

ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

**“IF IT WALKS, TALKS AND SQUAWKS . . .”  
THE FIRST AMENDMENT RIGHT OF ACCESS TO ADMINISTRATIVE ADJUDICATIONS:  
A POSITION PAPER**

*Committee on  
Communications & Media Law*

**INTRODUCTION**

This paper explores the nature of the public’s constitutional right of access to a class of administrative proceedings where important liberty and property interests are at stake, specifically those executive branch and agency proceedings conducted as adjudicatory hearings before a neutral decision maker. Although these hearings take place outside of the judicial branch, they fall well within the scope of the public’s First amendment right of access recognized by the U.S. Supreme Court more than two decades ago.

This paper grew out of concerns raised by the extreme restrictions on the public’s access rights advanced by the Department of Justice after 9/11. Following the attacks on the World Trade Center and the Pentagon, the Department of Justice rounded up hundreds of Arab and Muslim immigrants with visa violations, and then decided to conduct their deportation hearings completely in secret. The Department asserted the right to act in secret by claiming that the constitutional right to attend government proceedings exists *only* in criminal cases conducted before Article III judges.<sup>1</sup>

Because no statute currently mandates public access to immigration proceedings – or to most administrative proceedings – an absence of any constitutional constraint against closed administrative hearings would mean that administrative law judges can conduct proceedings

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<sup>1</sup> See, e.g., *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 695 (6th Cir. 2002); *N Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002), *cert. denied*, 583 U.S. 1056 (2003).

behind closed doors at any time, for any reason, or for no reason, which is just the power the Department of Justice claimed. As this position paper demonstrates, there is no principled basis in law or logic for such a cramped construction of the constitutional right of access.

It is beyond dispute that a broad, albeit qualified, First Amendment right protects the ability of the press and the public to attend certain government proceedings. Building on a tradition of public access to the workings of government that dates back to the founding of this nation, the Supreme Court in *Richmond Newspapers, Inc. v. Virginia*<sup>2</sup> identified such an implied right in the First Amendment. Scores of decisions by courts at every level have applied this constitutional right to the full range of criminal and civil proceedings conducted by Article III courts and their state counterparts. Only a few decisions, however, have yet addressed the scope of this First Amendment access right to administrative hearings and other executive branch proceedings.

Properly defining the scope of the public's right of access to administrative adjudicatory proceedings is particularly important given the vast power exercised by the ever-expanding "administrative state," where administrative law judges decide more cases each year than the Federal courts.<sup>3</sup> This task deserves urgent attention given the current claim of the Executive branch to possess the constitutional right to conduct completely secret deportation hearings – adjudicatory proceedings conducted in many respects just like a criminal trial. In the view of this Committee, the public's constitutional right of access plainly applies to administrative adjudicatory hearings to the same extent and under the same analysis as it applies to trials in Article III courts. This is the only interpretation that allows the right of access to fulfill its

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<sup>2</sup> 448 U.S. 555 (1980).

<sup>3</sup> See Paul R. Verkuil, *Reflections Upon the Federal Administrative Judiciary*, 39 UCLA L. REV., 1341, 1343 (1992).

constitutional purpose of informing voters about the actions of their government, and this is the only approach consistent with the clear Supreme Court precedent defining the First Amendment access right.<sup>4</sup>

Section I of this position paper reviews briefly the vast importance of the administrative state, comprising hundreds of administrative agencies that have supplanted courts as the arbiters of many important rights. Executive branch agencies now exercise broad-sweeping powers that “the Framers, who envisioned a limited Federal Government, could not have anticipated.”<sup>5</sup> Federal courts acquiesced in this delegation of responsibilities to administrative agencies, in large part, because they long ago concluded that “due process” and other procedural safeguards imposed upon the judicial system – such as the public right of access – would apply to adjudicatory proceedings conducted by government regulators and administrative agencies.

Section II reviews the series of four decisions in which the Supreme Court articulated the right of public access implicit in the First Amendment, whose logic and holdings make plain that the right applies broadly to all branches of government. Those decisions define the scope of the constitutional right of access to any government proceeding by two interrelated considerations: whether the type of proceeding has traditionally been open to the public, and whether public access enhances the functioning of the proceeding itself. While the First Amendment right of access is a qualified right, not an absolute right, where it exists a government proceeding may be closed only if openness threatens some “transcendent” public value that can not effectively be protected unless the public’s right of access is limited.

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<sup>4</sup> As discussed below in Section II, recognizing a constitutional right of access to deportation proceedings does not mean that such proceedings can never be closed where legitimate security concerns require confidentiality and existing standards would permit closed proceedings. The relation between the public’s right of access and national security concerns is explored more fully in this Committee’s earlier report, “*The Press and the Public’s First Amendment Right of Access to Terrorism on Trial: A Position Paper*,” 57 *The Record of the Association of the Bar of the City of New York* 94 (2002).

Section III demonstrates that the First Amendment right is not limited either to criminal proceedings or to Article III courts as the Department of Justice urged in defending secret deportation hearings. The Department's argument misconstrues the constitutional source of the right of access, and the constitutional purposes advanced by the right. Lower courts have widely rejected this restricted interpretation of the First Amendment right and have applied the right of access to civil proceedings, and proceedings outside of Article III courts, including bankruptcy proceedings, Executive branch courts martial and other adjudicatory proceedings.

Finally, Section IV demonstrates that a public right of access necessarily applies to those administrative proceedings that are conducted in the form of adjudicatory hearings, where the parties present information to an unbiased fact finder, have the right to counsel and to cross-examine, and can appeal findings that must be based on an evidentiary record. The body of Supreme Court case law applying the Due Process clause to administrative proceedings makes clear that the Due Process clause guarantees a "fair and open" hearing when liberty or property interests are to be decided through an administrative process conducted as an adjudicatory hearing. A public right of access must apply to any administrative proceeding where the Due Process clause independently provides the parties themselves the right to a "fair and open" hearing, just as the public has an independent First Amendment right of access to any criminal proceeding where a defendant has a Sixth Amendment right to a "public trial." This conclusion is confirmed by applying to administrative adjudicatory hearings the Supreme Court's standard for defining the scope of the First Amendment right of access.

This paper addresses only the public right of access to adjudicatory administrative proceedings, and leaves for future consideration the scope of access rights to other administrative

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<sup>5</sup> *Federal Ma. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 755 (2002).

proceedings, such as individual social security and welfare benefit proceedings that are non-adversarial.<sup>6</sup> There is no sound basis, however, to treat the public’s right of access to administrative adjudicatory hearings any differently than its right to attend Article III trials where similar procedures are followed. If a “proceeding ‘walks, talks, and squawks very much like a lawsuit’ ...[i]ts placement within the Executive Branch cannot blind us to the fact that the proceeding is truly an adjudication.”<sup>7</sup>

A core objective of the First Amendment is to shed light on the conduct of government, to empower voters, and to enable democracy to function. The First Amendment right of access must extend to hearings conducted by the vast administrative judiciary built over the past century if these objectives are to be fulfilled.

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<sup>6</sup> Such “mass justice” cases are beyond the scope of this paper because they typically are non-adversarial proceedings and different constitutional considerations may therefore apply. Nonetheless, there are strong public policy arguments for openness even in such non-adversarial proceedings. Many studies have shown a great concern for bias and discrimination in these proceedings, which would surely be improved if greater access were provided to the press and public. See, e.g., Elaine Golin, *Note: Solving the Problem of Gender and Racial Bias in Administrative Adjudication*, 95 Colum L. Rev. 1532 (1995); Linda G. Mills, *A Calculus for Bias: How Malingered Females and Dependent Housewives Fare in the Social Security Disability System*, 16 Harv. Women’s L.J. 211 (1993).

