Id.* at 581. Justice Stewart appeared to agree with this analogy as well. *See id.* at 599 (Stewart, J., concurring in judgment) ("In conspicuous contrast to a military base, a jail, or a prison, a trial courtroom is a public place." (quotations omitted)).
[87] *Id.* at 584 (Brennan, J., concurring in judgment).
[88] *Id.* at 585.
[89] *Id.* at 586.
[90] *Id.* at 587.
[91] *Id.*
[92] *Id.* at 588.

Brennan then turned to the problem of placing limits on this "'theoretically endless'" conception of the right of access.[93] As Brennan pointed out, plenty of government actions could be challenged as unconstitutionally "'decreas[ing] data flow.'"[94] Thus, the right of access had to be invoked with "discrimination and temperance."[95] He offered "two helpful principles" that could guide courts in considering the right of access. First, recognizing such a right had "special force when drawn from an enduring and vital tradition of public entree to particular proceedings or information."[96] Second, courts should consider "whether access to a particular government process is important in terms of that very process."[97] Where Burger recognized the right of access *because of* the historical precedent and the logic of allowing access, Brennan recognized the right *because of* the structural role it plays and then used experience and logic to limit it.

For their part, the other justices (except Rehnquist, who dissented,[98] and Powell, who recused himself[99]) agreed that a constitutional right of access attached. Justice Stevens said that *Richmond Newspapers, Inc.* was a "watershed case."[100] Contrasting the prior opinions in *Pell*, *Saxbe*, and *Houchins*, where the Court "implied that any governmental restriction on access to information, no matter how severe and no matter how unjustified, would be constitutionally acceptable," Stevens said that *Richmond Newspapers, Inc.* "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."[101] In other words, Stevens read *Richmond Newspapers, Inc.* as "protect[ing] the public and the press from abridgment of their rights of access to information about the operation of their government" generally—not just judicial proceedings.[102]

Justice Stewart took a narrower view. While he found that the right of access was based in the First Amendment, he too invoked the public forum analogy and maintained that the trial judge could place "reasonable limitations" on access.[103] Justice Blackmun remained convinced for the

---

[93] *Id.*
[94] *Id.* (quoting Zemel v. Rusk, 381 U.S. 1, 16-17 (1965)).
[95] *Id.*
[96] *Id.* at 591.
[97] *Id.*
[98] Rehnquist would become a consistent dissenter in access cases. *Id.* at 604 (Rehnquist, dissenting); *see also* Globe Newspaper Co. v. Super. Ct., 457 U.S. 596, 612 (1982) (Burger, C.J., dissenting); *Press-Enterprise II*, 478 U.S. at 15 (Stevens, J., dissenting).
[99] *Richmond Newspapers, Inc.*, 448 U.S. at 581 (plurality opinion).
[100] *Id.* at 582 (Stevens, J., concurring).
[101] *Id.* at 582-83.
[102] *Id.* at 583.
[103] *Id.* at 600 (Stewart, J., concurring in judgment).

reasons in his *Gannett Co.* dissent that the right of access was based in the Sixth Amendment but was left to conclude, as a "secondary position, that the First Amendment must provide some measure of protection for public access to the trial."[104] Justice White agreed with that position.[105]

2. *Globe Newspaper Co. v. Superior Court*

Soon after, the Court granted certiorari in *Globe Newspaper Co. v. Superior Court* to bring clarity to these divergent opinions. *Globe Newspaper Co.* would mark the first post-*Richmond Newspapers, Inc.* opinion resulting in a clean majority.[106] There, the issue was a Massachusetts law mandating closure of the trial court during the testimony of a minor sex victim.[107] With Chief Justice Burger in dissent, Justice Brennan, the most senior justice in the majority, wrote the controlling opinion. Unsurprisingly, he used the opportunity to invoke many of the motifs from his concurring opinion in *Richmond Newspapers, Inc.*

Brennan began by recognizing that while there was "no opinion of the Court" in *Richmond Newspapers, Inc.*, seven justices agreed that the First Amendment protected a right of access to criminal trials despite the lack of an explicit hook in the text of the Amendment itself.[108] This was consistent with the Court's long-held belief that the First Amendment was "broad enough to encompass those rights" that are "necessary to the enjoyment of other First Amendment rights."[109] The right of access was one such right, Brennan wrote, because it ensures that the discussion of government affairs protected by the First Amendment "is an informed one."[110] Thus, access "serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government."[111]

Brennan then recognized "[t]wo features of the criminal justice system" that he and Burger raised in *Richmond Newspapers, Inc.* that "together serve to explain why a right of access to criminal trials in particular is properly afforded protection by the First Amendment."[112] First, criminal trials were historically public, which is "significant in constitutional terms" because "the

[104] *Id.* at 604 (Blackmun, J., concurring in judgment).
[105] *Id.* at 581-82 (White, J., concurring).
[106] 457 U.S. 596 (1982)
[107] *Id.* at 598.
[108] *Id.* at 603-04.
[109] *Id.*
[110] *Id.* at 604-05.
[111] *Id.* at 604.
[112] *Id.* at 605.

Constitution carries the gloss of history" and because "'a tradition of accessibility implies the favorable judgment of experience.'"[113] Second, access played a "significant role in the functioning of the judicial process and the government as a whole."[114] It not only provides procedural benefits like the "appearance of fairness," it "permits the public to participate in and serve as a check upon the judicial process—an essential component in our structure of self-government."[115] In short, "the institutional value of the open criminal trial is recognized in both logic and experience."[116]

Having established that the right of access applies to criminal trials, Brennan turned to the proper standard that must be satisfied for the right of access to be overcome.[117] The right, he wrote, can only be overcome in "limited" circumstances, and the "State's justification in denying access must be a weighty one."[118] Laying down the standard for the Court for the first time, Brennan parted with Burger's and Stewart's suggestion that a court may impose "reasonable" restrictions on the access right under the Court's time, place, manner restrictions.[119] Instead, he raised the bar, writing that closure must be "necessitated by a compelling governmental interest" and it must be "narrowly tailored to serve that interest."[120] Because the Massachusetts's statute required blanket closure without respect to the particular facts of a given case in contravention of this test, Brennan found the law unconstitutional.[121]

Justice O'Connor, casting a vote for the first time in a right of access case, concurred in the judgment.[122] Unlike the majority, she did not interpret *Richmond Newspapers, Inc.* as "shelter[ing] every right that is 'necessary to the enjoyment of other First Amendment rights.'"[123] Instead, pointing to the plurality in that case, she viewed *Richmond Newspapers, Inc.* as "rest[ing] upon our long history of open criminal trials and the special value, for both public and accused, of that openness."[124] As such, she did not believe that *Richmond Newspapers, Inc.* had any application outside the criminal trial context.[125] Yet, because *Globe Newspaper Co.* was a criminal case, she

---

[113] *Id.*
[114] *Id.* at 606.
[115] *Id.*
[116] *Id.*
[117] *Id.* at 606-07.
[118] *Id.*
[119] *Id.* at 607.
[120] *Id.*
[121] *Id.*
[122] *Id.* at 611 (O'Connor, concurring in judgment).
[123] *Id.* (quoting *id.* at 604).
[124] *Id.* at 611.
[125] *Id.*

agreed with the majority as Massachusetts failed to demonstrate an "interest weighty enough to justify application of its automatic bar to all cases, even those in which the victim, defendant, and prosecutor have no objection to an open trial."[126]

Burger, joined by Justice Rehnquist, dissented. He called Brennan's opinion an "expansive interpretation of *Richmond Newspapers, Inc*" and criticized its "cavalier rejection" of Massachusetts interest in protecting minor sex victims.[127] *Richmond Newspapers, Inc.*, Burger wrote, did not establish a "right of access to all aspects of all criminal trials under all circumstances."[128] On the contrary, because there was no uniform history of access to the testimony of minor sex victims, Burger believed that the considerations at issue in *Richmond Newspapers, Inc.* were lacking.[129] Even if the right attached, Burger still disagreed with the standard for overcoming the access right.[130] The Court's compelling interest standard was too "rigid" in light of the interests of the minor victim, especially where the purpose of the law was not "to deny the press or public access to information."[131]

3. *Press-Enterprise I & II*

The last two substantive decisions of the Court would come back-to-back in 1984 and 1986 brought by the same petitioner: Press-Enterprise Co.[132] In both cases, Chief Justice Burger wrote the majority opinion. At issue in *Press-Enterprise I* was whether the right of access applied to *voir dire.*[133] As he had in *Richmond Newspapers, Inc.*, Burger again adopted the experience and logic approach, looking first to whether *voir dire* was traditionally open and second to whether openness played a beneficial role in the process itself.[134] As with a trial, *voir dire* historically took place in public since at least the sixteenth century and had consistently been practiced in open settings in the colonies as well.[135] Thus, history supported extending the right of access to *voir dire.*

---

[126] *Id.*
[127] *Id.* at 613 (Burger, C.J., dissenting).
[128] *Id.*
[129] *Id.* at 614.
[130] *Id.* at 616.
[131] *Id.* at 615-16. Justice Stevens also dissented on largely procedural grounds; *see id.* at 620 (Stevens, J., dissenting).
[132] *Press-Enterprise I*, 464 U.S. 501 (1984); *Press-Enterprise II*, 478 U.S. 1.
[133] *Press-Enterprise I*, 464 U.S. at 503.
[134] *Id.* at 505-10.
[135] *Id.* at 507.

On the second prong, consistent again with the theoretical indifference of the plurality opinion in *Richmond Newspapers, Inc.*, Burger wrote that how the Court "allocate[d] the 'right' to openness as between the accused and the public, or whether we view it as a component inherent in the system benefiting both, is not crucial."[136] And, while he observed in a footnote, that "the question we address . . . focuses on First . . . Amendment values and the historical backdrop against which the First Amendment was enacted," he failed to mention the First Amendment once in the body of the Court's opinion – a marked departure with the language of *Globe Newspaper Co.*[137] Instead, he noted the workaday procedural benefits of openness: that openness ensures that individuals unable to attend trials would have "confidence that standards of fairness" were observed.[138] Open proceedings, he wrote, also ensure that the community "know[s] that offenders are being brought to account."[139] Thus, logic supported a right of access to *voir dire* too.

Turning to the standard to be applied to overcome the right, Burger, however, did adopt the standard he dissented from in *Globe Newspaper Co.* Specifically, he found that "[c]losed proceedings, although not absolutely precluded, must be rare and only for cause shown that outweighs the value of openness."[140] The interest in favor of closure must be "'weighty'" and be supported by "findings specific enough that a reviewing court can determine whether the closure order was properly entered."[141] While the lower court identified the fair trial right and privacy interests of jurors as interests to be served by closure, that conclusion, Burger said, was "unsupported by findings showing that an open proceeding in fact threatened those interests."[142] Even if the trial court made such a finding, it failed to "consider whether alternatives were available to protect the interests of the prospective jurors that the trial court's orders sought to guard."[143] Thus, "the trial court could not constitutionally close the *voir dire*."[144]

Given Burger's short shrift to the First Amendment, Justice Stevens concurred to point out "[t]he fact that this is a First Amendment case."[145] The issue before the Court was not "simply . . . how a criminal trial is most efficaciously conducted," nor how "effective judicial administration"

---

[136] *Id.* at 508.
[137] *Id.* at 509 n.8.
[138] *Id.* at 508.
[139] *Id.* at 509.
[140] *Id.*
[141] *Id.* at 509-10 (citing Globe Newspaper Co. v. Super. Ct., 457 U.S. 596, 606-07 (1982)).
[142] *Id.* at 510-11.
[143] *Id.* at 511.
[144] *Id.*
[145] *Id.* at 529 (Stevens, J., concurring).

should be handled.[146] On the contrary, "the First Amendment's concerns are much broader."[147] Invoking the opinions of *Richmond Newspapers, Inc.*, Stevens explained that the right of access implicated the "'common core purpose of assuring freedom of communication on matters relating to the functioning of government.'"[148] The Court had itself "endorsed" this position in *Globe Newspaper Co.*[149] A right of access then "cannot succeed unless access makes a positive contribution to this process of self-governance."[150] Because access to *voir dire* "cannot help but improve public understanding" of that process and enable "critical examination of its workings to take place," Stevens concluded that the right of access attached.[151]

The last, substantive word from the Supreme Court on the right of access would also come from Chief Justice Burger two years later. In *Press-Enterprise II*, Press-Enterprise Co. was back at the Supreme Court claiming a right of access to a preliminary hearing.[152] The underlying case was a murder prosecution of a nurse accused of killing twelve patients.[153] At the preliminary hearing, the defendant made a motion to exclude the public under a California statute allowing closure to protect a defendant's fair trial right.[154] That hearing (much like the *voir dire* in *Press-Enterprise I*) lasted over a month.[155] After it concluded, Press-Enterprise Co. made a motion to unseal the transcript, which was denied.[156] It then appealed without success.[157] The newspaper finally sought a writ of certiorari in the Supreme Court, which was granted.

---

[146] *Id.* at 516-17.

[147] *Id.* at 517.

[148] *Id.* (quoting Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 575 (1980) (plurality opinion)). Elsewhere, Stevens characterized the purpose of the right of access as furthering "the First Amendment's mission of securing meaningful public control over the process of governance." *Id.* at 519.

[149] *Id.* at 517 (citing Globe Newspaper Co. v. Super. Ct., 457 U.S. 596 (1982)).

[150] *Id.* at 518.

[151] *Id.* Justice Marshall separately concurred in judgment to make clear that "the constitutional rights of the public and press to access to all aspects of criminal trials are not diminished in cases in which 'deeply personal matters' are likely to be elicited in *voir dire* proceedings." *Id.* at 520 (Marshall, J., concurring). As Marshall explained, "the policies underlying those rights are most severely jeopardized when courts conceal from the public sensitive information that bears upon the ability of jurors impartially to weigh the evidence presented to them." *Id.* (citations omitted). Justice Blackmun also concurred to make clear that the Court was not deciding issues relating to a juror's right of privacy. *Id.* at 513-14 (Blackmun, J., concurring).

[152] *Press-Enterprise II*, 478 U.S. at 3.

[153] *Id.*

[154] *Id.* at 4.

[155] *Id.*

[156] *Id.* at 5.

[157] *Id.*

The Supreme Court reversed. Chief Justice Burger, writing again for the majority, observed that "[t]he right to an open public trial is a shared right of the accused and the public."[158] While the Sixth Amendment right to a public trial might raise different issues, the First Amendment's right of access "cannot be resolved solely on the label we give the event, i.e., 'trial' or otherwise."[159] Instead, Burger returned to the "two complimentary considerations" of experience and logic, making quick work of the inquiry.[160] On the experience point, preliminary hearings like criminal trials had historically been open to the public.[161] On the logic point, he found that open preliminary hearings were "essential to the proper functioning of the criminal justice system."[162] While the preliminary hearings at issue in the case were more akin to probable cause hearings than a trial, Burger found that they were analogous to trials insofar as they often represented the end of a prosecution as those held over would plead out.[163] Access in these cases was especially important as there was no jury at the preliminary hearings to check against potential abuse.