Investigatory proceedings are similarly not addressed by this paper, but have often been opened to the public because of the important role they play in public knowledge of governmental inquiries. The investigation into the Space Shuttle Challenger in 1986, the New York City Mollen Commission in 1994, and many other investigations were conducted openly, resulting in an informed electorate who had had the benefit of scrutinizing for itself what went wrong both in space and on the streets of New York. Indeed, the court in *Soc. of Prof. Journalists v. Sec. of Labor*, 616 F. Supp. 569 (D. Utah 1985), *vacated as moot*, 832 F.2d 1180 (10th Cir. 1987), determined that no less than with administrative adjudications, the two-part access test of *Richmond Newspapers* should logically be applied in the context of investigatory hearings. Here the court found a First Amendment right of access to a formal fact-finding hearing conducted by the Federal Mine Safety and Health Administration into the cause of a tragic coal mine fire.

<sup>7</sup> *Id.* Fed. Mar. Comm’n. 535 U.S. at 751 (quoting *S. C. State Ports Auth. v. Fed. Mar. Comm’n*, 243 F.3d 165, 174 (4th Cir. 2001)).

## **I. BRIEF HISTORY OF THE ADMINISTRATIVE STATE AND GROWTH OF AN ADMINISTRATIVE JUDICIARY**

### **A. The Rise of the Administrative State**

As early as 1789, when the first federal agency was created, Congress and Article III courts struggled with the proper role of administrative agencies in our constitutional framework.<sup>8</sup> It was not, however, until the twentieth century that a vast administrative state began to develop in earnest.<sup>9</sup> In a burst of legislation from 1914 to 1934, Congress delegated substantial rule making, rule enforcement, and adjudicative powers to newly created administrative agencies,<sup>10</sup> while state legislatures established new authorities to oversee factory safety, workmen's compensation, and public utility regulation.<sup>11</sup> The primary impetus for this wave of legislative delegation was the inability of the traditional, compartmentalized tripartite form of government to deal effectively with the complex problems of an industrial economy.<sup>12</sup> According to Professor Richard Pierce, "[t]he scope and degree of modern government intervention and the complexity of modern society ... combined to make it impossible for legislatures to resolve most policy disputes by statute."<sup>13</sup>

The "New Deal" was a watershed event in the history of the administrative state. Many new and powerful agencies were created to ameliorate the problems of the Depression and to

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<sup>8</sup> The Act of July 31, 1789 created the first administrative agency "to estimate the duties payable" on imports and perform other duties. RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* § 1.4. at 8 (4th ed. 2002). At that time, there was quite a lot of distrust of executive power, with the separation of powers doctrine still holding great weight. Thus, the agencies of the eighteenth century were deliberately made rudimentary in order to restrict executive power. *Id.* § 1.4. at 9.

<sup>9</sup> The evolution of the federal administrative agencies, beginning with the Interstate Commerce Commission, is summarized in *Att'y Gen. Final Rep. On Admin. Proceed.* 7-11 (1941). See also JACOB A. STEIN, *Administrative Law* § 1.01[3] (2001).

<sup>10</sup> PIERCE, *supra* note 8, § 1.4. at 9.

<sup>11</sup> See STEIN, *supra* note 9, § 1.01[3] n.72.

<sup>12</sup> JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 1 (Yale Univ. Press 1966) (Seventh printing of lectures given by Landis in 1938).

<sup>13</sup> PIERCE, *supra* note 8, § 1.4 at 10

carry out the public philosophy of regulating the entire economy.<sup>14</sup> Among these new agencies were the National Recovery Administration, the Securities and Exchange Commission (SEC), and the National Labor Relations Board (NLRB), all having vast power over their respective arenas.<sup>15</sup> The National Recovery Administration had broad authority to regulate all economic life.<sup>16</sup> The SEC introduced new levels of personal liability to those involved in the issuance of securities. The NLRB was a particularly “intrusive” agency from the point of view of employers and seemed invariably to favor employees.<sup>17</sup>

Those opposed to the major expansion of administrative power by the Roosevelt administration, including significantly the American Bar Association (“ABA”),<sup>18</sup> invoked the separation of powers, the delegation doctrine and other concerns to condemn as unconstitutional the combination of legislative, executive, and judicial functions in one body.<sup>19</sup> Opponents initially challenged the constitutionality of the delegation of broad powers by Congress and sought *de novo* judicial review of virtually all administrative actions.<sup>20</sup> In 1933, the ABA formed a Special Committee on Administrative Law that issued a series of annual reports calling for the separation of judicial powers from administrative agencies, the creation of an “administrative court” to cure the “fundamental evils” of the new regulatory system, and other

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<sup>14</sup> See LANDIS, *supra* note 12, for a discussion of the legal battles surrounding the rise of the administrative state.

<sup>15</sup> *Id.* at 12.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> Much of the opposition to the modern administrative process was and continues to be directed at the combination of lawmaking, executive and adjudicative functions into a self-contained bureaucracy, without effective means to insure their operation is in the public interest. See generally ARTHUR SCHLESINGER, *The Imperial Presidency* (Boston: Houghton Mifflin Co. 1973); LEON FRIEDMAN ET AL. UNQUESTIONING OBEDIENCE TO THE PRESIDENT: THE ACLU CASE AGAINST THE LEGALITY OF THE WAR IN VIETNAM (W.W. Norton & Co. 1972)).

<sup>20</sup> LANDIS, *supra* note 12 at 11.

measures to protect the constitutional structure.<sup>21</sup> Criticism of the administrative state came from within the government too. In 1937 the President's Committee on Administrative Management issued a report calling the agencies "a headless 'fourth branch' of the government," and recommending complete separation of adjudicatory function and personnel from investigatory and prosecuting functions and personnel.<sup>22</sup>

Nonetheless, the palpable public benefits that flowed from the new regulatory regime -- from protection of investors to increased employee rights -- were a particularly effective shield against opponents of the rise of the administrative state. The reality was that, by the beginning of World War II, administrative agencies had become an integral part of the federal government, without which there could be no collection of taxes, dispensing of federal funds, carrying of mail, managing of public lands, or operating of the departments of agriculture, commerce and labor.<sup>23</sup> Justice Stone likened the opposition to administrative agencies to the opposition that arose to the Courts of Equity in the time of Coke and characterized opponents of the agencies as having "nostalgic yearnings for an era that has passed."<sup>24</sup>

Eventually the participants in the debate over the propriety of the new administrative structure compromised and passed the Administrative Procedure Act of 1946 (the "APA"). Passage of the APA had four major effects: (1) it satisfied a political desire for reform of the operation of administrative agencies, (2) it improved and strengthened the administrative

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<sup>21</sup> See AMERICAN BAR ASSOCIATION, REPORTS OF SPECIAL COMMITTEE ON ADMINISTRATIVE LAW, 59 A.B.A.R. 539 (1934); 61 A.B.A.R. 720 (1936); 63 A.B.A.R. 331 (1938).

<sup>22</sup> See Report of President's Committee on Administrative Management at 39-40 (1937) (quoted in PIERCE, *supra* note 8, §1.4 at 13).

<sup>23</sup> PIERCE, *supra* note 8, §1.4 at 13.

<sup>24</sup> Harlan Fiske Stone *The Common Law in the United States*, 50 HARV. L. REV. 5, 16-18 (1936) (quoted in PIERCE, *supra* note 4, §1.4 at 14).



process, (3) it enhanced uniformity within the administrative process, and (4) it preserved judicial review of administrative action.<sup>25</sup>

The delegation of adjudicatory authority to administrative agencies subsequently gained muted approval from the Supreme Court. Its 1982 plurality decision in *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*<sup>26</sup> resulted in a partial invalidation of adjudicatory powers granted to Article I bankruptcy judges, in a ruling that objected to non-Article III judges exercising jurisdiction over “private rights” (i.e. a breach of contract action at common law) rather than purely governmental rights. However, the plurality opinion was subsequently limited in *Commodities Future Trading Commission v. Schor*<sup>27</sup> and *Thomas v. Union Carbide Agricultural Products Co.*,<sup>28</sup> in which the Court granted wide deference to Congress’ delegation of adjudicatory power to administrative agencies.<sup>29</sup> There is now hardly any function of modern government that does not involve some rights that are subject to review before administrative tribunals in adjudicatory proceedings.

## **B. The Administrative Judiciary**

As the administrative state has grown, so too has the administrative judiciary—a “fourth” branch of government with which the public has little familiarity. There are many, many types

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<sup>25</sup> PIERCE, *supra* note 8, §1.4 at 15.