Burger then pivoted to the question of whether access had been overcome. The California Supreme Court found that the courtroom could be closed so long as there was a "reasonable likelihood of substantial prejudice."[164] This standard, however, "placed a lesser burden" on the party seeking closure than the test outlined in *Globe Newspaper Co.* and *Press-Enterprise I*.[165] As such, Burger rejected it and reaffirmed the test requiring a showing "that 'closure is essential to preserve higher values and is narrowly tailored to serve that interest."[166]

Justice Stevens, joined by Justice Rehnquist, dissented. In a departure from his access-friendly opinions in *Richmond Newspapers, Inc.* and *Press-Enterprise I*, Stevens wrote that "neither the Court's reasoning nor the result it reaches is supported by our precedents."[167] Before reaching the substance of his disagreement, however, Stevens acknowledged that he had "long believed that a proper construction of the First Amendment embraces a right of access to information about the

---

[158] *Id.* at 7.
[159] *Id.*
[160] *Id.* at 8.
[161] *Id.* at 10-11.
[162] *Id.* at 12.
[163] *Id.* In this way, these preliminary hearings were often "'the sole occasion for public observation of the criminal justice system.'" *Id.* (quoting San Jose Mercury-News v. Mun. Ct., 638 P.2d 655, 663 (Cal. 1982)).
[164] *Id.* at 14 (marks and citation omitted).
[165] *Id.*
[166] *Id.* at 13-14.
[167] *Id.* at 21 (Stevens, J., dissenting).

conduct of public affairs."[168] It was also his belief that "[a]n official policy of secrecy must be supported by some legitimate justification that serves the interest of the public office."[169] The Court thus found no right of access issue in *Pell* and *Saxbe* because there were legitimate penological reasons for limiting access and there was no evidence that the state was trying to "'conceal the conditions in its prisons.'"[170] On the other hand, where such reasons were lacking as in *Richmond Newspapers, Inc.* and *Globe Newspaper Co.*, the Court had found the right of access violated.[171] Because of the risk to the defendant's fair trial rights identified by the lower court in this case was "perfectly obvious," placing the case closer to *Pell* and *Saxbe*, Stevens would have found the access right overcome.[172]

Stevens also questioned whether the right of access even applied to preliminary proceedings.[173] As he saw it, "it is uncontroverted that a common-law right of access did not inhere in preliminary proceedings at the time the First Amendment was adopted."[174] Moreover, he rejected the majority view as to logic because its reasoning (that preliminary hearings were often the end of many prosecutions; that no jury was present) applied equally "to the traditionally secret grand jury."[175] Stevens then questioned his long-held belief that a meaningful right of access existed at all: "By abjuring strict reliance on history and emphasizing the broad value of openness, the Court tacitly recognizes the importance of public access to government proceedings generally."[176] Worse, Stevens wrote, the Court had "taken seriously the stated requirement that the sealing of a transcript be justified by a 'compelling' or 'overriding' governmental interest and that the closure order be narrowly tailored to serve that interest."[177]

---

[168] *Id.* at 18.
[169] *Id.* at 19.
[170] *Id.* (quoting Pell v. Procunier, 417 U.S. 817, 830 (1974)).
[171] *Id.* (citing *Press-Enterprise I*, 464 U.S. 501, 510-11 (1984); Globe Newspaper Co. v. Super. Ct., 457 U.S. 596, 608-09 (1982); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (plurality opinion)).
[172] *Id.* at 20.
[173] *Id.* at 21.
[174] *Id.* at 22.
[175] *Id.* at 26.
[176] *Id.* at 28.
[177] *Id.* (quoting *id.* at 9 (quotation marks omitted)).

4. *El Vocero v. Puerto Rico*

The Court's final substantive word on the First Amendment right of access came in 1993 in a short *per curiam* opinion in *El Vocero v. Puerto Rico*.[178] *El Vocero* also concerned a preliminary hearing, this time in Puerto Rico.[179] In reversing the Supreme Court of Puerto Rico, which had found that closure was proper, the Supreme Court found that *Press-Enterprise II* dictated the result.[180] The lower court failed to cite any substantial distinctions between Puerto Rico's preliminary hearings and those at issue in *Press-Enterprise II*; and, the lower court erroneously relied on preliminary hearings not being historically open to the public in Puerto Rico, which was irrelevant because "the 'experience' test of *Globe Newspaper Co.* does not look to the particular practice of any one jurisdiction, but instead 'to the experience in that type or kind of hearing throughout the United States.'"[181]

II. THE PROBLEMS WITH THE COURT'S ACCESS JURISPRUDENCE

The bulk of the Court's First Amendment access jurisprudence is in these nine cases handed down from 1974 through to 1993.[182] These cases, half of which were 5-4 splits or closer, spawned thirty-one separate opinions.[183] At first, it seemed like *Globe Newspaper Co.*, the first majority opinion recognizing a right of access under the First Amendment, laid the Court's theoretical groundwork for the right of access, namely, that access existed to provide the citizenry with information needed to ensure that the debate protected by the First Amendment was informed. But *Press-Enterprise I & II* muddied this by either not invoking the structural theory from *Globe Newspaper Co.* (as in *Press-Enterprise I*) or invoking it only in passing (as in *Press-Enterprise II*). Instead, these later cases relied predominantly on the complementary considerations of experience and logic without any great concern over a theoretical foundation for the right of access.

[178] 508 U.S. 147 (1993).
[179] *Id.* at 148.
[180] *Id.* at 149.
[181] *Id.* at 150 (quoting Rivera-Puig v. Garcia-Rosario, 983 F.2d 311, 323 (1st Cir. 1992)).
[182] *But see* McBurney v. Young, 569 U.S. 221, 232 (2013) (stating in a case addressing the constitutionality of a state freedom of information law that the "Court has repeatedly made clear that there is no constitutional right to obtain all the information provided by FOIA laws" (citation omitted)).
[183] Today, Justice Thomas is the only justice who has sat on the Court during any of these decisions, making it unclear how the Court would come out if these issues were raised again.

Thus, assertions by some that "[t]he Supreme Court has already told us why access is critical" may be an overly generous assessment of the Court's access jurisprudence.[184]

Another view is that "the Court's access cases have left the lower courts confused as to which values matter most when considering public access claims."[185] These courts are left to choose between the broad pronouncements of *Globe Newspaper Co.* about the structural role access plays in advancing self-governance and, on the other hand, the workman-like opinions of *Press-Enterprise I & II* that eschew overreliance on theory altogether.[186] Faced with this, courts have been unable to agree why the right of access applies, to what it applies, and when it is overcome. Some courts, for example, have refused to apply the experience and logic test outside of the context of judicial proceedings, opting instead for the *Houchins* plurality's rule that there is no right of access to government-controlled information.[187] Others have applied the test to all sorts of proceedings and records, and, in doing so, found that a constitutional right of access applies outside of the strict confines of *Richmond Newspapers, Inc.* and its progeny.[188] Others have applied the test but have been more hesitant to recognize novel rights of access.[189]

This disagreement regularly plays out in proceedings touching on national security, where many courts are not eager to recognize a right of access that might result in harm to national security interests. In *Dhiab v. Trump*, for example, a Guantánamo Bay detainee filed a *habeas corpus* lawsuit to challenge the conditions of his confinement.[190] During that litigation, counsel for the detainee filed various videos, classified at the SECRET level, which depicted the detainee

---

[184] Raleigh Hannah Levine, *Toward a New Public Access Doctrine*, 27 CARDOZO L. REV. 1739 (2006).

[185] David S. Ardia, *Court Transparency and the First Amendment*, 38 CARDOZO L. REV. 835, 865 (2017); Papandrea, *supra* note 9, at 47-48; Heidi Kitrosser, *Secrecy in the Immigration Courts and Beyond: Considering the Right to Know in the Administrative State*, 39 HARV. C.R.-C.L. L. REV. 95, 99 (2004) ("Much of the uncertainty over access rights doctrine can be traced to discontinuity between the Supreme Court's embrace of structuralism and access rights on the one hand and the Court's relatively ad hoc approach to limiting access rights on the other.").

[186] *See* Ardia, *supra* note 185, at 880 (recognizing the "confusion and inconsistency regarding the right of access").

[187] *See, e.g.*, Ctr. for Nat'l Security Stud. v. U.S. Dep't of Just., 331 F.3d 918, 935 (D.C. Cir. 2003) (stating that *Houchins'* rule that there is no First Amendment right to government-controlled information survived *Richmond Newspapers, Inc.*).

[188] *See, e.g.*, Co. Doe v. Pub. Citizen, 749 F.3d 246, 269 (4th Cir. 2014) (civil proceedings); Cal. First Amendment Coal. v. Woodford, 299 F.3d 868, 877 (9th Cir. 2002) (executions); United States v. Miami Univ., 294 F.3d 797, 824 (6th Cir. 2002) (student disciplinary board proceedings); Wash. Post v. Robinson, 935 F.2d 282, 288 (D.C. Cir. 1991) (plea agreements); Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1061 (3d Cir. 1984) (civil trial); Herald Co. v. Bd. of Parole, 499 N.Y.S.2d 301 (Sup. Ct. Onondaga Cnty. 1985) (parole board hearings).

[189] *See, e.g.*, N. Jersey Media Grp., Inc. v. Ashcroft, 308 F.3d 198, 209 (3d Cir. 2002) (no right of access to deportation proceedings); Oklahoma Observer v. Patton, 73 F. Supp. 3d 1318 (W.D. Okla. 2014) (no right of access to executions).

[190] 852 F.3d 1087, 1089 (D.C. Cir. 2017).

being forcibly extracted from his cell and force-fed.[191] A coalition of news organizations intervened in that case to vindicate their right of access to the videotape evidence.[192] Although the district court granted the motion to intervene and unseal, the D.C. Circuit reversed.

In reversing, however, there was a split among the panel as to whether the right of access applied to *habeas corpus* proceedings implicating national security. As far as Judge Randolph saw it, "In habeas corpus cases, there is no tradition of public access comparable to that recounted in *Press-Enterprise II* with respect to criminal trials."[193] Refining the focus, Randolph added that "from the beginning of the republic to the present day, there is no tradition of publicizing secret national security information involved in civil cases, or for that matter, in criminal cases."[194] Indeed, the "tradition is exactly the opposite."[195] In fact, courts often closed proceedings under the Classified Information Procedures Act, barred discovery of evidence under the state secrets privilege, refused to disclose national security information in Freedom of Information Act cases, and issued protective orders in Guantánamo detainee *habeas corpus* cases, all of which evidenced "the long history of protecting national security secrets of the United States"—not laying them bare.[196]

The rest of the panel disagreed. Judge Rogers found that the right of access attached to *habeas corpus* cases as they were a genus of civil proceedings. Invoking the experience and logic test, she observed that "[b]y its terms" the test "does not limit the right of access to criminal proceedings."[197] "[U]nmoored from the Sixth Amendment" and the interests of the defendant, as the right of access recognized in *Globe Newspaper, Co.* was, Rogers explained, "there is no principle that limits the [public's] First Amendment right of access' to criminal proceedings."[198] This was consistent with every court of appeals "to consider the issue."[199] Moreover, applying the right of access to *habeas corpus* cases made sense because such cases, like criminal trials themselves, "are designed to protect against abuses of Executive power and guard individual liberty."[200] And, like in *Press-Enterprise II*, access was especially necessary in *habeas corpus*

[191] *Id.*
[192] *Id.* at 1090. By way of disclosure, the author was co-counsel to the news organizations in that case.
[193] *Id.* at 1093.
[194] *Id.* at 1094.
[195] *Id.*
[196] *Id.* at 1094-95.
[197] *Id.* at 1099 (Rogers, J., concurring in part and concurring in judgment).
[198] *Id.* (quoting N.Y. Civil Liberties Union v. N.Y.C. Transit, 684 F.3d 286, 298 (2d Cir. 2011)).
[199] *Id.*
[200] *Id.* at 1101.

cases in light of the lack of a jury, which itself was a prime safeguard against executive abuses.[201] Nor was there any principle about national security proceedings specifically that displaced the *application* of the right of access to *habeas corpus* proceedings like that before the Court. As Judge Rogers wrote, that a proceeding concerned national security was accounted for in deciding whether the right of access was overcome in any given case, not whether it applied at all.[202]

Senior Judge Williams was more equivocal than either of his colleagues. Initially, he noted that the Court's case law did not answer at what the level of generality courts should apply the experience and logic test.[203] For example, in that case was the proper focus on "civil actions generally, habeas actions, habeas actions relating to conditions of confinement, [or] finally habeas actions related to Guantanamo"?[204] The Court's case law also did not answer, irrespective of the question of generality, how long a proceeding must have been traditionally open for this factor to weigh in favor of the recognition of an access right.[205] Courts, Williams said, were "left simply to guess at what history might be relevant."[206] In short, courts have "little guidance from the Supreme Court, or indeed any other, as to how to make those choices."[207]

Disagreements as to how to apply the experience and logic test, including in cases implicating national security information, run inter-circuit as well. In *Detroit Free Press v. Ashcroft*, for example, the question in this post 9/11 case was whether the government could "secretly deport a class [of non-citizens] if it unilaterally calls them 'special interest' cases" relating to the war on terror.[208] The Third Circuit in *North Jersey Media Group, Inc. v. Ashcroft* faced the same question.[209] While both the Sixth and Third Circuits agreed that it was proper to apply the experience and logic test to determine whether the administrative deportation hearings were subject to the First Amendment right of access, they came to opposite conclusions as to whether that test was satisfied.[210]

---

[201] *Id.* at 1102.

[202] *Id.* ("The Court's test protects against threats to our nation's security by prohibiting disclosure when it will cause a 'substantial probability' of harm to an 'overriding interest.'").

[203] *Id.* at 1104 (Williams, J., concurring in part and concurring in judgment).

[204] *Id.*

[205] *Id.* at 1105.

[206] *Id.* at 1106.

[207] *Id.* at 1107.

[208] 303 F.3d 681 (6th Cir. 2002).

[209] 308 F.3d 198 (3d Cir. 2002).

[210] *Compare Detroit Free Press*, 303 F.3d at 700 ("Deportation hearings, and similar proceedings, have traditionally been open to the public, and openness undoubtedly plays a significant positive role in this process.") *with N. Jersey Media Grp., Inc.*, 308 F.3d at 209 (concluding the opposite).