<sup>26</sup> 458 U.S. 50 (1982).

<sup>27</sup> 478 U.S. 833 (1986). In *Schor*, the Supreme Court decided that the jurisdiction of the CFTC over allegations of Commodities Exchange Act violations entitled it to adjudicate related state law counterclaims.

<sup>28</sup> 473 U.S. 568 (1985).

<sup>29</sup> *Id.* at 593-94. On the other hand, when disputes concern questions of law, deference to an agency will be less likely. See, e.g., *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 305-06 (1976) (holding that Civil Aeronautics Board was incompetent to resolve any of the issues in the case since “[t]he standards to be applied in an action for fraudulent misrepresentation are within the conventional competence of the courts, and the judgment of a technically expert body is not likely to be helpful in the applications of these standards to the facts of this case”).

of administrative decision-makers. Administrative Law Judges (or “ALJs”)<sup>30</sup> are appointed under the APA to preside over formal administrative hearings.<sup>31</sup> ALJs exercise the same responsibility for maintaining the integrity of our federal laws as do traditional Article III judges,<sup>32</sup> but there are many more of them. Approximately 1400 ALJs exist within 29 administrative agencies; Article III judges total only about 850 nationwide.<sup>33</sup> Despite their extensive responsibility and significant caseloads, ALJs have been described as the “hidden judiciary” because they are little known beyond the parties directly engaged with a regulatory agency involved in an administrative hearing process.<sup>34</sup>

The scope of issues subject to adjudication before an ALJ is vast. ALJs preside over cases involving radio and TV broadcasting licenses; gas, electric, oil and nuclear energy allocation and rates; labor-management relations; consumer product safety; corporate mergers; occupational health and workplace safety; securities trading; social security benefit adjustments; international trade; and many other matters.<sup>35</sup> The types of cases decided by ALJs have been distilled by one commentator into three general categories: “mass justice cases,” “typical regulatory proceedings,” and “esoteric proceedings.”<sup>36</sup>

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<sup>30</sup> The term “Administrative Law Judge” replaced “hearing examiner” as the result of a Civil Service Commission regulation promulgated in 1972, the APA was accordingly amended in 1978.

<sup>31</sup> Administrative Procedure Act, 5 U.S.C. §556(b) (2003).

<sup>32</sup> Jeffrey A. Wertkin, *A Return to First Principles: Rethinking the ALJ Compromise*, 22 J. OF THE NAT’L ASS’N OF ADMIN. L. JUDGES, 365 (Fall, 2002).

<sup>33</sup> See <http://www.usajobs.opm.gov/EI28.asp> (last visited May 27, 2004) for ALJ information; See <http://www.uscourts.gov/history/tablek.pdf> (last visited May 27, 2004) for Article III judgeship information.

<sup>34</sup> Paul R. Verkuil, *Reflections Upon the Federal Administrative Judiciary*, 39 UCLA L. REV. 1341, 1341 (1992).

<sup>35</sup> See Wertkin, *supra* note 32 at 365 (quoting THE ALJ HANDBOOK: AN INSIDER’S GUIDE TO BECOMING AN ADMINISTRATIVE LAW JUDGE 3, (Linda P. Sutherland & Richard L. Hermann eds., 3d ed. 1997)).

<sup>36</sup> Alan W. Heifetz, *ALIS, ADR, and ADP: The Future of Administrative Adjudication*, 1 WIDENER J. OF PUB. L. 13, at 15-16 (1992).

Mass justice cases include Social Security disability cases and Department of Labor benefits cases that are decided by the hundreds of thousands every year.<sup>37</sup> These cases are “non-adversarial, involve relatively simple issues, and typically take no more than an hour or two to hear.”<sup>38</sup> At the other end of the spectrum, esoteric proceedings, include such matters as Federal Energy Regulatory Commission and Nuclear Regulatory Commission proceedings, far removed from the simplicity and speed of the mass justice cases.

These proceedings may involve numerous parties and issues, extensive discovery, lengthy written expert testimony, multiple prehearing conferences, weeks or months of hearings, posthearing briefs, and initial decisions running into the hundreds of pages.<sup>39</sup>

Occupying the middle ground between these extremes is the typical regulatory case, such as proceedings before ALJs at the National Labor Relations Board, the Securities and Exchange Commission, the Federal Mine Safety Review Commission, the Department of Housing and Urban Development, the various banking agencies and about twenty other departments and agencies of the federal government.<sup>40</sup> Usually initiated by an individual complaint, these cases are defended by seasoned counsel and often involve complex legal and factual disputes heard over a period of days or weeks.<sup>41</sup> A typical regulatory case can involve the imposition of a variety of sanctions including civil money penalties, cease and desist orders, revocation or suspension of licenses, and debarment from doing business with the government.<sup>42</sup>

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<sup>37</sup> *Id.* at 15 (as of 1992, more than 70% of ALJs were assigned to the Social Security Administration and 7% to the black lung and other cases for the Department of Labor).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 16.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* The similarities between adjudications presided over by ALJs and cases before an Article III court are not mere happenstance, but rather are the intended result of the compromise struck between opponents and proponents of the administrative state during the drafting of the APA. Those opponents, such as the ABA, pushed for an

The “typical regulatory cases” and “esoteric cases” are “in all significant respects, functionally equivalent to federal non-jury trials” and—like Article III judicial proceedings—often result in decisions that have far-reaching effects.<sup>43</sup> Thus, it is not surprising that the Supreme Court has held that a determination of rights by an ALJ is subject to constitutional “due process” requirements, like judicial proceedings. As the Court stated in 1960, “when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process.”<sup>44</sup> In decisions stretching back to the creation of the modern administrative state, the Court repeatedly has ruled that the “rudiment of fair play” guaranteed by due process mandate that administrative adjudications—no less than judicial proceedings—be “fair and open.”<sup>45</sup>

## **II. THE SUPREME COURT’S ARTICULATION OF THE FIRST AMENDMENT RIGHT OF ACCESS**

Between 1980 to 1986, the United States Supreme Court recognized and defined the qualified First Amendment right of public access in four cases dealing with access to various court proceedings.<sup>46</sup> The common thread binding these decisions together is the Court’s unwavering focus on the need for openness to inform the citizenry about the operations of

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entirely separate administrative judiciary, but finally settled for a cadre of independent judicial officers who remained part of the agencies.

<sup>43</sup> *Id.*

<sup>44</sup> *Hannah v. Larche*, 363 U.S. 420, 442 (1960).

<sup>45</sup> See, e.g., *Ohio Bell Tel. Co. v. Pub. Utils. Comm’n of Ohio*, 301 U.S. 292, 304-05 (1937); *Morgan v. United States*, 304 U.S. 1, 15 (1938), *rev’d on other grounds*, 313 U.S. 409 (1941).

<sup>46</sup> See *Richmond Newspapers*, 448 U.S. at 580 (recognizing right to attend criminal trials); *Globe Newspaper Co. v. Superior Court for Norfolk County*, 457 U.S. 596 (1982) (striking down state law mandating closed trial proceedings whenever the victim of a sex crime is called to testify); *Press-Enter. Co. v. Superior Court, of Cal.*, 464 U.S. 501 (1984) (“*Press-Enterprise I*”) (applying the public’s right of access to jury *voir dire*); *Press-Enter. Co. v. Superior Court, of Cal.*, 478 U.S. 1 (1986) (“*Press-Enterprise II*”) (applying the public’s right of access to pretrial proceedings which had no equivalent in English or early American history).

government, and the importance of an informed citizenry to the success of our system of democratic self-rule.<sup>47</sup>

*Richmond Newspapers, Inc. v. Virginia*, resolved the “narrow question” of whether there is a First Amendment right to attend a criminal trial,<sup>48</sup> but it was a “watershed” decision,<sup>49</sup> declaring for the first time an affirmative, enforceable right to compel access to a government proceeding. In his plurality opinion, Chief Justice Burger traced the history of public access to criminal trials from before the Norman Conquest of England up to Colonial America, finding that “throughout its evolution, the trial has been open to all who cared to observe.”<sup>50</sup> Examining the reason behind this record, he concluded that the presumption of openness “is no quirk of history; rather, it has long been recognized as an indispensable attribute of an Anglo-American trial.”<sup>51</sup> Foremost among the values of openness, stated the Chief Justice, is its operation as a check on the proper functioning of trials, in that “it gave assurance that the proceedings were

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<sup>47</sup> The public’s right to know about the workings of government -- while not explicitly mentioned in the Constitution -- has come to be accepted by scholars and courts as a fundamental First Amendment principle rooted in the idea that an informed public is the essence of a democratic society. See e.g., ALEXANDER, MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT, 26 (1948); L. LEVY, ORIGINS OF THE FIRST AMENDMENT, 101-132 (Yale Univ. Press 2001).