The Sixth Circuit adopted Justice Brennan's concurring opinion in *Richmond Newspapers, Inc.* as the "prevailing view" and interpreted that opinion as standing for the proposition that "a brief historical tradition might be sufficient to establish a First Amendment right of access where the beneficial effects of access to that process are overwhelming and uncontradicted."[211] And, according to the court, the benefits of access to deportation hearings were obvious: access "acts as a check on the actions of the Executive"; "ensures that government does its job properly"; provides the public with community catharsis; "enhances the perception of integrity and fairness"; "ensure[s] that 'the individual citizen can effectively participate in and contribute to our republican system of self-government.'"[212] Thus, in light of the history of openness in deportation proceedings (albeit not as uniformly established as in criminal proceedings) paired with the overwhelming benefits of openness, the Sixth Circuit found that the right of access applied to deportation hearings.[213]

The Third Circuit, however, found dispositive what it characterized as the lack of historical openness. While it recognized that Congress had "never authorized the general closure" in deportation proceedings, "deportation hearings have frequently been closed to the general public."[214] These hearings were often held in places not open to the public like "prisons, hospitals, or private homes."[215] Based on this, the court concluded that "[w]e ultimately do not believe that deportation hearings boast a tradition of openness sufficient to satisfy *Richmond Newspapers*."[216] Moreover, unlike the Sixth Circuit, the Third Circuit did not simply ask whether access would benefit the functioning of the proceeding; it also considered "the extent to which openness impairs the public good" in deciding whether logic weighed in favor of a presumption of access.[217] Departing from Judge Rogers' later view in *Dhiab* that national security should not affect the analysis of whether the right of access applies only whether it is overcome, the Third Circuit panel found that logic did not support a right of access in light of "substantial evidence" that access to these deportations could threaten national security.[218]

---

[211] *Detroit Free Press*, 303 F.3d at 701.
[212] *Id.* at 703-04 (citation omitted).
[213] *Id.* at 705.
[214] *North Jersey Media Grp., Inc.*, 308 F.3d at 211-12.
[215] *Id.* at 212.
[216] *Id.*
[217] *Id.* at 217.
[218] *Id.*; *see also* In re Opinions & Orders of this Court Addressing Bulk Collection of Data under the Foreign Intelligence Surveillance Act, No. Misc. 13-08, slip op. at 4 (FISA Ct. Feb. 11, 2020) [hereinafter *Bulk Collection*

Even when courts agree that the right of access attaches to a certain proceeding implicating national security, there are splits as to when a court has the power to find it has been overcome. In *In re Washington Post*, for example, a Ghanaian defendant was indicted on eight espionage counts in the Eastern District of Virginia.[219] After negotiating a plea deal, the United States and Ghana made motions to hold the plea colloquy and sentencing hearing behind closed doors, which the court granted.[220] After being denied entry to the plea hearing and access to the transcript of those proceedings, the *Washington Post* filed a motion for access to the transcript and leave to participate in any additional hearings.[221] When the court granted the government additional time to respond, the *Post* appealed.[222] While on appeal, the sentencing hearing went forward behind closed doors.[223] After the sentencing, the district court unsealed the transcripts of the hearings but left several other documents under seal.[224] The *Post* then appealed from that ruling as well.[225]

On appeal, the Fourth Circuit found that the right of access applied to "documents filed in connection with plea hearings and sentencing hearings in criminal cases, as well as to the hearings themselves."[226] Nevertheless, the government argued that the normal strictures of the right of access should not apply "where national security interests are at stake."[227] Such cases, it said, require special treatment and the district court should be permitted to "defer to the judgment of the executive branch."[228] The Fourth Circuit, however, disagreed: "troubled as we are by the risk that disclosure of classified information could endanger the lives of both Americans and their foreign informants, we are equally troubled by the notion that the judiciary should abdicate its decisionmaking responsibility to the executive branch whenever national security concerns are present."[229] A "blind acceptance by the courts of the government's insistence on the need for secrecy, without notice to others, without argument, and without a statement of reasons, would impermissibly compromise the independence of the judiciary and open the door to possible

Opinions & Orders] (finding that the right of access does not apply to Foreign Surveillance Intelligence Court proceedings).

[219] 807 F.2d 383, 386 (4th Cir. 1986).
[220] *Id.* at 387.
[221] *Id.*
[222] *Id.*
[223] *Id.*
[224] *Id.*
[225] *Id.*
[226] *Id.*
[227] *Id.* at 391.
[228] *Id.*
[229] *Id.*

abuse."[230] Thus, the court remanded the case back to the district court to apply the proper standards under *Richmond Newspapers, Inc.*[231]

Other circuits however have disagreed.[232] In *North Jersey Media Group, Inc.*, for example, the Third Circuit expressed concern over overruling the government's representations as to potential harm were classified information released: "We are quite hesitant to conduct a judicial inquiry into the credibility of these security concerns, as national security is an area where courts have traditionally extended great deference to Executive expertise."[233] In 2019, the Second Circuit agreed.[234] In a footnote meant to explain the presence of the redactions in an opinion relating to a material support case, the court disclosed that the government had been given an opportunity redact references to classified information.[235] The panel then met *ex parte* with the government "to discuss potential substitutions or modified phrasing that would minimize the need for redaction, and the possibility that certain information referenced in the opinion could be declassified, thus further reducing the need for redaction."[236] As to the remaining redactions as to which neither the court nor the government agreed, the court said that it had "neither the authority, nor the expertise, nor the inclination to overrule classification decisions made by the relevant executive branch agencies."[237] And in 2020, the Foreign Intelligence Surveillance Court of Review appeared to endorse this view, albeit in *dicta*.[238]

Scholarship on the right of access has not yet been able to bring clarity to the status quo. Since *Detroit Free Press*, several have tried to clean up the Court's access jurisprudence by proposing new ways to understand the access right. David Ardia, Heidi Kitrosser, Raleigh Hannah Levine, and Kathleen Olson have argued in favor of *per se* rules that the right of access applies to judicial

---

[230] *Id.* at 392.

[231] *Id.* at 393.

[232] *See, e.g.*, United States v. Rosen, 487 F. Supp. 2d 703, 717 (E.D. Va. 2007) ("*Press-Enterprise* and *In re Washington Post* require more; they require a judicial inquiry into the legitimacy of the asserted national security interest, and specific findings, sealed if necessary, about the harm to national security that would ensue if the request to close the trial is not granted."); United States v. Pelton, 696 F. Supp. 156, 157 (D. Md. 1986) (similar).

[233] 308 F.3d 198, 219 (3d Cir. 2002).

[234] United States v. Hasbajrami, 945 F.3d 641 (2d Cir. 2019).

[235] *Id.* at 646 n.1.

[236] *Id.*

[237] *Id.*

[238] In re Opinions & Orders of this Court Addressing Bulk Collection of Data under the Foreign Intelligence Surveillance Act, 957 F.3d 1344, 1357 (FISA Ct. Rev. 2020) ("Because the crux of the Movants' claim to disclosure here lies within the Executive's clear authority to determine what material should remain classified, we recall the Supreme Court's admonition that '[b]ecause of their very potency, inherent powers must be exercised with restraint and discretion.'" (citation omitted)).

proceedings.[239] As Olson explained, her approach "narrows and enlarges courtroom access doctrine from its current state."[240] It closes the door to applying the presumption of access to non-judicial or non-quasi-judicial proceedings, but lifts uncertainty as to whether the access right applies to all phases of civil and criminal adjudications. Separately, Lauren Gilbert, in her analysis of *Detroit Free Press* and *North Jersey Media Group, Inc.*, concluded that the best approach would be to "limit the test in *Richmond Newspapers* to proceedings which are judicial or quasi-judicial in nature *and* where fundamental liberties are at stake."[241] Differing views as to when the access right, if found to attach, may be overcome are plentiful as well.[242]

In short, right of access law in the national security context, as elsewhere, lacks consistency as do proposed fixes. At risk of adding yet another proposal to the mix, this article focuses on what appears to be the nub of the problem as demonstrated by fractured opinions in *Dhiab* and the dispute between the Third and Sixth Circuit's resolution of the right of access to deportation cases: there is no widely accepted view as to *why* access matters to begin with. Some courts are dismissive of access altogether.[243] Some view access as nothing more than a tool for encouraging procedural fairness (for example, the idea that witnesses are more likely to tell the truth if giving testimony publicly).[244] Even those that recognize that access implicates the First Amendment narrowly define the interests at stake.[245] Still others take a broad view of those interests.[246]

To answer the *why* access matters, this article proposes a refinement to Justice Brennan's structural approach. Clearly, a "First Amendment only" structural approach has not helped courts refine the right of access. The First Amendment datapoint has not proved all that useful on its own.

---

[239] Ardia, *supra* note 185, at 907; Kathleen K. Olson, *Courtroom Access After 9/11: A Pathological Perspective*, 7 COMMC'N L. & POL'Y 461, 490 (2002); Levine, *supra* note 184; Kitrosser, *supra* note 185, at 143 ("In the context of adjudicative proceedings, access denials should be presumptively unconstitutional.").

[240] Olson, *supra* note 239, at 490.

[241] Lauren Gilbert, *When Democracy Dies Behind Closed Doors: The First Amendment and "Special Interest" Hearings*, 55 RUTGERS L. REV. 741, 780 (2003) (emphasis added).

[242] *See, e.g.*, Ardia, *supra* note 185, at 915-16 (advocating for current strict-scrutiny test for overcoming access right); Olson, *supra* note 240, at 492-93 (same); Levine, *supra* note 184, at 1786 (advocating for "true strict scrutiny" review); Kitrosser, *supra* note 185, at 143 (advocating for a "Slightly-Less-than-Strict Scrutiny" approach).

[243] *See, e.g.*, Ctr. for Nat'l Security Stud. v. U.S. Dep't of Just., 331 F.3d 918, 935 (D.C. Cir. 2003).

[244] *See, e.g.*, United States v. Loera, No. 09-cr-0466, 2018 U.S. Dist. LEXIS 192614, at *12-13 (E.D.N.Y. Nov. 6, 2018).

[245] *See, e.g.*, United States v. Amodeo, 71 F.3d 1044, 1048 (2d Cir. 1995).

[246] *See generally* Nation Mag. v. U.S. Dep't of Def., 762 F. Supp. 1558 (S.D.N.Y. 1991) ("Given the broad grounds invoked in these holdings, the affirmative right to gather news, ideas and information is certainly strengthened by these cases. . . . If the reasoning of these recent access cases were followed in a military context, there is support for the proposition that the press has at least some minimal right of access to view and report about major events that affect the functioning of government, including, for example, an overt combat operation.").

Rather than focus on access as merely providing the information necessary for self-government to work under the First Amendment then, what follows suggests a comprehensive understanding of access informed by the functions that access plays throughout the Constitution and Bill of Rights in advancing the rights protected by them. From this, courts can triangulate in any given case the constitutional interests in providing access and decide whether the right of access has properly been overcome by countervailing interests in favor of closure. In other words, this article makes the humble suggestion that courts should undertake a fulsome assessment of the interests for and against disclosure in any particular case – an assessment that is too often missing in motions practice relating to the right of access.

III. A STRUCTURAL APPROACH TO ACCESS

The Constitution nowhere mentions "access" or "transparency." It mentions "Secrecy" once as an exception: "[e]ach House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy."[247] Senator Thomas Hennings, Jr., an early transparency advocate, argued that the failure to mention transparency is probably owed to it being "taken so much for granted that it was deemed unnecessary to include it."[248] Secrecy in the Constitution is "the exception that proves the rule."[249] According to Hennings, "By 1787, the year the Constitution was written, there had developed in England the concept of a right in the people to know what their Government was doing" and "[s]ome of the express terms of the original Constitution . . . demonstrate an obvious intent," if not explicit proscription, "to keep secrecy in government at a minimum."[250]

The Founders "were concerned with broad principles, and wrote against a background of shared values and practices."[251] The Constitution is, beyond everything, a document that, as John Hart Ely put it, "ensur[es] a durable structure for the ongoing resolution of policy disputes."[252] To understand the Constitution as the scaffolding supporting self-governance, "it is essential to

[247] U.S. CONST. art. I, § 5.
[248] Thomas C. Hennings, Jr., *Constitutional Law: The People's Right to Know*, 45 A.B.A. J. 667, 668 (1959).
[249] Fuchs, *supra* note 10, at 157.
[250] Hennings, Jr., *supra* note 248, at 668.
[251] *See* Globe Newspaper Co. v. Super. Ct., 457 U.S. 596, 604 (1982); *see also* THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 5 (1970) ("Any study of the legal doctrines and institutions necessary to maintain an effective system of freedom of expression must be based upon the functions performed by the system in our society, the dynamics of its operation, and the general role of law and legal institutions supporting it.").
[252] JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 90 (1980).

recognize the sort of text it is: a *constitutive* text that purports, in the name of the People of the United States of America, to bring into being a number of distinct but interrelated institutions."[253] For that reason, emphasis must be placed on the "text *and* structure, both the structure *within* the text—the pattern and interplay in the language of the Constitution . . . —and the structure . . . *outside* the text—the pattern and interplay in the governmental edifice that the Constitution describes and creates."[254]

Access's role in our broader constitutional structure remains undeveloped in the Supreme Court's jurisprudence, as well in scholarship. For its part, the Court has often compartmentalized access, separating out the interests in favor of access embodied in the First, Sixth, and due process clauses of the Fifth and Fourteenth Amendments without lingering on the potential interrelationships between the various provisions or whether access stands for something more than the sum of its parts.[255] Scholarship similarly suffers. Ardia (and others) have focused primarily on the structural First Amendment interests advanced by access, namely, "the recognition that the First Amendment's speech and press protections are intended to ensure that Americans are capable of self-governance."[256] He, however, did not focus on what other functions a right of access may play in our constitutional system and how those functions may inform our understanding of access.

A truly structural approach to the right of access must consider not just the First Amendment but the entirety of the Constitution. As Meredith Fuchs explained, "At a fundamental

level, secrecy claims must be measured against our historic and constitutional commitments to government openness."[257] While this holistic approach has not been endorsed by the Court, individual justices have recognized how publicity broadly serves a variety of functions throughout the Constitution and sought to use those functions to help explain why access is important as a constitutional matter.[258] In *Richmond Newspapers, Inc.*, for example, Justice Brennan noted that

---

[253] Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1235 (1995); *see also* Ardia, *supra* note 185, at 885-89.

[254] Tribe, *supra* note 253, at 1236; *see also* Ardia, *supra* note 185, at 885-89.

[255] Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 603 (1980) (Blackmun, J., concurring in judgment) (plurality opinion) (criticizing the Court for "eschew[ing] the Sixth Amendment route").

[256] *Id.* at 881; Levine, *supra* note 184; Kitrosser, *supra* note 185, at 99 ("secrecy's First Amendment implications stem from its stifling of the speech-related preconditions of self-government").

[257] Fuchs, *supra* note 10, at 139.