Even before *Richmond Newspapers*, the Court recognized that one fundamental purpose of the First Amendment is to protect public discussion of government officials and policies. See, e.g., *Mills v. Alabama*, 384 U.S. 214, 219 (1966) (“the press serves and was designed to serve a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve”); *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 783, (1978) (“First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw”).

<sup>48</sup> 448 U.S. at 558. Justice Rehnquist filed the only dissent to this 7-1 decision. Justice Powell did not take part in consideration of the case, but indicated in his earlier concurring opinion in *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979), that he viewed the First Amendment as conferring right of access to criminal trials. *Id.* at 397-98.

<sup>49</sup> *Id.* at 582 (Stevens, J., concurring).

<sup>50</sup> *Richmond Newspapers*, 448 U.S. at 564; see also *id.* at 564-69.

<sup>51</sup> *Id.* at 569.

conducted fairly to all concerned, and it discouraged perjury, the misconduct of participants, or decisions based on secret bias or partiality.”<sup>52</sup>

Among the reasons the Chief Justice cited as requiring openness include its ability to enhance “the performance of all involved,”<sup>53</sup> protection of judges and prosecutors from “imputations of dishonesty,”<sup>54</sup> “the education of the public,”<sup>55</sup> and the significant therapeutic value of open proceedings, providing an outlet for community concern, hostility and emotion.<sup>56</sup> Not only do open trials enhance the likelihood of justice, they “satisfy the appearance of justice.”<sup>57</sup> And, Justice Burger famously stated, while “[p]eople in an open society do not demand infallibility from their institutions ... it is difficult for them to accept what they are prohibited from observing.”<sup>58</sup> The importance of openness to the democratic process was clearly crucial to the recognition of the access right. The Court thus held “that the right to attend criminal trials is implicit in the guarantees of the First Amendment; without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and ‘of the press could be eviscerated.’”<sup>59</sup>

In his concurrence, Justice Brennan went beyond the historical record to underscore the “structural role” that the First Amendment “play[s] in securing and fostering our republican

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<sup>52</sup> *Id.* (citing MATHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND, 343-45 (6th ed. 1820) and 3 WILLIAM BLACKSTONE, COMMENTARIES, 372-73).

<sup>53</sup> *Id.* at 569 n.7 (citation omitted).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 569 n.7 572.

<sup>56</sup> *Id.* at 570-71. Another “collateral aspect” of open courts is the “possibility that someone in attendance at the trial or who learns of the proceedings through publicity may be able to furnish evidence in chief or contradict ‘falsifiers.’” *Id.* at 570 n.8 (citing 6 J. WIGMORE, EVIDENCE § 1834).

<sup>57</sup> *Id.* at 571-72 (citation omitted).

<sup>58</sup> *Id.* at 572.

<sup>59</sup> *Id.* at 580 (citation omitted).

system of self-government.”<sup>60</sup> “Implicit in this structural role,” wrote Brennan, “is not only ‘the principal that debate on public issues should be uninhibited, robust and wide-open,’ but also the antecedent assumption that valuable public debate – as well as other civic behavior – must be informed.”<sup>61</sup> This, Brennan concluded, is the wellspring of the access right.<sup>62</sup> Recognizing that this wellspring provides a “‘theoretically endless’” justification for access to government proceedings, Justice Brennan cautioned that any assertion of the First Amendment right of access must be assayed by considering the value of access to the operation of the specific procedure. While the right of access “has special force” when it carries the “favorable judgment of experience,” what is “crucial” in deciding where the access right exists, according to Justice Brennan, is “whether access to a particular government process is important in terms of that very process.”<sup>63</sup>

*Globe Newspaper Co. v. Superior Court for Norfolk County*, decided two years later, tested the Court’s commitment to *Richmond Newspaper’s* holding in a highly sensitive case. In *Globe*, the trial judge had closed the courtroom during testimony of three minor rape victims, under a statute that required mandatory closing during the testimony of minors in such cases, and closed the balance of the trial as well.

Justice Brennan, this time writing for the Court, reiterated the view in his *Richmond* concurrence that the First Amendment right of access is based on

[T]he common understanding that a “‘major purpose of that Amendment was to protect the free discussion of governmental affairs.’” . . . By offering such protection, the First Amendment serves to ensure that the individual citizen can effectively

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<sup>60</sup> *Id.* at 587 (citation omitted).

<sup>61</sup> *Id.* (citation and footnote omitted).

<sup>62</sup> *See id.* at 588 n.4 (“The technique of deriving specific rights from the structure of our constitutional government, or from other explicit rights, is not novel”; citing examples).

<sup>63</sup> *Id.* at 589.

participate in and contribute to our republican system of self-government.<sup>64</sup>

The *Globe* Court reinforced the right by performing an exacting strict scrutiny analysis of the reasons offered for mandatory closure. The Court demanded that before “the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest.”<sup>65</sup>

In *Globe*, the closure rule was justified as a means to safeguard the physical and mental well being of minor sexual assault victims, and there was no dispute that the government’s interest was compelling. Nonetheless, the Court held, “as compelling as that interest is, it does not justify a *mandatory* closure rule, for it is clear that the circumstances of the particular case may affect the significance of the interest.”<sup>66</sup> Instead, “[a] trial court can determine on a case-by-case basis whether closure is necessary to protect the welfare of a minor victim.”<sup>67</sup> Buttressing the point, the Court recalled that “the plurality opinion in *Richmond Newspapers* suggested that individualized determinations are *always* required before the right of access may be denied....”<sup>68</sup>

*Press-Enterprise Co. v. Superior Court* (“*Press-Enterprise I*”) in 1984 applied the access right for the first time outside a criminal trial proper, applying the analysis of *Richmond Newspapers* to jury *voir dire*, and holding by a 9-0 majority that the First Amendment right attaches to those proceedings as well. Writing this time for a unanimous Court, Chief Justice Burger analyzed the structural benefits of open *voir dire* proceedings, reinforcing its past

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<sup>64</sup> *Globe Newspaper*, 457 U.S. at 604 (citation omitted).

<sup>65</sup> *Id.* at 606-07 (citations omitted).

<sup>66</sup> *Id.* at 607-08 (emphasis in original).

<sup>67</sup> *Id.* at 608 (footnote omitted).

<sup>68</sup> *Id.* at 608 n.20 (emphasis in original).



findings that public proceedings enhance the basic fairness of the process, as well as the appearance of fairness so essential to public confidence, and have great cathartic value.<sup>69</sup>

“Proceedings held in secret,” the Court stated in a single voice, “would deny this outlet and frustrate the broad public interest ....”<sup>70</sup>

In language even stronger than *Globe*, the Court held that “[t]he presumption of openness may be overcome only by an overriding interest based on findings that closure is *essential to preserve higher values* and is narrowly tailored to serve that interest.”<sup>71</sup> These findings must be “specific.”<sup>72</sup> Here, the Court found, “not only was there a failure to articulate findings with the requisite specificity but there was also a failure to consider alternatives to closure and to total suppression of the transcript.”<sup>73</sup>

*Press-Enterprise Co. v. Superior Court* (“*Press-Enterprise II*”) broke further new ground in 1986, finding a First Amendment right of access to preliminary proceedings that had no precedent in English or Colonial American history. The Court synthesized its prior holdings as basing the First Amendment right of access on two “complementary considerations,”<sup>74</sup> the “tradition” of openness and the “structural benefit” of openness. The first considers whether there exists a “tradition” of public access to a type of proceeding that carries “the favorable

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<sup>69</sup> 464 U.S. 501 at 507-09. Justice Stevens, in a separate concurrence, echoed the broader First Amendment values articulated in *Richmond Newspapers*, specifically the “common core purpose of assuring freedom of communication on matters relating to the functioning of government,” in order to protect “all members of the public ‘from abridgment of their rights of access to information about the operation of government, including the Judicial Branch.’” *Id.* at 517 (quoting *Richmond Newspapers* plurality opinion, Stevens concurrence and Brennan concurrence).