[258] *Richmond Newspapers, Inc.*, 448 U.S. at 603 (Blackmun, J., concurring in judgment) (observing that the plurality opinion "invoke[d] a veritable potpourri of [constitutional sources of the right]—the Speech Clause of the First Amendment, the Press Clause, the Assembly Clause, the Ninth Amendment, and a cluster of penumbral

the public trial right in the Sixth Amendment did "not impliedly foreclose the derivation of such a right from other provisions of the Constitution."[259] "The Constitution," he wrote, "was not framed as a work of carpentry, in which all joints must fit snugly without overlapping."[260] On the contrary, "a document that designs a form of government will address central political concerns from a variety of perspectives."[261] Prior to *Richmond Newspapers, Inc.* then, the Court had recognized the need for publicity for the accused "as a matter of the Sixth Amendment" open trial guarantee as well as "an ingredient in Fifth Amendment due process."[262] At times, other justices have recognized that other parts of our constitutional structure may, too, ensure access for other reasons.[263]

What follows suggests two additional structural functions that access plays: a checking function that advances the separation of powers as established by the Constitution, and the equipping function that advances and enables a healthy republican government. In national security cases, these functions play an outsized role and thus merit outsized discussion here. The focus on these two functions, though, is not meant to suggest that these are the only two structural functions that access plays in the Constitution in this context. On the contrary, as suggested, openness is found throughout the Constitution and serves a variety of interests depending on the context, as also described briefly herein.

IV. THE CHECKING FUNCTION OF ACCESS

The Constitution, by its very structure, establishes a system of three branches with "separate and distinct" powers.[264] This system was, of course, purposeful. Separation of powers is "essential to the preservation of liberty."[265] It is the "foundation" for the independent powers of each

---

guarantees recognized in past decisions"); *see also* Gannett Co. v. DePasquale*,* 443 U.S. 368, 429 n.11 (1979) (Blackmun, J., dissenting) (noting that public access may be derived "from a combination of the First and Sixth Amendments").

[259] 448 U.S. at 585 n.1 (Brennan, J., concurring in judgment).

[260] *Id.*

[261] *Id.*

[262] *Id.*

[263] *Id.* at 579 & n.15 (plurality opinion) (suggesting that federal-state interests embodied in the Ninth Amendment support openness); *id.* at 577-78 (asserting that "[t]he right of access to places traditionally open to the public, as criminal trials have long been, may be seen as assured by the amalgam of the First Amendment guarantees of speech and press; and their affinity to the right of assembly is not without relevance.").

[264] THE FEDERALIST NO. 51 (James Madison).

[265] *Id.*

branch,[266] ensures that "the members of each department should be as little dependent as possible on those of the others," and gives "those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others."[267] It prevents any branch from subsuming any other and intruding on the powers reserved by the People. For the Founders, "the doctrine of separation of powers was not mere theory; it was a felt necessity."[268]

At its most basic, "the constitutional system of checks and balances does not permit the executive branch to act beyond the accountability of the judiciary. Article III of the Constitution empowers the judiciary to resolve disputes including secrecy disputes."[269] Enforcing a right of access to judicial proceedings and records advances separations of power by clearly delineating separate spheres of power between the judiciary and executive and ensuring that the executive is accountable to the judiciary.

Decisions as to access to judicial proceedings and records—whether or not the content is national security information—are within the remit of the judiciary not the executive. Take two examples. First, as the D.C. Circuit recognized early on in *Ex Parte Drawbaugh* when a party sought to seal court records based on the rules of the U.S. Patent Office, "[T]his is a public court of record, governed by very different principles and considerations, in respect to its records and proceedings, from those that apply to an executive department."[270] In other words, executive rules could not dictate how the judiciary managed its proceedings and records.

Second, the Supreme Court adopted a similar line of reasoning a half-century later in *United States v. Reynolds* when it recognized the state secrets privilege.[271] There, the Court held that the government could make *an assertion* of executive privilege to maintain secrecy, but, importantly, it held that a "court *itself* must determine whether the circumstances are appropriate for the claim of privilege."[272] "Judicial control over the evidence in a case," after all, "cannot be abdicated to the caprice of executive officers."[273] Such a holding "would lead to intolerable abuses."[274] Thus,

---

[266] *Id.*
[267] *Id.*
[268] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 593 (1952) (Frankfurter, J., concurring).
[269] Fuchs, *supra* note 10, at 158.
[270] *Ex parte* Drawbaugh, 2 App. D.C. 404, 405 (D.C. Cir. 1894).
[271] United States v. Reynolds, 345 U.S. 1, 6 (1953).
[272] *Id.* at 8.
[273] *Id.* at 9-10.
[274] *Id.* at 8; *see also* Nixon v. United States, 418 U.S. 683, 704-05 (1974).

even in the context of national security, when it came to judicial proceedings, it was ultimately courts that retained the power over their proceedings and records.

This claim of judicial power to determine whether judicial proceedings or records may properly be closed, even when they implicate national security, can best be illustrated by considering the converse—a leading case relied on by the government when it asserts that only it should be able to decide whether classified information can be disclosed. In that case, *Department of Navy v. Egan*, the Navy denied a civilian employee the security clearance needed for the position for which he applied.[275] The employee then appealed that decision to an administrative board.[276] The presiding official reversed, holding that the board had the power to review that decision and further that the Navy failed support its finding.[277] Through successive layers of review the Federal Circuit finally agreed that the board had the authority to review denials of security clearances.[278]

Recognizing that the case raised "separation-of-powers concerns," the Supreme Court reversed.[279] Flowing from the president's Article II authority as Commander-in-Chief was both the executive's power to "classify and control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position in the executive branch that will give that person access to such information."[280] This conclusion found support in the Court's decisions "recogniz[ing] the Government's 'compelling interest' in withholding national security information from unauthorized persons in the course of executive business."[281] This conclusion made sense because "'an agency head who must bear the responsibility for the protection of classified information committed to his custody should have the final say in deciding whether to repose his trust in an employee.'"[282] The opinion though was cabined in a fundamentally important respect. Article II dictated the answer because the issue was the *internal administration* of national security information within the executive branch. As the majority pointed out, the executive's control over classified information extended to the control of

[275] 484 U.S. 518, 522 (1988).
[276] *Id.*
[277] *Id.*
[278] *Id.* at 524-25.
[279] *Id.* at 525-27.
[280] *Id.* at 527.
[281] *Id.*
[282] *Id.* at 529 (quoting Cole v. Young, 351 U.S. 536, 546 (1956)).

that information "in the course of executive business."[283] It was within that executive sphere that separation-of-powers concerns arose.

Where the issue is control of such information in the course of judicial business, however, the separation-of-powers analysis under *Egan* actually cuts in favor of the judiciary.[284] As the Supreme Court has held, "Every court has supervisory power over its own records and files."[285] In *Bulk Collection Opinions & Orders*, for example, two civil rights organizations originally sought access to four classified "opinions evaluating the meaning, scope, and constitutionality of Section 215" of the USA PATRIOT Act.[286] An en banc Foreign Intelligence Surveillance Court recognized that the motion raised separation of powers concerns.[287] It was true, the majority said, that "courts rarely presume to review the Executive Branch's decisionmaking, at least without a statutory hook."[288] But, echoing *Ex Parte Drawbaugh*, it added that "the classified information here is not housed in the Executive Branch; instead, it arises within an Article III proceeding, and Plaintiffs seek access to portions of *judicial* opinions."[289] In other words, as Laura Donohue, the court-

[283] *Id.* at 527.

[284] Daniel Cluchey, *Transparency in OLC Statutory Interpretation: Finding a Middle Ground*, 1 CORNELL POL'Y REV. 57, 65-66 (2011) (recognizing the limited scope of *Egan*).

[285] Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 598 (1978).

[286] *Bulk Collection Opinions & Orders*, slip op. at 2 (FISA Ct. Nov. 9, 2017).

[287] *Id.* at 16.

[288] *Id.*

[289] *Id.* Later in the same case, the Foreign Intelligence Surveillance Court of Review, after finding that it lacked jurisdiction to consider an appeal from an order denying the motion, later cast doubt (in *dicta*) on the conclusion of the *en banc* court. Specifically, the Court of Review observed that movants sought "disclosure of non-public material which has been deemed classified *by the Executive Branch*" and, therefore, "the crux of Movants' claim to disclosure here *lies within the Executive's clear authority* to determine what material should remain classified." *In re Opinions & Orders of this Court Addressing Bulk Collection of Data under the Foreign Intelligence Surveillance Act*, 957 F.3d at 1357 (second emphasis added). The *en banc* court's approach, however, is the better one. The Court of Review confuses the separation of power inquiry by focusing in the first instance not on the *function* to be performed, *i.e.*, the sealing or unsealing of a judicial record, but on the *content* of the judicial record at issue, *i.e.*, classified information. Sealing or unsealing a judicial record is a judicial not an executive function. *See, e.g.*, FISA Ct. R. of Proc., Rule 60(b) ("The Clerk: (1) maintains the Court's docket and records - including records and recordings of proceedings before the Court . . . ."); *see also id.*, FISA Ct. R. of Proc., Rule 62(a) (providing for release of opinions on court order). Certainly, the presence of classified information in a judicial record might ultimately militate against disclosure, *see* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 598 n.24 (1980) (Brennan, J., concurring in judgment) ("national security concerns about confidentiality may sometimes warrant closures during sensitive portions of trial proceedings, such as testimony about state secrets"), but it does not divest courts of their power to control their own records in the first place, Globe Newspaper Co. v. Super. Ct., 457 U.S. 596, 605 n.13 (1982) (noting that whether the right of access attaches to certain judicial proceedings does not depend on the content of the proceedings while the question of whether the right has been overcome does "depend[] . . . on the state interests assertedly supporting the restriction"). Ultimately, the Court of Review and, later, the Foreign Intelligence Surveillance Court determined that they lacked subject matter jurisdiction to consider constitutional right of access claims by non-parties. *See, e.g.*, In re Opinions & Orders of This Court Containing Novel or Significant Interpretations of Law, No. 16-01, 2020 WL 5637419, at *2 (FISA Ct. Sept. 15, 2020).

appointed amicus, would later note, "Judicial opinions belong to the courts. . . . Should the Court find for the government, Art. II would trump Article III in an area of core Article III powers."[290] *Egan*'s rationale is perfectly consistent with this argument.

Bulk Collection Opinions & Orders is not an outlier in recognizing this distinction. As previously noted, the Fourth Circuit in *In re Washington Post* rejected the government's argument that only it could dictate whether national security information in judicial proceedings could properly be disclosed.[291] Although the court recognized "the government's concern that dangerous consequences may result from the inappropriate disclosure of classified information," it held that a presumption of access attached to the proceeding and the court had to determine whether access had been overcome.[292] As the court put it, "A blind acceptance by the courts of the government's insistence on the need for secrecy, without notice to others, without argument, and without a statement of reasons, would impermissibly compromise the independence of the judiciary and open the door to possible abuse."[293] It is improper, the court said, for the judiciary to "abdicate its decision-making responsibility to the executive branch."[294]

While some courts have followed this approach,[295] the government has stridently maintained, with success in many cases, "that no matter how central the document or the testimony is to the resolution of a court case, the court under no circumstances can disclose it if the government has stamped it secret."[296] But the government's support for this argument does not stand up.[297] First, the government points to the "President's constitutional role as the head of the Executive Branch and as Commander-in-Chief."[298] Neither *Egan* nor its progeny, though, establish unilateral executive power to dictate the handling of classified information outside of the executive

---

[290] Brief of Amicus Curiae at 29-30, *Certification of Questions of Law*, No. FISC 18091 (FISA Ct. Rev. Mar. 16, 2018).

[291] 807 F.2d 383, 391 (4th Cir. 1986).

[292] *Id.*

[293] *Id.* at 392.

[294] *Id.* at 391; *see also id.* ("History teaches us how easily the spectre of a threat to 'national security' may be used to justify a wide variety of repressive government actions.").

[295] United States v. Rosen, 487 F. Supp. 2d 703, 717 (E.D. Va. 2007); United States v. Pelton, 696 F. Supp. 156, 157 (D. Md. 1986).

[296] Oral Argument at 24:04, Dhiab v. Obama, 141 F. Supp. 3d 23 (D.D.C. 2015), *rev'd sub nom.* Dhiab v. Trump, 852 F.3d 1087 (D.C. Cir. 2017) (No. 14-5299).

[297] *See generally* Fuchs, *supra* note 10, at 167 ("[I]t appears that a separation of powers argument for deference based on executive preeminence in national security matters is not well founded.").

[298] Opening Brief for Respondents-Appellants/Cross-Appellees at 31, Dhiab v. Trump, 852 F.3d 1087 (D.C. Cir. 2017) (No. 16-5011); *see also* Opening Brief for the United States at 19, *Certification of Questions of Law*, No. FISCR 18-01 (FISA Ct. Rev. Mar. 16, 2018); Gov. Response to Press Movants' Motion to Unseal 30 Oct. 2015 Transcript of Pub. Proceedings at 11, United States v. Mohammad, AE 400L (Mil. Comm'n 2016).

branch.[299] Moreover, the executive is not solely responsible for national security.[300] It was Congress, after all, that passed the National Security Act pursuant to which the presidents have promulgated executive orders creating the classification system that the executive relies on to keep secret judicial records containing classified information.[301] But there is a substantial question of whether Congress could—even with its "broad power to regulate the structure, administration, and jurisdiction of the courts," which the executive lacks, and its power over national security, which the executive shares[302]—divest an Article III court of its power over its records.[303]

Second, the government claims that Congress has validated its exclusive authority over national security information through the Freedom of Information Act ("FOIA") and the Classified Information Procedures Act ("CIPA"). It contends that FOIA, which requires disclosure of government records subject to exemptions, including one for national security information,

---

[299] Courts show less deference when there are inter-branch conflicts. *See* Dep't of Navy v. Egan, 484 U.S 518, 530 (1988) ("[*U*]*nless Congress specifically has provided otherwise*, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." (emphasis added)); United States v. AT&T, 551 F.2d 384, 392 (D.C. Cir. 1976) (observing that case law does "not establish judicial deference to executive determinations in the area of national security when the result of that deference would be to impede Congress in exercising its legislative powers").

[300] *See* U.S. CONST. art. I, § 8 (giving Congress the power to "declare war," 'raise and support armies," "provide and maintain a Navy," "organiz[e], arm[], and disciplin[e], the Militia"); *see also* KENNETH MAYER, WITH THE STROKE OF A PEN: EXECUTIVE ORDERS AND PRESIDENTIAL POWERS 143 (2002) ("The legal and constitutional arguments concerning the balance of congressional-executive authority over classification suggest strongly that the pure presidency-centered view is overdrawn."); Fuchs, *supra* note 10, at 157 ("[T]he Constitution vests significant powers with regard to the protection of national security in Congress as well.").