<sup>70</sup> *Id.* at 509.

<sup>71</sup> *Id.* at 510 (emphasis added).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 513.

<sup>74</sup> *Press-Enterprise II*, 478 U.S. at 8.

judgment of experience.”<sup>75</sup> The second asks “whether public access plays a significant positive role in the functioning of the particular process in question.”<sup>76</sup> While reciting these two factors, the Court in *Press Enterprise II* focused on the “structural benefit” prong, emphasizing that “the First Amendment question cannot be resolved solely on the label we give the event, i.e., ‘trial’ or otherwise, particularly where the preliminary hearing *functions much like a full-scale trial*.”<sup>77</sup>

This focus on function no doubt derived from the Court’s recognition that there was no historical equivalent to the modern pretrial procedures that were at issue.<sup>78</sup> Justice Stevens underscored in dissent the absence of any meaningful historical evidence of open pre-trial proceedings, contending that

a common-law right of access did not inhere in preliminary proceedings at the time the First Amendment was adopted, and . . . the Framers and ratifiers of that provision could not have intended such proceedings to remain open.<sup>79</sup>

Nonetheless, citing a string of modern cases from high courts of 28 states, each recognizing a right of access to preliminary proceedings, the *Press Enterprise II* majority concluded that a “near uniform” practice had developed of conducting open preliminary proceedings.<sup>80</sup> This current practice, coupled with the structural benefits of public access – the value of openness to “the very process” of a preliminary hearing – was sufficient to establish a First Amendment right of access.

The majority’s analysis of the structural benefit of access to these proceedings was expansive. The Court found that “California preliminary hearings *are sufficiently like a trial to*

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<sup>75</sup> *Id.* (citation omitted).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 7 (emphasis added).

<sup>78</sup> *Id.* at 8.

<sup>79</sup> *Id.* at 22.

justify the same conclusion” about the right of access that was reached in *Richmond Newspapers, Globe and Press-Enterprises I*.<sup>81</sup> Except for those limited instances that “would be totally frustrated if conducted openly,” the Court broadly asserted, preliminary proceedings “plainly require public access.”<sup>82</sup>

The Supreme Court in these four cases thus defined the scope of the constitutional right of access. It found the right implicit in the First Amendment, and it defined the right to reach those government proceedings where openness plays a “significant positive role in the functioning of the particular process,” confirmed by the weight of “tradition.”

In each of its access decisions, the Supreme Court made plain that a determination that a proceeding is subject to the First Amendment right of access does not mean that closure is never proper. The First Amendment right of access is a qualified, not an absolute, right. The qualified right to attend a government proceeding may be overcome where there is a showing of a countervailing, transcendent interest requiring closure.<sup>83</sup>

Whether the qualified right of access may be restricted in a given instance is resolved by a consideration of four specific factors laid down by the Supreme Court in *Richmond Newspapers* and its progeny:

1. whether an open proceeding is substantially likely to prejudice another transcendent value;<sup>84</sup>
2. if so, whether any alternative exists to avoid that prejudice without limiting public access;<sup>85</sup>

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<sup>80</sup> *Id.* at 10 (footnote omitted).

<sup>81</sup> *Id.* at 12.

<sup>82</sup> *Id.* at 8-9.

<sup>83</sup> *E.g., Richmond Newspapers*, 448 U.S. at 581; *Globe Newspaper*, 457 U.S. at 606-07.

<sup>84</sup> *Globe Newspaper*, 457 U.S. at 606-07; *Press Enterprise I*, 464 U.S. at 510.

<sup>85</sup> *Press Enterprise II*, 478 U.S. at 14; *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1070 (3d Cir. 1984).

3. if not, whether the limitation of access is narrowed (in scope and time) to the minimum necessary;<sup>86</sup> and,
4. whether the limitation of access effectively avoids the prejudice it is intended to address.<sup>87</sup>

This four-part test requires a particularized showing to justify any denial of access on a case-by-case basis.<sup>88</sup>

### **III. THE FIRST AMENDMENT RIGHT OF ACCESS IS NOT LIMITED TO ARTICLE III CRIMINAL PROCEEDINGS**

In its response to the terrorist attacks on September 11, 2001, the Department of Justice curtailed access to a great deal of government information previously available to the public,<sup>89</sup> including access to deportation hearings of hundreds of individuals rounded up after 9/11. To close the deportation proceedings of “special interest” aliens, the government did not urge merely that national security concerns outweighed the presumptive right of access. Instead, the Department argued that the First Amendment right of access does not apply at all to Executive Branch administrative hearings. It urged that the right extends only to criminal trials before Article III judges, and asserted an Executive Branch prerogative to close any administrative proceeding that Congress had not directed by law must be open.

The Department’s assertion that the constitutional right of access does not exist outside of Article III criminal proceedings is premised on the “yarn”<sup>90</sup> that the Constitution contains its own

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<sup>86</sup> *Press-Enterprise I*, 464 U.S. at 510; *United States v. Antar*, 38 F.3d 1348, 1362-63 (3d Cir. 1994).

<sup>87</sup> *Globe Newspaper*, 457 U.S. at 610; *In re Charlotte Observer*, 882 F.2d 850, 854-55 (4th Cir. 1989). The “effectiveness” factor flows from the proposition that First Amendment rights will not be abridged for an idle purpose. See *Neb. Press Ass’n v. Stuart*, 427 U.S. 539 (1976) (rejecting a prior restraint, *inter alia*, as ineffective in accomplishing its intended goal); *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97 (1979).

<sup>88</sup> *Globe Newspaper*, 457 U.S. at 608.

<sup>89</sup> See, e.g., David A. Schulz, *How the Government’s Response to 9/11 May Close The Doors to Open Government*, 20 ABA COMM. L., 3 (Winter 2003).

<sup>90</sup> Brief *Amici Curiae* of ABC, Inc. et al. in *N. Jersey Media Group* at 6.

“access” provisions in Article I (governing Congress) and Article II (governing the Executive), so that no other, unstated right of access to any proceedings in those branches of government should be inferred to exist.<sup>91</sup> Specifically, in the Department’s view, Article I contains an “access” right by imposing an obligation on Congress to report annually its receipt and expenditure of taxpayer funds;<sup>92</sup> Article II similarly contains an express “access” right by requiring the President to report on the “state of the union.”<sup>93</sup> Because the Constitution contains these express “access” obligations in Articles I and II, the Department argues that no other constitutional access obligation can be “implied” to exist for Congress or the Executive.<sup>94</sup> As a constitutional matter, the Department asserts, *any* other access information or proceedings provided to the public by these two branches is purely a matter of executive and legislative “grace.”<sup>95</sup>

In contrast, the Department observes that Article III is silent on “access,” imposing no obligations on the Judicial branch, while the Sixth Amendment affirmatively guarantees criminal defendants a “public trial.”<sup>96</sup> Given this, the Department says, it was not unreasonable for the Supreme Court to infer a public right of access to criminal trials in Article III courts, consistent with the Sixth Amendment.<sup>97</sup> The Department thus contends that the First Amendment right of access does not exist anywhere outside of the criminal courts (the only context directly addressed

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<sup>91</sup> Appellant’s Brief in *N. Jersey Media Group* at 21.

<sup>92</sup> Article I requires Congress to publish a “regular Statement and Account of the Receipts and Expenditures of all public Money” (U.S. CONST. art. I, § 9, cl. 7), and requires each House of Congress to publish a journal of proceedings from which it may withhold “such Parts as . . . may in [its] Judgment require Secrecy.” (U.S. CONST. art. I, § 5, cl. 3).

<sup>93</sup> Under Article II, the President must “from time to time give to the Congress Information of the State of the Union.” (U.S. CONST. art. II, § 3).

<sup>94</sup> Appellant’s Brief in *N. Jersey Media Group* at 21.

<sup>95</sup> *Id.* at 22.

<sup>96</sup> The Sixth Amendment provides in relevant part that: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . .” (U.S. CONST. amend. VI.)

by the Supreme Court), and the Constitution “leaves to the democratic processes the regulation of public access to the political branches.”<sup>98</sup>

**A. The Constitution Does Not Exempt the Executive Branch From the First Amendment Right of Access**

The Department’s claim that “the political branches of Government are completely immune from the First Amendment guarantee of access”<sup>99</sup> makes no sense, and was properly rejected by the Sixth Circuit and the Third Circuit when presented to them last year in two cases challenging the closure of post-9/11 deportation proceedings.<sup>100</sup> Although the two courts reached different conclusions about whether deportation proceedings are presumptively open, they both rejected the Government’s cramped view of the First Amendment right as limited to criminal courts.<sup>101</sup>

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<sup>97</sup> Appellant’s Brief in *N. Jersey Media Group* at 20.

<sup>98</sup> Appellant’s Brief in *N. Jersey Media Group* at 22.

<sup>99</sup> *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 695 (6th Cir. 2002).

<sup>100</sup> *Id.*; *N. Jersey Media Group v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002).

<sup>101</sup> In *Detroit Free Press*, the Sixth Circuit rejected “the Government’s assertion that a line has been drawn between judicial and administrative proceedings, with the First Amendment guaranteeing access to the former but not the latter.” 303 F.3d at 695. The court noted that “the Government cites no cases explicitly stating such a categorical distinction – that the political branches of government are completely immune from the First Amendment guarantee of access recognized in *Richmond Newspapers*”, and concluded to the contrary that “*there is a limited First Amendment right of access to certain aspects of the executive and legislative branches. . . . While the Government is free to argue that the particular historical and structural features of certain administrative proceedings do not satisfy the Richmond Newspapers two-part test, we find that there is no basis to argue that the [First Amendment] test itself does not apply.*” 303 F.3d at 695-96 (emphasis added).

In *North Jersey Media Group*, the Third Circuit was more tentative in reaching the same conclusion. While opining that “the notion that *Richmond Newspapers* applies [to executive branch administrative proceedings] is open to debate as a theoretical matter,” the Third Circuit concluded that its own “prior precedent” barred it from adopting the Department’s position that the First Amendment access right exists only in Article III proceedings. *N. Jersey Media Group*, 308 F.3d at 201. Citing its own decisions in *Capital Cities Media, Inc. v. Chester*, 797 F.2d 1164 (3d Cir. 1986) (en banc) (applying the *Richmond Newspapers* analysis to determine whether public has right of access to state environmental agency records), *First Amendment Coalition v. Judicial Inquiry & Review Bd.*, 784 F.2d 467 (3d Cir. 1986) (same for state administrative proceedings imposing judicial discipline), and *Whiteland Woods, L.P. v. W. Whiteland*, 193 F.3d 177 (3d Cir. 1999) (same for videotaping Township Planning Commission meeting), the Third Circuit ruled that:

These precedents demonstrate that in this Court, *Richmond Newspapers* is a test broadly applicable to issues of access to government proceedings, including [INS] removal [proceedings]. In this one respect we note our agreement with the Sixth Circuit’s conclusion in their nearly identical case.

The Department’s contrary argument is seriously flawed on several levels. First, the Department misstates the constitutional source of the *public’s* right of access. This access right does not emanate from the Sixth Amendment’s “public trial” guarantee but, rather, from the core democratic principles protected by the *First Amendment*, such as ensuring an informed electorate, assuring public confidence in the workings of government and the actions of governmental officials, and the therapeutic value of open proceedings. Indeed, in *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979), decided one year before *Richmond Newspapers*, the Supreme Court held that the “public trial” guarantee of the Sixth Amendment is an individual right extended only to criminal defendants and does *not* confer a general right of access on the public or press.<sup>102</sup> Nor does the constitutional access right derive from the presence (or absence) of any language in Articles I through III themselves.

Instead, as the Supreme Court repeatedly has stated, “the First Amendment, of its own force...secures the public an independent right of access[.]”<sup>103</sup> While the right of access “is not explicitly mentioned in terms in the First Amendment,” the Supreme Court emphasized in *Globe* that:

[W]e have long eschewed any “narrow literal conception” of the [First] Amendment’s terms. For the Framers were concerned with broad principles, and wrote against a background of shared values

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*N. Jersey Media Group*, 308 F.3d at 208-209 (emphasis added).

<sup>102</sup> *Richmond Newspapers*, 448 U.S. at 604 (Blackmun, J., concurring) (“with the Sixth Amendment [right of the accused to a public trial] set to one side in this case, I am driven to conclude, as a secondary position, that the First Amendment must provide some manner of protection for public access to the trial”); *Press-Enterprise I*, 464 U.S. at 516 (Stevens, J., concurring) (“[t]he constitutional protection for the right of access . . . is found in the First Amendment rather than the public trial provision of the Sixth”); *Press-Enterprise II*, 478 U.S. at 7 (“[h]ere . . . the right asserted is not the defendant’s Sixth Amendment right to a public trial since the defendant requested a closed preliminary hearing. Instead, the right asserted is that of the public under the First Amendment”) (emphasis in original).

<sup>103</sup> *Richmond Newspapers*, 448 U.S. at 584-85 (Brennan, J., concurring); *id.* at 576 (Burger, C.J., plurality op.) (“the First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors”); *id.* at 599 (Stewart, J., concurring) (“the First and Fourteenth Amendments clearly give the press and the public a right of access to trials”).

and practices. The First Amendment is thus broad enough to encompass those rights that while not unambiguously enumerated in terms of the Amendment, are nonetheless necessary to the enjoyment of other First Amendment rights.<sup>104</sup>

Recognizing that “a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs,”<sup>105</sup> the Supreme Court held that a qualified right of access to information about government functions is “implicit” in the First Amendment, just as the right to travel, the right of privacy and the right to be presumed innocent are implicit in other provisions of the Bill of Rights. In short, the Supreme Court has lodged the public right of access squarely in the First Amendment.<sup>106</sup>

Unlike the Sixth Amendment (which by its terms applies only to criminal trials), the First Amendment has long been held to impose limits on *all* branches of government, not just the

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<sup>104</sup> *Globe Newspaper*, 457 U.S. at 604.

<sup>105</sup> *Id.* at 604 (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)).

<sup>106</sup> *Richmond Newspapers*, 448 U.S. at 555 (Burger, C.J., plurality op.). The Department’s argument based upon the supposed explicit constitutional “access” provisions governing the Executive and Legislative branches is reminiscent of an argument the Supreme Court expressly rejected in *Richmond Newspapers*. There, the State of Virginia argued that no public right of access to judicial proceedings should be found to exist because the Constitution had an express access right that extended only to criminal defendants (in the Sixth Amendment), and contained no other explicit right for public access to trials. *Id.* at 579. In recognizing nonetheless an “implicit” right of access within the First Amendment, the Court noted that:

The Constitution’s draftsmen . . . were concerned that some important rights might be thought disparaged because not specifically guaranteed. It was even argued that because of this danger no Bill of Rights should be adopted. . . . But arguments such as the State makes have not precluded recognition of important rights not enumerated.

*Id.* Indeed, Madison himself worried that “there is great reason to fear” precisely the type of argument the Department is now making – that the “positive declaration” of some rights would be asserted as proof of the non-existence of other rights not expressly enumerated. 5 WRITINGS OF JAMES MADISON 271 (G. Hunt ed. 1904). This fear animated passage of the Ninth Amendment, which has been described as a constitutional “savings clause” that “served to allay the fears of those who were concerned that expressing certain guarantees could be read as excluding others.” *Richmond Newspapers*, 448 U.S. at 579 n. 15. See also *id.* at n.15 (the Ninth Amendment “serve[d] to foreclose application to the Bill of Rights of the maxim that the affirmation of particular rights implies a negation of those not expressly defined”); 2 J. STORY, COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES, 651 (5th ed. 1891).