[301] Congress has also established how it and others must handle classified information and when it can be disclosed irrespective of executive demands. *See* S. Elisa Poteat, *Discovering the Artichoke: How Mistakes and Omissions Have Blurred the Enabling Intent of the Classified Information Procedures Act*, 7 J. NAT'L SECURITY L. & POL'Y 81, 85-86, 110 n.127 (2014); *see also* Brief of Amicus Curiae at 30, *Certification of Questions of Law*, No. FISC 18091 (FISA Ct. Rev. Mar. 16, 2018) ("The Senate retains the right to declassify material when it determines that doing so would be in the public interest. The Senate Select Committee on Intelligence can declassify witness names and make classified material available." (citations omitted)); Rules of the House of Representatives, Effective for the One Hundred and Fourteenth Congress, Rule X(11)(g)(1)(G) (provision permitting release of classified information over the objection of the President); *see also* Molly E. Reynolds, *The Little-Known Rule that Allowed Congress to Release Devin Nunes's Memo*, LAWFARE BLOG (Jan. 30, 2018, 4:04 PM), https://perma.cc/G6QY-DKWW.

[302] ELIZABETH B. BAZAN, JONNY KILLIAN & KENNETH R. THOMAS, CONG. RSCH. SERV., RL32926, CONGRESSIONAL AUTHORITY OVER THE FEDERAL COURTS 1 (2005).

[303] *See Bulk Collection Opinions & Orders*, slip op. at 2 (FISA Ct. Nov. 9, 2017) (Collyer, J., dissenting) ("The effect of the Court's decision today is to displace Congress's judgment that access to classified and *ex parte* FISC judicial opinions shall be resolved through the procedures set forth in Section 402 of the USA FREEDOM Act."); *see also* Globe Newspaper Co. v. Super. Ct., 457 U.S. 596, 611 n.27 ("[A] mandatory rule, requiring no particularized determinations in individual cases, is unconstitutional."); Nation Mag. v. U.S. Dep't of Def., 762 F. Supp. 1558, 1568 (S.D.N.Y. 1991) ("The Court concludes that the mere fact that the regulations were promulgated by DOD to deal with press restrictions during military operations does not render the controversy non-justiciable."); *cf.* McKeever v. Barr, No. 19-307, 2020 U.S. LEXIS 628, at *1 (Jan. 21, 2020) (Breyer, J., respecting the denial of certiorari) (discussing courts' inherent authority over disclosure of grand jury records despite Federal Rule of Criminal Procedure 6(e)).

demonstrates that courts "must accept . . . at face value" its classification decisions.[304] It is true that the Supreme Court held in *EPA v. Mink* that Congress never intended FOIA "to subject executive security classifications to judicial review."[305] But a year later, Congress overrode *Mink* and a presidential veto to make clear that courts have such power.[306] Senator Edmund Muskie, the chief sponsor of the override, explained, "I object to the idea that anything but full *de novo* review will give us the assurance that classification—like other aspects of claimed secrecy—has been brought under check."[307]

The government's reading of CIPA is backwards too. CIPA accommodates a public trial, or, short of that, prevents a secret one from going forward. Under CIPA, the government can request an *in camera* hearing to determine "the use, relevance, or admissibility of classified information" at a defendant's criminal trial.[308] If the court determines that the information is relevant and admissible, it may "authoriz[e] the disclosure."[309] If the government objects, it can either admit the relevant facts or provide an unclassified summary.[310] The court must then determine whether either "will provide the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information."[311] If not, and if the government still opposes disclosure, the indictment should be dismissed.[312] Nowhere does CIPA validate the use of secret

[304] Opening Brief for Respondents-Appellants/Cross-Appellees at 34, Dhiab v. Trump, 852 F.3d 1087 (D.C. Cir. 2017) (No. 16-5011) (citing International Counsel Bureau v. U.S. Dep't of Def., 906 F. Supp. 2d 1, 6 (D.D.C. 2012); *see also* Ctr. for Constitutional Rights v. CIA, 765 F.3d 161, 167-68 (2d Cir. 2014)).

[305] 410 U.S. 73, 82 (1973).

[306] Ray v. Turner, 587 F.2d 1187, 1190-91 (D.C. Cir. 1978) ("In 1974 Congress overrode a presidential veto and amended the FOIA for the express purpose of changing this aspect of the Mink case."); *see also* CIA v. Sims, 471 U.S. 159, 188-89 (1985) (Marshall, J., concurring in judgment) ("At one time, this Court believed that the Judiciary was not qualified to undertake this task. Congress, however, disagreed . . . ." (citation omitted)).

[307] Freedom of Information Act and Amendments of 1974, Pub. L. No. 93-502, 88 Stat. 1561 (1974), *reprinted in* SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE AND PROCEDURE OF THE COMMITTEE ON THE JUDICIARY. FREEDOM OF INFORMATION ACT AND AMENDMENTS OF 1974 (P.L. 93-502): A SOURCE BOOK : LEGISLATIVE HISTORY, TEXTS, AND OTHER DOCUMENTS (93-502), 305 (1975); *see also* Fuchs, *supra* note 10, at 158 ("Congress . . . has acknowledged the judiciary's constitutional role in policing executive claims of secrecy."

[308] 18 U.S.C. app. 3 § 6(a).

[309] *Id.* § 6(c)(1).

[310] *Id.* § 6(c)(1)(A)-(B).

[311] *Id.* § 6(c)(1).

[312] *Id.* § 6(e)(2); *see also, e.g.*, Neil A. Lewis & David Johnston, *U.S. to Drop Spy Case Against Pro-Israel Lobbyists*, N.Y. TIMES (May 1, 2009), https://perma.cc/737P-CP99 ("Judge Ellis rejected several government efforts to conceal classified information if the case went to trial.").

evidence. Thus, courts have "squarely reject[ed] the notion that CIPA authorize[s] . . . trial closure."[313]

Third, the government often contends that courts should not second-guess the executive because they "might err by releasing information that in fact should remain classified."[314] This argument, however, has little weight where there is "broad agreement that too much information is classified."[315] At any rate, in the context of domestic terrorism, the Supreme Court has rejected "the Government's argument that internal security matters are too subtle and complex for judicial evaluation."[316] And the D.C. Circuit extended that logic to the national security context in *Zweibon v. Mitchell*.[317] Congress's legislative override in *Mink*, it said, evidenced a "vote of confidence in the competence of the judiciary" and affirmed the "belief that judges do, in fact, have the capabilities needed to consider and weigh data pertaining to the foreign affairs and national defense of this nation."[318]

But this is not merely a question of *who* decides, as that question alone fails to illuminate *why* access advances separation of powers. When executive conduct is challenged in court, the right of access advances separation of powers by placing in the hands of the judiciary the power to air disputes concerning the government before the public thus maintaining the integrity of the judicial process and holding the executive to account. This recalls the "familiar maxim . . . , 'justice should not only be done, but should manifestly and undoubtedly be seen to be done.'"[319] In *Richmond Newspapers, Inc.*, Chief Justice Burger recognized the risk that closed proceedings would erode trust in the judicial process. As he put it, "A result considered untoward may undermine public

---

[313] United States v. Rosen, 487 F. Supp. 2d 703, 718-19 (E.D. Va. 2007); United States v. Poindexter, 732 F. Supp. 165, 167 n.9 (D.D.C. 1990) (observing that "CIPA obviously cannot override a constitutional right of access").

[314] In re Motion for Release of Court Records, 526 F. Supp. 2d 484, 495 (FISA Ct. 2007); *see also* Opening Brief for Respondents-Appellants/Cross-Appellees at 32, Dhiab v. Trump, 852 F.3d 1087 (D.C. Cir. 2017) (No. 16-5011) ("The deference that courts give to the Executive regarding access to classified information . . . rests on practical concerns: 'the Executive and the intelligence agencies under his control occupy a position superior to that of the courts in evaluating the consequences of a release of sensitive information.'" (quoting El-Masri v. United States, 479 F.3d 296, 305 (4th Cir. 2007)).

[315] *See* Herbert Lin, *A Proposal to Reduce Government Overclassification of Information Related to National Security*, 7 J. NAT'L SECURITY L. & POL'Y 443, 462 (2015).

[316] United States v. U.S. Dist. Ct. for E. Dist. of Mich., 407 U.S. 297, 320 (1972); *see also* Sterling v. Constantin, 287 U.S. 378, 401 (1932) ("What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions.").

[317] 516 F.2d 594, 642 (D.C. Cir. 1975) (en banc).

[318] *Id.*; *see also* Deborah Pearlstein, *Before Privacy, Power: The Structural Constitution and the Challenge of Mass Surveillance*, 9 J. NAT'L SECURITY L. & POL'Y 159, 181-83 (2017) (explaining *Zweibon* in historical context).

[319] T.S. Ellis III, *Sealing, Judicial Transparency and Judicial Independence*, 53 VILL. L. REV. 939, 940 (2008) (quoting Rex v. Sussex Justices, 1 K.B. 256, 259 (1924)).

confidence, and where the trial has been concealed from public view an unexpected outcome can cause a reaction that the system at best has failed and at worst has been corrupted."[320]

Openness also acts as a check on the executive. Openness, the Sixth Circuit observed, "require[es] the Government to account for their choices" before public.[321] If the judiciary lacked the authority to enforce openness, "the government could act arbitrarily" with the protection of doing so "behind closed doors."[322] In those cases, judicial proceedings would be "immunize[d] . . . from the public scrutiny that is necessary to sustain the judiciary's legitimacy."[323] Then-Chief Judge Garland, in addressing a similar concern in the *Dhiab* case, questioned the government's assertion that it could short circuit openness in judicial proceedings and the logical end of that assertion. Under the government's logic, in the face of an objection from the government, a court would be unable to order disclosure of classified information even if the government was acting "irrational" or "hiding something."[324] As he put it, if the decision to seal proceedings or records in the judiciary were committed solely to the executive in national security cases, the public could not be assured that justice was being done by the judiciary; if the government had its way, it could "stamp[] [a copy of the Gettysburg Address] secret" and offer it as evidence "that Mr. Dhiab blew up the World Trade Center," and the court would be powerless to disclose that evidence in the face of an objection from the government.[325]

In some of the most sensitive national security cases of our time, the Supreme Court has similarly recognized the need that even these cases play out in public. In the *New York Times v. United States*, the *Pentagon Papers* case, the government asked the Supreme Court to seal portions of the oral argument over whether *The New York Times* and *The Washington Post* could be restrained from publishing a secret (and highly embarrassing) history of the Vietnam War. The Court, however, denied that request and required that the argument be held in public despite

[320] Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 57 (1980) (plurality opinion). While not implicating traditional separation of powers concerns, it is worth recognizing that the Court of Military Commission Review recently recognized the importance of such legitimacy in those proceedings. Ali v. United States, 398 F. Supp. 3d 1200, 1222 (C.M.C.R. 2019) ("Regardless of the hearing's outcome, it is important for the integrity of the 9/11 prosecution that the truth come out and be available to anyone who cares to inquire.") (citing *Richmond Newspapers, Inc.*, 448 U.S. at 564 (plurality opinion)).

[321] Detroit Free Press v. Ashcroft, 303 F.3d 681, 693(6th Cir. 2002).

[322] *Id.*

[323] Ellis, *supra* note 319, at 947.

[324] Oral Argument at 24:04, Dhiab v. Obama, 141 F. Supp. 3d 23 (D.D.C. 2015), rev'd sub nom. Dhiab v. Trump, 852 F.3d 1087 (D.C. Cir. 2017) (No. 14-5299).

[325] *Id.*

national security concerns raised by the government.[326] While no reason was given, it takes little imagination to conclude that the Court knew the public was watching. If the government was going to make a case for a prior restraint against the press, for depriving the public of information on a war that cost the lives of thousands of American men, it would have to do so in public.

Years later, Lakhdar Boumediene, a detainee in the war of terror housed at Guantánamo Bay, sought a writ of *habeas corpus*.[327] Although the principal issues in that case related to the Military Commissions Act of 2006, the Suspension Clause, and whether detainees could claim the protection of the Fifth Amendment's Due Process Clause, the case also had a subplot relating to the disclosure of national security information in Article III courts.[328] On that point, the government argued that the Court should decline to permit *habeas corpus* actions in civilian courts because of the risk of "widespread dissemination of classified information."[329] The Court rejected that argument too. It noted that while "the Government has a legitimate interest in protecting sources and methods of intelligence gathering," a civilian court could "accommodate" that interest through the application of existing evidentiary privileges.[330] This reservation by the courts to decide whether and how to accommodate those interests was especially important because, as Justice Kennedy recognized, there is "risk inherent in any process that . . . is 'closed and accusatorial.'"[331]

In cases implicating government conduct, the Constitution places in the hands of the judiciary the power to decide what judicial proceedings or records may be secreted (if any). This is a decidedly judicial function. Access not only prevents executive intrusion into this function, which on its own serves to protect separation of powers, it protects the integrity of the judiciary in the eyes of the public by ensuring that the government is treated as any other litigant.[332] It ensures that the judiciary is the handmaiden of justice; not the handmaiden of the government. This is especially

---

[326] Oral Argument at 00:01, N.Y. Times Co. v. United States, 403 U.S. 713 (1971) (No. 1873), https://perma.cc/HK23-9TD4.

[327] Boumediene v. Bush, 553 U.S. 723, 796 (2008).

[328] *See generally id.*

[329] *Id.* at 796.

[330] *Id.* (citing United Stated v, Reynolds, 345 U.S. 1, 10 (1953)). Lower courts have construed *Boumediene* as a direction "to preserve to the extent feasible the traditional right of public access to judicial records grounded in the First Amendment." Ameziane v. Obama, 620 F.3d 1, 6 (D.C. Cir. 2010).

[331] *Boumediene*, 553 U.S. at 56.

[332] *Press-Enterprise I*, 464 U.S. 501, 508 (1984) (access ensures "public confidence in the system"); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 572 (1980) (noting "a system of secrecy" undermines a "strong confidence in judicial remedies").

so where the government is inappropriately trying to shield not the disclosure of sensitive information—but the disclosure of embarrassing information, perhaps information implicating the government's violation of individuals' constitutional rights.[333] While not implicating as a technical matter the same constitutional separation of powers, one need look no further than the military commissions at Guantánamo Bay to understand how legitimacy suffers when special dispensations are provided to the executive in judicial proceedings.[334] Without access, the separation of powers principle baked into the Constitution would be frustrated; with it, it is advanced.

V. THE EQUIPPING FUNCTION OF ACCESS

In addition to the separation of powers role that access plays, access also equips citizens with the information they need to engage in self-governance. Unlike other systems of government, a republican form of government requires access to information in order to work.[335] The "Constitution created a form of government under which 'The people, not the government, possess the absolute sovereignty.'"[336] This idea, that "We the People of the United States . . . do ordain and establish this Constitution for the United States of America," that the People was sovereign, was a radical one at the time that had equally radical implications for what information is owed to the public by its government.[337] Because the Founders "guarantee[d] to every State in this Union a Republican Form of Government,"[338] "it logically and necessarily follows that the people have a right to know what the Government—which they themselves established—is doing."[339]

---

[333] *See* Ali v. United States, 398 F. Supp. 3d 1200, 1221 (C.M.C.R. 2019) (noting the importance of the motion as seeking "to determine whether there has been governmental misconduct"); *see also* Waller v, Georgia, 467 U.S. 39, 47 (1984) ("The public in general also has a strong interest in exposing substantial allegations of police misconduct to the salutary effects of public scrutiny.").