Judicial branch.<sup>107</sup> First Amendment restrictions and obligations are routinely applied to the Executive Branch in a variety of contexts.<sup>108</sup> Indeed, when it serves their purposes, even the current administration has argued that the First Amendment applies to the Executive Branch – as when application of the First Amendment furthers the administration’s interests in secrecy. Thus, for example, they argued that the reporter’s privilege, which derives from the First Amendment, protects the Department of Defense publication, *Stars and Stripes*, arguing: “although *Stars and Stripes* is published by the DOD and its audience consists primarily of the ‘armed forces community,’ it is also ‘every bit a newspaper in the traditional sense,’ and as such enjoys ‘the full protection of the First Amendment.’”<sup>109</sup> To argue that the right of access does *not*

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<sup>107</sup> While the First Amendment explicitly states that “Congress shall make no laws” abridging freedom of speech or of the press, by settled tradition it “has been read to apply to the entire national government,” including the executive. GERALD GUNTHER, *CONSTITUTIONAL LAW, CASES AND MATERIALS*, 462 (10th ed. 1982). As explained by Justice Brennan:

[N]o clear distinction can be drawn in [the First Amendment] context between actions of the Legislative Branch and those of the Executive Branch. To be sure, the First Amendment is phrased as a restriction on Congress’ legislative authority; this is only natural since the Constitution assigns the authority to legislate and appropriate only to Congress. But it is difficult to conceive of an expenditure for which the last Government actor . . . is not an Executive Branch official. The First Amendment binds the Government as a whole, regardless of which branch is at work in a particular instance.

*Valley Forge Christian Coll. v. Americans. United for Separation of Church & State, Inc.*, 454 U.S. 464, 511 (1982) (Brennan, J., dissenting on other grounds). See also *Richmond Newspapers*, 448 U.S. at 575 (“[t]he First Amendment . . . prohibits governments from ‘abridging the freedom of speech, or of the press’”), *Smith v. Ca.*, 361 U.S. 147, 157 (1960) (Black, J., concurring) (“[t]he First Amendment . . . fixed its own value on freedom of speech and press by putting these freedoms wholly ‘beyond the reach’ of federal power to abridge”).

<sup>108</sup> See, e.g., *United States v. Nat’l Treasury Employees Union*, 513 U.S. 454, 465 (1995) (prohibition barring low-level executive employees from receiving honoraria for speeches and articles unrelated to official duties violated First Amendment); *Lamont v. Postmaster Gen.*, 381 U.S. 301, 305 (1965) (administrative scheme under which U.S. Post Office destroyed foreign mail deemed to be “communist party propaganda,” unless addressee affirmatively expressed desire to receive such mail, violated First Amendment); *Ozonoff v. Berzak*, 744 F.2d 224 (1st Cir. 1984) (executive order requiring loyalty investigation of American citizens as precondition of employment at World Health Organization violated First Amendment); *United States v. Schmucker*, 721 F.2d 1046, 1049 (6th Cir. 1983) (executive branch “cannot adopt a [selective] prosecution policy which, if adopted by Congress as a statute, would be unconstitutional” under First Amendment); *Quaker Action Group v. Morton*, 516 F.2d 717 (D.C. Cir. 1975) (National Park Service required under First Amendment to grant permits for public gatherings and protests on White House sidewalk and in Lafayette Park); *Nat’l Fed’n of Fed. Employees v. United States*, 695 F. Supp. 1196, 1205 (D.C. 1988) (government forms that imposed civil sanctions on executive branch employees for unauthorized disclosure of “classifiable” information, without any definition of the proscribed disclosures, violated First Amendment).

<sup>109</sup> *Tripp v. Dep. of Defense*, 284 F. Supp. 2d 50 (D.D.C. Sept. 30, 2003).

apply to the Executive Branch but the reporter's privilege *does* is inconsistent and disingenuous, at best.

Nor would a "political branch" exemption to the First Amendment make any sense, as Justice Black explained in the *Pentagon Papers* case,<sup>110</sup> where the court rejected the Nixon administration's argument that the President had both the "inherent power" and the express power as Commander-in-Chief during times of war to enjoin publication of a classified study about American involvement in the Vietnam War:

[T]he Executive Branch seems to have forgotten the essential purpose and history of the First Amendment. When the Constitution was adopted, many people strongly opposed it because the document contained no Bill of Rights to safeguard certain basic freedoms. . . . The amendments were offered to curtail and restrict the general powers granted to the Executive, Legislative and Judicial Branches two years before in the original Constitution. The Bill of Rights changed the original Constitution into a new charter under which *no branch of government* could abridge the people's freedoms of press, speech, religion, and assembly.<sup>111</sup>

Historical claims about the Founders' expectation of Executive Branch secrecy are misdirected for similar reasons. In urging that the Constitution provides no right of public access beyond Article III courts, the Justice Department has cited comments made by Alexander Hamilton during ratification of the 1787 Constitution describing "'secrecy' as a principal virtue of the unitary executive,"<sup>112</sup> and James Madison's observation that "[t]here never was any legislative assembly without a discretionary power of concealing important transactions, the

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<sup>110</sup> *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971).

<sup>111</sup> *Id.* at 715-16 (Black, J., concurring)(emphasis added).

<sup>112</sup> Appellant's Brief in *N. Jersey Media Group* at 23-24 (citing THE FEDERALIST No. 70 at 742) (Alexander Hamilton) (J. Cooke ed. 1961)).

publication of which might be detrimental to the community.”<sup>113</sup> This selective resort to historical materials perverts history, ignoring that the potential abuse of government secrecy was actually a major concern voiced in several of the state ratifying conventions during the original ratification debates.<sup>114</sup> And, more to the point, the views lauding government secrecy cited by the Department were expressed during the debates on the *original* Constitution—they pre-date the adoption of the First Amendment in 1791, which was created for the very purpose of “prohibit[ing] the widespread practice of governmental suppression of embarrassing information.”<sup>115</sup>

The rationale of the Supreme Court’s access decisions also contradicts the Department’s assertion that the right of access is confined to Article III criminal proceedings. The facts of the four cases decided by the Court, to be sure, involved public access to criminal trials and pre-trial proceedings. Over and over again, however, the members of the Court emphasized that the paramount purpose of the First Amendment is to ensure that citizens effectively observe the

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<sup>113</sup> *Id.* (quoting *The Debates in the Several State Conventions on the Adoption of the Federal Constitution, As Recommended By the General Convention at Philadelphia in 1787*, 409 (J. Elliot ed. 1881) (“*Elliot’s Debates*”).

The Government also cites as historical justification for Executive secrecy Thomas Jefferson’s refusal to turn over records to Chief Justice Marshall during the treason trial of Aaron Burr, a perplexing historical reference. Jefferson’s invocation of executive privilege was, in fact, rejected as precedent in the only decided case in which a president claimed the power to withhold information in a criminal proceeding. *United States v. Burr*, 25 F. Cas. 187 (C.C.D. Va. 1807) (No. 14,694). And, to add a touch of irony, the probable cause hearing during Burr’s treason trial – which was held by Justice Marshall in the Hall of the House of Delegates in Virginia “to accommodate the crush of interested citizens” – was cited by the Supreme Court in *Press Enterprise II* as historical evidence for the application of First Amendment access rights to preliminary hearings in criminal cases. 478 U.S. at 10 (citing *United States v. Burr*, 25 F. Cas. 1 (C.C. Va. 1807) (No. 14, 692)).

<sup>114</sup> See *Elliot’s Debates* at 169-70 (Patrick Henry of Virginia) (“[t]he liberties of a people never were, nor ever will be, secure, when the transactions of their rulers may be concealed from them”); *id.* at 408 (James Wilson of Pennsylvania) (“the people have a right to know what their agents are doing or have done, and it should not be in the option of the legislature to conceal their proceedings”); David M. O’Brien, *The First Amendment and the Public’s “Right to Know”*, 7 HASTINGS CONST. L.Q. 579, 593 (1980).