[334] For a recent discussion of secrecy's toll on the legitimacy of the military commissions see Carol Rosenberg, *The Growing Culture of Secrecy at Guantánamo Bay*, N.Y. TIMES (Apr. 4, 2020), https://perma.cc/V2AZ-K2AM; *see also* Carol Rosenberg, *The Strange Case of the C.I.A. Interpreter and the 9/11 Trial*, N.Y. TIMES (Aug. 14, 2019), https://perma.cc/V2AZ-K2AM.

[335] *See* Ardia, *supra* note 185, at 886 ("The First Amendment serves a structural function by facilitating the communicative processes necessary for democratic self-governance.").

[336] New York Times Co. v. Sullivan, 376 U.S. 254, 274 (2008).

[337] U.S. CONST. pmbl.; *cf.* Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 597-98 (1978) (recognizing that "[i]n contrast to the English practice," access in the United States is "not condition[ed] . . . on a proprietary interest in the document or upon a need for it as evidence in a lawsuit" but rather "in the citizen's desire to keep a watchful eye on the workings of public agencies, and in a newspaper publisher's intention to publish information concerning the operation of government" (citations omitted)).

[338] U.S. CONST. art. IV, § 4.

[339] Hennings, Jr., *supra* note 248, at 669.

The Founders viewed public knowledge as fundamental to the government they were creating. In early debates in the House over whether to consider a treaty in secret, those opposed, including James Madison, objected, "secrecy in a Republican Government wounds the majesty of the sovereign people; that this Government is in the hands of the people; and that they have a right to know all the transactions of their own affairs."[340] This view was hardly novel at the Founding. Madison famously said that a "people who mean to be their own Governors must arm themselves with the power knowledge gives" and that a "popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both."[341] Thomas Jefferson agreed, "The way to prevent these [protests by the People] is to give them full information of their affairs through the channel of the public papers, and to contrive that those papers should penetrate the whole mass of the people."[342]

The Founders memorialized this need for information throughout the Constitution. In Article I, Section 5, Clause 3, the House and the Senate are directed to "keep a Journal of its Proceedings, and from time to time publish the same, except such Parts as may in their judgment require Secrecy."[343] That clause, the Supreme Court later said, "'insure[d] publicity to the proceedings of the legislature'" and deprived "'[i]ntrigue and cabal . . . of some of their main resources, by plotting and devising measures in secrecy.'"[344] By ensuring publicity, the Court said, "'The public mind is enlightened by an attentive examination of the public measures.'"[345] Under Article I, Section 9, Clause 7, Congress is required from "time to time" to publish a "Statement and Account of Receipts and Expenditures of all public Money."[346] And under Article II, Section 3, the president

---

[340] 4 ANNALS OF CONG. 150 (1793). Courts have overstated the amount of secrecy in the early days of the Union. *See, e.g.*, Capital Cities Media, Inc. v. Chester, 797 F.2d 1164, 1169-71 (3d Cir. 1986) (stating incorrectly that "the House [met in closed session] until the War of 1812"). Some history cannot be swept aside, however. The Senate did meet in secret until 1794 when state legislators forced it to stop. CHRISTOPHER M. DAVIS, CONG. RESEARCH SERV., R42106, SECRET SESSIONS OF THE HOUSE AND SENATE: AUTHORITY, CONFIDENTIALITY, AND FREQUENCY 3 (2014). During the time the Senate was closed, senators from Virginia, "believ[ing] it was their constitutional duty to keep their State governments informed about their activities in the Senate," "often freely discussed outside the Senate Chamber the activities within." ROY SWANSTROM, THE UNITED STATES SENATE, 1787-1801: A DISSERTATION ON THE FIRST FOURTEEN YEARS OF THE UPPER LEGISLATIVE BODY 239 (1988).

[341] 9 THE WRITINGS OF JAMES MADISON 103 (Gaillard Hunt ed., 1910).

[342] 2 MEMOIR, CORRESPONDENCE, AND MISCELLANIES, FROM THE PAPERS OF THOMAS JEFFERSON 85 (Thomas Jefferson Randolph ed., 1830).

[343] U.S. CONST. art. I, § 5, cl. 3.

[344] Marshall Field & Co. v. Clark, 143 U.S. 649, 670-71 (1892) (quoting 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 840, 841, at 590-81 (1873)).

[345] *Id.*

[346] U.S. CONST. art. I, § 9, cl. 7.

"shall from time to time give to the Congress Information of the State of the Union."[347] This section creates "a positive *duty* to provide information to the Congress," which, in turn, would provide it to the People.[348]

The right to know shows up in Article III, Section 2 and the Sixth Amendment, as well.[349] In *Gannett Co., Inc. v. DePasquale*, while the Court refused to recognize a public right of access to criminal trials under the Sixth Amendment, it admitted that "[t]here can be no blinking the fact that there is a strong societal interest in public trials."[350] Later, in *Waller v. Georgia*, the Court noted, "To the extent there is an independent public interest in the Sixth Amendment public-trial guarantee, it applies with full force to suppression hearings."[351] That right existed because access "'ensure[d] that [the] constitutionally protected "discussion of governmental affairs" is an informed one.'"[352] That case, especially, implicated the public interest in learning about allegations that "police conducted general searches and wholesale seizures in over 150 homes, and eavesdropped on more than 800 hours of telephone conversations by means of effectively unsupervised wiretaps."[353]

The equipping function, however, is most at home in the First Amendment. As Kitrosser has explained, "The relationship between the basic premises and principles of self-government as a political concept and the guarantee of free speech is borne out first and most obviously by the inextricable connection between the First Amendment, the Bill of Rights, and the American 'constitutional experiment' generally."[354] Implicit in the First Amendment "is a right to knowledge, including knowledge about what the government is doing."[355] To effectively petition their government, the People need to be able to assemble; and to effectively assemble, citizens must be able to share ideas; and to effectively share ideas, citizens must be able to gain access to

---

[347] *Id.* art. II, § 3.

[348] Hennings, Jr., *supra* note 248, at 669.

[349] *See* U.S. CONST. art. III, § 2 ("The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury"); *see also id.* amend. VI. A "jury trial" at the time of the Founding was synonymous with a "public trial." *See, e.g.*, 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1791 (Boston, Hilliard, Gray, and Co. 1833) ("The trial is always public[.]").

[350] 443 U.S. 368, 383 (1979).

[351] 467 U.S. 39, 47 n.5 (1984) (citations omitted).

[352] *Id.* (quoting Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 605 (1982)).

[353] *Id.* Query whether the right of access should take on especial importance in such matters because the right to be free from unreasonable searches and seizures is protected by the Fourth Amendment. In other words, that the Fourth Amendment protects the citizens from such abuses, perhaps the right of access should be viewed as applying with especially force to cases implicating an abuse of those rights.

[354] Kitrosser, *supra* note 185, at 127.

[355] Hennings, Jr., *supra* note 248, at 669.

information about their government.[356] Without the ability to gain access to information about their government, the machine of self-government breaks down. As Charles Black explained, "[I]t seems rather clear that [the exercise of First Amendment rights are] a part of the working of the national government; . . . a part of the flow of communication which is its lifeblood."[357]

The Supreme Court, in *Grosjean v. American Press Co.*, affirmed this structural view that the First Amendment and its complimentary clauses enable a republican form of government.[358] There, the Court explained that "[t]he predominant purpose of the grant of immunity here invoked [under the First Amendment] was to preserve an untrammled press as a vital source of public information . . . since informed public opinion is the most potent of all restraints upon misgovernment."[359] In other words, the "'evils to be prevented'" by the First Amendment "were not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters *as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens*.'"[360]

Yet, when the Court recognized a constitutional right of access in *Richmond Newspapers, Inc.*, the plurality opinion did not rally around this understanding.[361] In fact, as discussed, the plurality said that "[i]t is not crucial" to link the right of access to any theory.[362] Justice Brennan, however, recognized that if access was to be recognized as a constitutional right, a structural understanding of the right of access was vital in explaining the interests at stake. Thus, Brennan wrote, invoking *Grosjean*, the right of access had "a *structural* role to play in securing and fostering our republican system of self-government."[363] "The structural model," he wrote, "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

---

[356] *See, e.g.*, CHARLES BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 41 (1969); *see also* Branzburg v. Hayes, 408 U.S. 665, 681 (1972) ("without some protection for seeking out the news, freedom of the press could be eviscerated.").

[357] BLACK, *supra* note 356, at 41.

[358] 297 U.S. 233 (1936).

[359] *Id.* at 250; *see also* Hennings, Jr., *supra* note 248, at 669.

[360] Grosjean v. American Press Co., 297 U.S. 233, 249-50 (1936) (emphasis added) (quoting THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 886 (1927)).

[361] 448 U.S. 555, 576 (1980) (plurality opinion).

[362] *Id.*

[363] *Id.* at 587 (Brennan, J., concurring in judgment) (citing United States v. Carolene Products Co., 304 U.S. 144, 152-153, n. 4 (1938)); *Grosjean*, 297 U.S. 233, 249-50 (1936); *see also* Stromberg v. California, 283 U.S. 359, 369 (1931).

communication."[364] The First Amendment, to be effective, must be understood to protect "the antecedent assumption that valuable public debate . . . must be informed."[365] It protected both the ends *and* the means of informed debate.[366]

This theory was "not novel," Brennan said.[367] The Court often "deriv[ed] specific rights from the structure of our constitutional government, or from other explicit rights."[368] The right to vote and the right of association—the former, "inferred from the nature of 'a free and democratic society'" and the latter, "a correlative guarantee" derived for the First Amendment's "explicit freedoms"—were two such rights.[369] Pointing to Footnote 4 of *United States v. Carolene Products Co.*, he implied that recognition of such rights was especially important when government conduct undermined the Constitution's democratic processes that would normally "be expected to bring about" accountability.[370]

In *Grosjean*, for example, the Court invalidated a tax aimed at newspapers critical of the Louisiana governor not because the tax was facially invalid but because it was "a deliberate and calculated device . . . to limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties."[371] In such cases, courts had an obligation to enforce "more exacting judicial scrutiny" to protect not just speech but republican government itself.[372]

And, although Justice Powell did not participate in *Richmond Newspapers, Inc.*, Brennan noted that the structural role of right of access was "foreshadowed in . . . Powell's dissent" in *Saxbe v. Washington Post Co.*[373] There, Powell said that the First Amendment was a "vital bulwark[] of our national commitment to *intelligent self-government*," and, therefore, speech "must not only be unfettered; *it must also be informed*."[374] While the majority found that a regulation limiting the

---

[364] Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 587-88 (Brennan, J., concurring in judgment).
[365] *Id.* at 587.
[366] Eugene Cerruti, *"Dancing in the Courthouse": The First Amendment Right of Access Opens a New Round*, 29 U. RICH. L. REV. 237, 283 (1995) ("*Richmond Newspapers* does not vindicate a freedom of speech so much as it does a freedom of self-rule.").
[367] *Richmond Newspapers, Inc.*, 448 U.S. at 588 n.4 (Brennan, J., concurring in judgment).
[368] *Id*.
[369] *Id.* (citation omitted).
[370] United States v. Carolene Prod. Co., 304 U.S. 144, 153 n.4 (1938).
[371] 297 U.S. at 250.
[372] *Carolene Prod. Co.*, 304 U.S. at 152 n.4 (1938).
[373] *Id.* at 150 n.3 (Brennan, J., concurring in judgment).
[374] Saxbe v. Wash. Post Co., 417 U.S. 843, 862-63 (1974) (Powell, J., dissenting) (emphases added); *see also id.* at 862 (noting that the First Amendment "embodies our Nation's commitment to popular self-determination and our abiding faith that the surest course for developing sound national policy lies in a free exchange of views on public issues").

press's ability to interview prisoners did not implicate the First Amendment, Powell, joined by Brennan and Marshall, disagreed. "Federal prisons," he wrote, were "public institutions" and "administration of these institutions, the effectiveness of their rehabilitative programs, [and] the conditions of confinement that they maintain . . . are all matters of legitimate societal interest and concern."[375] While the regulation did not directly infringe on the right to speak, it impermissibly frustrated "the societal function of the First Amendment in preserving free public discussion of governmental affairs."[376]

Two years after *Richmond Newspapers, Inc.*, the Court came the closest it would to adopting the structural role of the First Amendment in matters of access to information.[377] In *Globe Newspaper Co. v. Superior Court*, Brennan "eschewed any 'narrow, literal conception' of the [First] Amendment's terms."[378] The First Amendment, he said, was "broad enough to encompass those rights that, while not unambiguously enumerated . . . are nonetheless necessary to the enjoyment of other First Amendment rights."[379] One such right was access to government proceedings to "ensure that the individual citizen can *effectively* participate in and contribute to our republican system of self-government."[380] The access right, he wrote, guaranteed that the "constitutionally protected 'discussion of governmental affairs' is an informed one."[381]

While overshadowed by subsequent opinions in *Press-Enterprise I & II*, *Globe Newspaper Co.*'s structural approach has subsisted in access scholarship and case law. As to the former, scholarship has viewed Brenan's structural approach as access's defining theoretical inflection point. Ardia, who has most recently confronted the problem of access in depth, has said that "public access is of constitutional significance because it makes self-government possible."[382] Papandrea called the recognition "that the First Amendment played a structural role in requiring an open government" revolutionary.[383] Kitrosser, Levine, and Olson similarly approve of an understanding

[375] *Id.* at 861.
[376] *Id.* at 862.
[377] Globe Newspaper Co. v. Super. Ct., 457 U.S. 596, 604-05 (1982).
[378] *Id.* at 604 (quoting NAACP v. Button, 371 U.S. 415, 430 (1963)).
[379] *Id.* (citing *Richmond Newspapers, Inc.*, 448 U.S. at 579-80 & n.16 (plurality opinion)); *Richmond Newspapers, Inc.*, 448 U.S. at 587-88 & n.4 (Brennan, J., concurring in judgment).
[380] *Globe Newspaper Co.*, 457 U.S. at 604 (emphasis added) (citing Thornhill v. Alabama, 310 U.S. 88, 95 (1940)); *Richmond Newspapers, Inc.*, 448 U.S. at 587-88 (Brennan, J., concurring in judgment).
[381] *Globe Newspaper Co.*, 457 U.S. at 605.
[382] Ardia, *supra* note 185, at 894.
[383] Papandrea, *supra* note 9, at 44.

of access as serving a structural function.[384] As Kitrosser put it, "access denials are significant not because they directly restrain speech but because they threaten the preconditions of speech facilitative of self-government and the checking of government abuse."[385]

As to the case law, the First Amendment structuralist approach has found special importance in cases touching on national security where the public has a palpable interest in the government's conduct. As discussed, in *Detroit Free Press*, the question was whether in the wake of 9/11 the government could "secretly deport a class [of individuals] if it unilaterally calls them 'special interest' cases."[386] Emphasizing what it called the government's demand from the judiciary for "selective[] control[of] information rightfully belonging to the people," the Sixth Circuit held that those proceedings were subject to public access.[387] While it recognized traditional functions served by access (for example, ensuring witness testimony was truthful), the court found that the true importance of access was in ensuring "that 'the individual citizen can effectively participate in and contribute to our republican system of self-government.'"[388] It thus rejected what it called the government's limitless argument that the proceedings should be closed because it would be "impossible to keep some sensitive information confidential if any portion of the hearing is open."[389] If accepted, 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."[390] This the court could "not countenance," as a "government operating in the shadow of secrecy stands in complete opposition to the society envisioned by the Framers of our Constitution."[391]

The district court in *Dhiab* reached similar conclusions. As the court observed there, "the importance of releasing the videotapes to the public in order to 'enlighten the citizenry' . . . cannot be overstated."[392] According to the court, the detention of uncharged detainees at Guantánamo

---

[384] Ardia, *supra* note 185, at 907; Olson, *supra* note 239, at 491; Levine, *supra* note 184; Kitrosser, *supra* note 185, at 99.

[385] Kitrosser, *supra* note 185, at 99.

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

[387] *Id.*

[388] *Id.* at 704 (quoting *Globe Newspaper Co.*, 457 U.S. at 604).

[389] *Id.* at 708-10.

[390] *Id.* at 709-10.

[391] *Id.* at 710; *see also* Nation Mag. v. Dep't of Def., 762 F. Supp. 1558, 1572 (S.D.N.Y. 1991) ("If the reasoning of these recent access cases were followed in a military context, there is support for the proposition that the press has at least some minimal right of access to view and report about major events that affect the functioning of government . . . .").

[392] Dhiab v. Obama, 141 F. Supp. 3d 25, 29 (D.C. Cir. 2015).

Bay, sometimes indefinitely, had been a "burning, controversial issue in this country."[393] Transparency, the court wrote, "is one of the cornerstones of our democracy," and where the government failed to provide sufficient justification for closing particular proceedings or sealing particular records, the court would not keep them "from the eyes and ears of the American public."[394] Invoking Justice Stewart's concurring opinion in the *Pentagon Papers* case, the court wrote, "In the absence of the governmental checks and balances present in other areas of our national life, the only effective restraint upon executive policy and power in the areas of national defense and international affairs may be in an enlightened citizenry—in an informed and critical public opinion which alone can . . . protect the values of democratic government."[395]

Similarly, in *Nation Magazine v. Department of Defense*, where various media challenged Department of Defense regulations limiting press access to battlefields, the district court also invoked the equipping function. As the court there explained, "A fundamental theme in *Richmond* and *Globe* was the importance of an informed American citizenry."[396] Access to government proceedings was not simply meant to ensure fair process. Rather, the court wrote, "guaranteed access of the public to occurrences in a courtroom during a criminal trial assures 'freedom of communication on matters relating to the functioning of government.'"[397] Thus, the right of access protected the right to "[l]earn[] about, criticiz[e] and evaluat[e] government," and guarded "against abuse of government power."[398]

Where there are allegations of government misconduct, the equipping function is at its apex. In *Ali v. United States*, for example, the issue before the Court of Military Commission Review was whether the military judge should be ordered "to hold a public hearing in a pre-trial matter involving the unclassified testimony of a witness known as the 'Interpreter.'"[399] The Interpreter had previously worked for Ali's defense team, until he or she was recognized as having previously worked at a CIA black site.[400] Thereafter, the government confirmed that the Interpreter had, in fact, worked for the CIA.[401] The government, however, maintained that the Interpreter was not a

[393] *Id.*
[394] *Id.*
[395] *Id.* (quoting *N.Y. Times Co.*, 403 U.S. at 732 (Stewart, J., concurring)).
[396] *Nation Mag.*, 762 F. Supp. at 1572.
[397] *Id.* (quoting Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 575 (1980)).
[398] *Id.* (citations omitted).
[399] 398 F. Supp. 3d 1200, 1209 (C.M.C.R. 2019).
[400] *Id.* at 1212.
[401] *Id.*

government asset and that it had not caused the Interpreter to seek employment with the defense teams.[402] The military commission eventually agreed to permit the defense to question the Interpreter as to how he or she came to work with the defense and whether he or she shared any information learned with the government.[403] After the government expressed concern that the testimony would result in spillage, the military judge ruled that the testimony would be closed to the public.[404]

In vacating the military judge's ruling, the Court of Military Commission Review identified as the "most important" salient issue "the need for public scrutiny of what will occur during the hearing."[405] As the court explained, "[T]he purpose of the hearing is to seek information that *may or may not* be evidence of governmental misconduct and to determine the extent, if any, the defense's privileged and protected information has been compromised."[406] As such, relying on *Richmond Newspapers, Inc.*, it found that "[r]egardless of the hearing's outcome, it is important for the integrity of the 9/11 prosecution that the truth come out and be available to anyone who cares to inquire."[407] Sunlight, the court wrote, quoting Justice Brandeis, "is said to be the best of disinfectants."[408] But more importantly, when it comes to potential misconduct, "sunshine also provides the grounding for Supreme Court and Circuit Court holdings stating that a hearing involving alleged misconduct by prosecutors, agents, or police ordinarily should be open."[409]

In addition to advancing separation of powers, the right of access advances constitutional interests in having an informed citizenry that can effectively self-govern based on a full account of the conduct of its government. This is especially so where that conduct implicates rights and interests otherwise protected by the Constitution. A citizenry that can discover government abuses and impropriety or a lack thereof can then use that information to engage in democratic decision-making accordingly. Contrary to the plurality opinion in *Richmond Newspapers, Inc.* then, theory does matter when it comes to the right of access. Access does not exist for its own sake. It helps advance the very system of self-governance established by the Constitution itself.

---

[402] *Id.*
[403] *Id.* at 1213.
[404] *Id.* at 1213-14.
[405] *Id.* at 1221.
[406] *Id.*
[407] *Id.*
[408] *Id.* (citing Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 564 (1980)).
[409] *Id.* at 1222 (quoting Louis D. Brandeis, *What Publicity Can Do*, HARPER'S WKLY., Dec. 20, 1913, at 10).

VI. EMBRACING A HOLISTIC STRUCTURAL VIEW

Parts IV and V describe two kinds of constitutional interests advanced by access, both of which places judicial disputes relating to the conduct of the government at the center of a structural understanding of the right of access. Still, there are others found elsewhere in the Constitution that can also serve to inform courts' adjudication over disputes regarding access as well, that may or may not relate directly to government conduct. While outside the scope of this article, the right of access is embodied by the defendant's Sixth Amendment right to a public trial. It is also embodied in the due process clauses. In each, access advances individual liberty by protecting defendants from secret proceedings prone to abuse. The Supreme Court has catalogued these interests at length in a number of cases.[410] In *In re Oliver*, for example, the Court held that the trial court violated the defendant's right to a public trial under the due process clause when it tried him in secret.[411] Dismissing "[w]hatever other benefits the guarantee to an accused that his trial be conducted in public may confer upon our society," the Court explained that an open trial had "always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution."[412]

Moreover, there is substantial evidence that the Founders intended the jury trial as provided for in Article III, Section 2 as embodying a public trial requirement that injected popular power into the executive's law enforcement to curb executive excesses. While Article III, Section 2 does not explicitly refer to a public trial, jury trials were synonymous with public trials at the Founding; as Justice Brennan explained in *Richmond Newspapers, Inc.*, "The public trial seems almost a

---

[410] Weaver v. Massachusetts, 137 S. Ct. 1899 (2017); Presley v. Georgia, 558 U.S. 209, 213 (2010); Waller v. Georgia, 467 U.S. 39, 41 (1984); Levine v. United States, 362 U.S. 610, 616 (1960).

[411] *See generally* 333 U.S. 257 (1948). As Justice Brennan observed in *Richmond Newspapers, Inc.*, *In re Oliver* did not involve the Sixth Amendment, but rather "notions intrinsic to due process, because the criminal contempt proceedings at issue in the case were 'not within "all criminal prosecutions" to which [the Sixth] . . . Amendment applies.'" Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 592 n.16 (1980) (Brennan, J., concurring in judgment).

[412] *In re Oliver*, 333 U.S. at 270; *see also* STORY, *supra* note 349, § 1780 (observing that a public trial guarded against "oppression and tyranny" by rulers and "violence and vindictiveness" by the people). These views are hardly novel. In the seventeenth century, Coke commented that even proper judicial action was improper if done in private: "all causes ought to be heard, ordered, and determined before the judges of the kings courts openly in kings courts, whither all persons may resort; and in no chambers, or other private places." Judges are, as Coke explained, "not judges of chambers, but of courts, and therefore in open court . . . . Nay, that judge that ordereth or ruleth a cause in his chamber, *though his order or rule be just, yet offendeth he the law (as here it appeareth) because he doth it not in court*." EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 103 (1681) (emphasis added).

necessary incident of jury trials."[413] And "there is strong evidence that the public trial, which developed before other procedural rights now routinely afforded the accused, widely was perceived as serving important social interests . . . that exist apart from, and conceivably in opposition to, the interests of the individual defendant."[414] This view is consistent with scholarship on the issue: "The first [jury trial clause], in the Constitution proper, reads like a collective right, or a right of the people."[415] A public jury trial, historically, was considered society's "power to thwart Parliament and Crown"[416] by providing "scrutiny of the community as a whole."[417] It "responded to community needs and community interests"[418] and, as John Adams wrote, imbued the executive with "a mixture of popular power."[419]

Nor are the interests protected by a right of access access limited to criminal proceedings. The Seventh Amendment explains, "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ."[420] The Amendment was intended to "preserve[] . . . the [public jury trial] right which existed under the English common law when the amendment was adopted."[421] It thus protects private property, as opposed to the Sixth Amendment's protection of life and liberty.[422] According to Justice Story, the Amendment was one of the "most important and valuable" amendments and "place[d] upon the high ground of constitutional right the inestimable privilege of a trial by jury in civil case."[423] He added that a jury trial right in civil cases is "scarcely inferior to that in criminal cases" and "counted by all persons

---

[413] 448 U.S. at 589 n.6 (Brennan, J., concurring in judgment) (alterations, citations, and quotation marks omitted).

[414] Gannett Co. v. DePasquale*,* 443 U.S. 368, 423 (1979) (Blackmun, J., concurring in part and dissenting in part).

[415] *See* Laura I. Appleman, *The Lost Meaning of the Jury Trial Right*, 84 IND. L.J. 397, 398 (2009).

[416] Jones v. United States, 526 U.S. 227, 245 (1999).

[417] WILLIAM NELSON, AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830 15 (1975); *see also* JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 300-01 (1996) (observing that "colonial juries were happy to play their rights-protecting role, determining facts and interpreting law to guard their neighbors against the despotism of imperial bureaucrats").

[418] NELSON, *supra* note 417, at 15.

[419] 1 PAPERS OF JOHN ADAMS 168 (Belknap Press, Robert J. Taylor, Mary-Jo Kline, Gregg L. Lint, eds. 1977); *see also* NELSON, *supra* note 417, at 21 (discussing same).

[420] U.S. CONST. amend VII.

[421] Baltimore & Carolina Line v. Redman, 295 U.S. 654, 657 (1913).

[422] *See* George Kaye, *Petty Offenders Have No Peers!*, 26 U. CHI. L. REV. 245, 275 (1959) ("The language of the Amendments of 1791 is easily read consistently with Hamilton's conception that the preservation of liberty was exclusively the function of the criminal jury, and that the protection of property was primarily the task of the civil jury.").

[423] STORY, *supra* note 349, § 1768.

to be essential to political and civil liberty."[424] Moreover, providing access even to civil disputes plays a fundamental rule in ensuring public safety and informing the public about private conduct that affects society as a whole, which, again, serve a role in how society choose to govern itself.[425]

At this point, a fair question may be, *So what?* or *So, what now?* On the first point, recognizing the myriad functions that access plays in the Constitution provides courts with a better understanding of why access matters in the first place and, therefore, why it should be protected in any particular case. As Mary-Rose Papandrea said in assessing the right of access in the national security context, a central problem with right of access jurisprudence is that it evidences a "disturbing" trend of "the judiciary's view that the right of access lacks significant value."[426] Indeed, there is widespread failure by the courts "to recognize the value of the public's right to know."[427] Ardia agrees, explaining that "courts take too narrow a view of the benefits of openness, focusing only on the role that public access plays in a particular court proceeding and eschewing a broader structural perspective."[428] So it is not surprising to see decisions relating to access in national security cases as not even addressing *why* access matters.[429] When courts fail to consider *why* the right exists, they risk undervaluing the right.

Courts cannot begin to construe a right with meaningful consistency if they cannot first identify why it matters at all. There is nothing particularly groundbreaking about an approach that advocates for courts to consider the different interests that access serves throughout our constitutional system and use those considerations to determine whether access should be enforced in any given case. But this back-to-basics approach is worthy lingering on simply to remind courts that the right of access serves important interests that too often go unnoticed. Considering these constitutional interests helps courts zero in on why access matters and how important it is and, importantly, how important it is relative to countervailing interests.

In addition to recognizing the interests that access serves, courts must also operationalize these interests in ways that inform the resolution of disputes over access. Ardia, who emphasized the

---

[424] *Id.*

[425] *See, e.g.*, David S. Sanson, *The Pervasive Problem of Court-Sanctioned Secrecy and the Exigency of National Reform*, 53 DUKE L.J. 807, 813 (2004) (noting that "the now-infamous Johns-Manville asbestos settlement, . . . the recent Firestone/Ford Explorer settlements, and the numerous Catholic Church settlements" all of which, if made public earlier, "would have revealed significant dangers to the public and saved countless lives").

[426] Papandrea, *supra* note 9, at 72.

[427] *Id.* at 72.

[428] Ardia, *supra* note 185, at 865.

[429] *See, e.g.* United States v. Alimehmeti, 284 F. Supp. 3d 477, 485-86 (S.D.N.Y. 2018).

structural role that the right of access plays as a matter of the First Amendment, has argued that the importance of the right of access requires courts to adopt a presumption that all courts proceedings and records are presumptively public under the First Amendment.[430] That is, Ardia would jettison the experience and logic test from *Richmond Newspapers, Inc.* altogether in favor of a default position in favor of access.[431] He is not alone in this view. Papandrea appears to be in agreement in light of "the practical and theoretical difficulties of applying the history and logic tests."[432] But we need not go as far as jettisoning existing parts of Supreme Court jurisprudence in order to begin to mend some of the damage caused by that very same jurisprudence. Rather, a more prudent course is to recalibrate the existing test in order to better reflect the constitutional preference in favor of openness. What follows is a description of that recalibration.

When confronted with a dispute over access, courts should first engage in a more fulsome inquiry into the logic of providing access than they current undertake. Here, courts should canvass the structural roles that access plays in a particular case in light of the nature of that case and the interests it might implicate, whether because of the parties to it or the nature of the dispute. Does, for example, access to a particular proceeding serve separation of powers interests because of the government's role as a party? Is there evidence, for example, that the government is invoking its interests not to protect sensitive information but to protect itself from embarrassment? Would recognizing access to a particular proceeding equip the public with important information that contributes to self-governance? What about the interests of the defendant in ensuring public access under the Sixth Amendment or the public's interest in monitoring the specific proceeding at issue?

If courts were to find that access would not meaningfully advance any of these interests – likely a rare finding, then the constitutional right of access does not attach and the inquiry ceases. On the other hand, if courts conclude that access would meaningfully advance one or more of these interests, they should then turn to an assessment of the experience prong. But rather than wade into an ill-defined inquiry of whether there is a sufficient historical record of access to a particular proceeding such that the right of access is elevated to a constitutional plane, they should limit this inquiry to whether the historical record is hostile to the recognition of access in a particular adjudicative or quasi-adjudicative proceeding. If, undertaking this analysis, there is no historical

[430] Ardia, *supra* note 185, at 907; *see also* Levine, *supra* note 184.
[431] Ardia, *supra* note 185, at 907.
[432] Papandrea, *supra* note 9, at 47.

evidence of hostility to access to a particular proceeding, then the constitutional right of access should be found to apply.

As Brennan recognized in *Richmond Newspapers, Inc.* in establishing his own test for access, this task of sorting out experience and logic "is as much a matter of sensitivity to practical necessities as it is of abstract reasoning."[433] Ardia similarly found that the chief failing of the logic prong is that it "ends up being too indeterminate to facilitate reasoned line drawing between proceedings."[434] Yet, the approach just proposed constrains some of that abstract reasoning by giving courts constitutional sign posts as to *what* matters for the purposes of the logic prong. Through this, courts can focus their analysis on specific constitutional interests, why they matter, and how access serves them in a given case.

This approach also constrains abstract reasoning on the experience prong by reducing it merely to a question of whether history is hostile to access rather than whether it affirmatively supports a finding of access. Think here of the disagreement on the history prong between the Third and Sixth Circuits. While the Sixth Circuit found that there was a sufficient historical record supporting access to deportation proceedings, the Third Circuit did not. But had the test been only a question of hostility to access, the Third Circuit would have likely found that there was no such hostility as the administrative regulations in that case actually provided for openness.[435] Thus, this approach alleviates confusion as to whether recently constituted tribunals or administrative proceedings that claim no history of openness like, for example, the military commissions at Guantánamo Bay, should be subject to access. While there may well be debate as to whether one can represent that there is an unbroken history of access to military commissions to support a finding that the right of access attaches, it is less open to debate that the history of military commissions are hostile to the right of access.[436]

While *Detroit Free Press* was bound by the Court's experience and logic test, it nevertheless made steps toward applying the experience and logic test in the way proposed here.[437] As the court

---

[433] Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 588 (1980) (Brennan, J., concurring in judgment).

[434] Ardia, *on*
note 185, at 865.

[435] N. Jersey Media Grp., Inc. v. Ashcroft, 308 F.3d 198, 213 (3d Cir. 2002) (admitting that "the 1964 Department of Justice regulations did create a presumption of openness").

[436] *See* Abdul-Aziz Ali v. United States, 398 F. Supp. 3d 1200, 1216 (C.M.C.R. 2019) ("[W]e find that petitioner has a right to a public trial embedded in the Manual for Military Commissions, R.M.C. 806(a). That Rule states: 'Except as otherwise provided in chapter 47A of title 10, United States Code, and this Manual, military commissions shall be publicly held.'").

[437] Detroit Free Press v. Ashcroft, 303 F.3d 681, 701 (6th Cir. 2002).

said there, "[A]lthough historical context is important, a brief historical tradition might be sufficient to establish a First Amendment right of access where the beneficial effects of access . . . are overwhelming and uncontradicted."[438] This view of the interaction between experience and logic as "complimentary" where overwhelming logic might support access even without a historical component the court said, "comports with the [Supreme] Court's view that the First Amendment concerns 'broad principles' applicable to contexts not known to Framers."[439] In light of the emphasis placed on the logic prong in that case, the court was able to zero in on the First Amendment interests at issue in that case, as well as the separation of powers concerns, which thereby informed its decision as to the importance of the access being sought.[440] Other courts have followed a similar approach.[441]

The next issue to be addressed is what should be required to overcome the right of access in any given case. Here, the current compelling interest test does much of the work, if applied with sufficient rigor. Under the current approach, if a judge determines that there is a substantial likelihood of harm to compelling interest absent closure, then closure will be appropriate so long as it is narrowly tailored irrespective of any countervailing public interest in favor of access. This demanding inquiry—focused on harms should the presumption of access not be overcome in a particular case—is not one to be glossed over. This inquiry should resolve most cases. Indeed, secrecy under this test is understood to be the exception rather than the rule.

Under the current test, however, the interests in favor of access are not accounted for in deciding whether the right of access should be overcome in the face of countervailing harms from disclosure. Said differently, the only interests that are accounted for in determining whether the right of access has been overcome are interests against providing access. When it comes to sensitive areas, like, for example, national security, this imbalanced test requires a constitutional

---

[438] *Id.* (quoting *Richmond Newspapers, Inc.*, 448 U.S. at 589 (Brennan, J., concurring in judgment)).

[439] *Id.*; *see also* Phoenix Newspapers, Inc. v. U.S. Dist. Ct., 156 F.3d 940, 948 (9th Cir. 1998) (finding that the logic prong of the *Richmond Newspapers* test can be dispositive); United States v. Simone, 14 F.3d 833, 838 (3d Cir. 1994) (noting that the court "did not believe that historical analysis was relevant").

[440] *Detroit Free Press*, 303 F.3d at 703-05.

[441] *See, e.g.*, United States v. Chagra, 701 F.2d 354, 363 (5th Cir. 1983); Newman v. Graddick, 696 F.2d 796, 801 (11th Cir. 1983); Herald Co. v. Bd. of Parole, 131 Misc. 2d 36, 46 (N.Y. Misc. 1985) (finding right of access attached to parole proceedings "[d]espite the fact that there is no evidence that parole revocation hearings have historically been open to the public and press"); *see also Press-Enterprise II*, 478 U.S. at 10 n.3 (noting that state courts had found that access right attached to pretrial proceedings because the "importance of the . . . proceeding" was obvious despite lacking a "historical counterpart").

backstop. In national security cases, after all, courts will often (although not always[442]) find national security to be a compelling interest likely to be harmed if disclosure is made.[443] As such, the current test does not do much work in these cases. Where the test for overcoming the presumption of access considers only the interests in favor closure and not at the interests in favor of disclosure, this should hardly be surprising.

In light of the importance of access in our constitutional system, however, a better approach is to apply the test as currently constituted and, assuming that the test is satisfied, balance the likely harm of disclosure against the harm to the public's interests should the right of access be overcome. This kind of a test has been proposed in another strand of jurisprudence dealing with the conflict between national security and First Amendment interests. As Judge David Tatel has proposed in cases dealing with whether national security journalists can be compelled to disclose their sources in a leak investigation: "the court must weigh the public interest in compelling disclosure [of a journalist's source], measured by the harm the leak caused, against the public interest in newsgathering, measured by the leaked information's value."[444] This allows for a more nuanced balancing of the relevant competing interests. Transplanted into the access context, a court should weigh the likely harm caused by disclosure against the public interest in access to the information sought to be secreted as informed by the sundry constitutional interests that access advances.

To be sure, this kind of an interest balancing will be subjective, but not "unmanageable."[445] Courts frequently balance the public interest in disclosure against potential harms in assessing claims of a common law right of access.[446] And there may well be cases where even national

---

[442] As the court in *United States v. Rosen* explained, "While it is true, as an abstract proposition, that the government's interest in protecting classified information can be a qualifying compelling and overriding interest, it is also true that the government must make a specific showing of harm to national security in specific cases to carry its burden in this regard." 487 F. Supp. 2d 703, 716 (E.D. Va. 2007). There, the court found that the government had not carried that burden: "instead, it has done no more than to invoke 'national security' broadly and in a conclusory fashion, as to all the classified information in the case." *Id.* at 717; *see also* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 598 n.24 (1980) (Brennan, J., concurring in judgment) ("national security concerns about confidentiality *may sometimes warrant closures* during sensitive portions of trial proceedings, such as testimony about state secrets." (emphasis added)).

[443] *See, e.g.*, Olson, *supra* note 239, at 492-93.

[444] In re Grand Jury Subpoena, Judith Miller, 397 F.3d 964, 986 (D.C. Cir. 2005) (Tatel, J., concurring in judgment), *superseded*, 438 F.3d 1141 (D.C. Cir. 2006).

[445] *Id.* ("Though flexible, these standards (contrary to the special counsel's claim) are hardly unmanageable.").

[446] *See, e.g.*, Bradley on behalf of AJW v. Ackal, 954 F.3d 216, 233 (5th Cir. 2020) (noting that access was favored because "one of the parties is a public official" and because "the public's interest in the settlement amount is particularly legitimate and important, not least because disclosure will allow the public to monitor the expenditure of taxpayer money"); Romero v. Drummond Co., Inc., 480 F.3d 1234, 1246 (11th Cir. 2007) ("In balancing the public interest in accessing court documents against a party's interest in keeping the information confidential, courts consider . . . whether the information concerns public officials or public concerns[.]"); EEOC v. National Children's

security information should be disclosed despite the risk of harm to national security. As David Cole explained in this Journal, "History demonstrates that secrecy is used not only for legitimate purposes of national security, but too often to shield illegal or embarrassing activity from public scrutiny. Even the most ardent security proponent must concede that the benefits of revealing illegal abuses of authority will sometimes outweigh the costs of disclosing those secrets."[447]

Nor, for the reasons already discussed, does this backstop upset separation of powers. It does not intrude into the executive's authority to classify or declassify information nor to make predictions about potential harms to national security. (Indeed, that a court denies a motion to close a proceeding or seal evidence does not mean that the court is "declassifying" information. Disclosure is not a question of whether a court has the power to declassify information.[448]) As Judge Tatel wrote in the leak context, while courts defer to the executive in areas of "'core executive constitutional function[s],' . . . the executive branch possesses no special expertise that would justify judicial deference to prosecutors' judgments about the relative magnitude of First Amendment interests."[449]

If courts emphasize logic as informed by the constitutional interests access advances, deemphasize experience by assessing only whether history is hostile to access, and balance the interest in access against the potential risk to national security, they can begin to roll back some of the secrecy that has overtaken courts. It may well be that, in some cases, closure should be permitted. Brennan himself recognized this in *Richmond Newspapers, Inc.* when he observed that "national security concerns about confidentiality may sometimes warrant closures during sensitive portions of trial proceedings, such as testimony about state secrets."[450] But prior to closure, it is fundamentally important that courts, at the least, understand the gravity of the interests at stake on

---

Center, Inc., 98 F.3d 1406, 1410 (D.C. Cir. 1996) (considering the "need for public access" to the information sought); Pansy v. Borough of Stroudsburg, 23 F.3d 772, 788 (3d Cir. 1994) ("If a settlement agreement involves public officials or parties of a public nature, and involves matters of legitimate public concern, that should be a factor weighing against entering or maintaining an order of confidentiality.").

[447] David D. Cole, *Assessing the Leakers: Criminals or Heroes?*, 8 J. NAT'L SECURITY L. & POL'Y 107, 108 (2015).

[448] United States v. Ressam, 221 F. Supp. 2d 1252, 1264 (W.D. Wash. 2002) (granting the "reasonable" request of the government for leave to declassify court records prior to their public disclosure "[w]ithout addressing the issue of whether the Court is obligated to . . . [do so] when the documents are subject to the First Amendment right of access").

[449] In re Grand Jury Subpoena, Judith Miller, 397 F.3d 964, 998 (Tatel, J., concurring in judgment).

[450] Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 598 n.24 (1980) (Brennan, J., concurring in judgment).

both sides of the balance and weigh them so as to ensure that closure truly is the exception rather than rule in national security cases.

CONCLUSION

Secrecy in national security proceedings has been normalized. Too often, courts are simply blind to the roles that access plays—in checking inter-branch conflicts, in providing the electorate of the information that it needs to function, in guaranteeing a fair trial and policing executive abuses. And even courts that are not blind to these interests have little guidance from the Supreme Court as to how to deal with the conflict between them and likely harms to national security. Without such guidance, it is unsurprising to see courts err on the side of secrecy, lest blood be on their hands.[451] In fact, twenty years after 9/11, it seems strange to even suggest that courts have the power to order disclosure of national security information.

But courts have precisely that power and for good reason: without it the executive would be able to dictate how courts must handle their own records and the procedures.[452] Such an executive-centric view of the power to control judicial proceedings and records—even those containing classified information—destabilizes separation of powers and chokes off the flow of information central to democratic decision making on an issue of central importance, among other constitutional interests. As the Sixth Circuit explained now nearly twenty years ago, such a view is contrary to our constitutional system: "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.'"[453]

This article attempted to reset the discussion on the right of access by taking an interest-based approach informed by the role that access plays throughout the Constitution. Specifically, it highlights the role that access plays in reinforcing the Constitution's separation of powers between the executive and the judiciary. While it offers these two examples, it hints at others that should be the subject of future scholarly examination. It proposes that access is not simply meant to ensure

---

[451] *See* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 850-51 (2006) (gathering data showing the relative leniency with which some courts permit restrictions on particularly types of cases).

[452] *See supra* Part IV.

[453] Detroit Free Press v. Ashcroft, 303 F.3d 681, 683 (6th Cir. 2002) (citation omitted).

that all parties act properly or that all witnesses tell the truth. Rather, access is meant to ensure that our constitutional system works as intended by advancing the interests the Founders thought important.

Applying this understanding to determine whether a particular proceeding is subject to the right of access, courts should assess whether access would meaningfully advance the interests access is meant to protect in the Constitution. At the same time, courts should deemphasize the historical inquiry in the present test, which is divorced from any theoretical understanding of the right of access, by asking only whether the historical record is hostile to recognizing a right of access. Finally, to account for the importance of access, courts should continue to apply with rigor the current strict scrutiny test for determining whether the right of access has been overcome. Even if that test is satisfied, courts should ensure that closure is proper by weighing the likely harm from disclosure against the interest in the information sought to be kept from the public.