<sup>115</sup> *N.Y. Times Co.*, 403 U.S. at 723-24 (Douglas, J., concurring). See also, *id.* at 716 (Black, J., concurring) (“the Solicitor General argues . . . that the general powers of the Government adopted in the original Constitution should be interpreted to limit and restrict the specific and emphatic guarantees of the Bill of Rights adopted later. I can imagine no greater perversion of history”); *Capital Cities Media*, 797 F.2d at 1185 (Gibbons, J., dissenting) (“I would not suppose . . . that if presented with the question the Supreme Court would defer totally to Congress with

functioning of *government* (not just the judiciary) so that they may intelligently participate in the political process. As the Supreme Court stated in *Globe*, “underlying the First Amendment right of access” is,

the common understanding that ‘a major purpose of that Amendment was to protect the free discussion of *governmental affairs*’ . . . . By offering such protection, the First Amendment serves to ensure that the individual citizen can effectively participate in and contribute to a republican form of self-government.<sup>116</sup>

Indeed, in crafting the tradition/structural benefits test in *Richmond Newspapers*, Justice Brennan described the “crucial” inquiry as “whether access to a particular *government process* is important in terms of that very process.”<sup>117</sup>

Pronouncements such as these -- broadly linking the public’s right of access “to information about the operation of their government” -- abound in the Court’s access opinions.<sup>118</sup>

The collective force of these pronouncements makes clear that *Richmond Newspapers* is not only about access to criminal trials, but about access to matters relating to the functioning of

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respect to the secrecy of legislative proceedings. Rather it would, as it has frequently done, accommodate the competing governmental interest in secrecy and the values of the First Amendment”).

<sup>116</sup> *Globe Newspapers*, 457 U.S. at 604 (citations omitted) (emphasis added). Justice Brennan perhaps put it best in *Richmond Newspapers*, 448 U.S. at 586-87 (emphasis in original):

The Court’s approach in right-of-access cases simply reflects the special nature of a claim of First Amendment right to gather information. Customarily, First Amendment guarantees are interposed to protect communication between speaker and listener. . . . But the First Amendment embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a *structural* role to play in securing and fostering our republican system of self-government.

<sup>117</sup> *Richmond Newspapers*, 448 U.S. at 589 (Brennan, J., concurring) (emphasis added).

<sup>118</sup> See, e.g., *id.* at 584 (Stevens, J., concurring) (“[T]he First Amendment protects the public and the press from abridgement of their rights of access to information about the operation of their government, including the Judicial Branch.”); *id.* at 575 (Burger, J., plurality op.) (the guarantees of the First Amendment “share a common core purpose of assuring freedom of communication on matters relating to the functioning of government”); *id.* at 586 (Brennan, J., concurring) (“[r]ead with care and in context, our decisions must . . . be understood as holding only that any privilege of access to governmental information is subject to a degree of restraint dictated by the nature of the information and countervailing interests in security or confidentiality”); *Press-Enterprise I*, 464 U.S. at 517 (Stevens, J., concurring) (“the First Amendment’s concerns are much broader [than the interest in effective judicial administration]. The ‘common core purpose of assuring freedom of communication on matters relating to the functioning of government’ . . . underlies the decision of cases of this kind”).

government, which, as discussed in the following section, is precisely how lower courts have interpreted the Supreme Court’s rulings.

In sum, the text of the Constitution, the historical record and the Supreme Court’s access decisions, in our view, all undercut the Department’s claim that the “political branches” are exempt from the First Amendment access analysis articulated in *Richmond Newspapers*.

### **B. Lower Courts Have Applied the First Amendment Right of Access Beyond Article III Criminal Proceedings**

Lower courts have consistently construed the access principles established in *Richmond Newspapers* to extend beyond Article III criminal proceedings. They have uniformly applied the right to civil proceedings in Article III courts, and have applied the same *Richmond Newspapers* analysis to adjudications and other types of proceedings conducted by the Executive Branch (including hearings on mine safety<sup>119</sup> and presidential press conferences<sup>120</sup>), to legislative hearings<sup>121</sup> and to certain state administrative proceedings.<sup>122</sup> Even when courts have held that particular proceedings do not warrant public access rights, they have done so only after applying the First Amendment analysis required under *Richmond Newspapers*.<sup>123</sup>

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<sup>119</sup> *Soc’y of Prof’l Journalists v. Sec’y of Labor*, 616 F. Supp. 569, 572, 578 (D. Utah 1985) (even though Articles I and II of “[t]he United States Constitution [do] not expressly require either Congress or the Executive to hold any of their meetings in public,” court applied First Amendment test of *Richmond Newspapers* to hold that “the press and public have a constitutional right of access” to formal hearings conducted by the Mine Safety and Health Administration into deadly coal mine fire).

<sup>120</sup> *Cable News Network Inc. v. Am. Broad. Co.*, 518 F. Supp. 1238, 1245 (N.D. Ga. 1981) (exclusion of television reporters from presidential press conferences attended by print journalists “denies the public and the press their limited right of access guaranteed by the First Amendment ...”).

<sup>121</sup> See, e.g., *WJW-TV, Inc. v. City of Cleveland*, 686 F. Supp. 177, 180 (N.D. Ohio 1988) (finding “the First Amendment mandates that the legislative process be made generally available to the press and the public”), *vacated as moot*, 878 F.2d 906 (6th Cir. 1989); *League of Women Voters v. Adams*, 13 Media L.Rep. 1433 (Alaska Super. Ct. 1986) (“can it be doubted that access to legislative meetings would even more directly and forcefully serve the goals of ensuring an informed electorate and improving our system of self-government”).

<sup>122</sup> See, e.g., *Whiteland Woods L.P.*, 193 F.3d at 180-81 (holding without hesitation that plaintiff “had a constitutional right of access to the [Township] Planning Commission meeting”) (citations omitted).

<sup>123</sup> See, e.g., *United States v. Miami Univ.*, 294 F.3d 797 (6th Cir. 2002) (applying First Amendment access test to request for student disciplinary records); *First Amendment Coalition v. Judicial Inquiry & Review Bd.*, 784 F.2d at 472 (applying First Amendment access test to request for records of judicial discipline board); *Capital Cities Media*,

## 1. Civil court proceedings.

Lower courts have broadly construed *Richmond Newspapers* to apply to civil proceedings.<sup>124</sup> Most lower courts have not required that the substance of the civil proceeding resemble a criminal trial.<sup>125</sup> Rather, the same traditions of openness and favorable impact on the functioning of the system that are cited in the criminal context have independently been invoked to justify access in the civil setting.<sup>126</sup> For example, the Third Circuit in *Publicker Industries, Inc. v. Cohen*, found “that the civil trial, like the criminal trial, ‘plays a particularly significant role in the functioning of the judicial process and the government as a whole’ ”<sup>127</sup> The court found numerous precedents crediting the benefits of openness generally, including an opinion of Oliver Wendell Holmes in a libel case decided when he served as a justice of the Massachusetts Supreme Court:

It is desirable that the trial of [civil] causes should take place under the public eye, not because of the controversies of one citizen with another are of public concern, but because it is of the highest

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*Inc. v. Chester*, 797 F.2d at 1174-75 (applying First Amendment access test to request for state environmental agency records).

<sup>124</sup> See, e.g., *Rushford v. New Yorker Magazine*, 846 F.2d 249, 253 (4th Cir. 1988); *Publicker Indus. Inc. v. Cohen*, 733 F.2d 1059, 1061 (3d Cir. 1984); *Westmoreland v. CBS*, 752 F.2d 16, 23 (2d Cir. 1984); *In re Cont'l Ill. Sec. Litig.*, 732 F.2d 1302, 1308 (7th Cir. 1984); *Newman v. Graddick*, 696 F.2d 796, 801 (11th Cir. 1983); see also *In re Iowa Freedom of Info. Council*, 724 F.2d 658, 661-63 (8th Cir. 1983).

<sup>125</sup> Some cases, however, decided shortly after *Richmond Newspapers* applied First Amendment access rights to civil proceedings on the narrow ground that the civil proceedings at issue were akin to, or arose out of, a criminal trial. For example, in *Newman v. Graddick*, 696 F.2d 796 (11th Cir. 1983), the Eleventh Circuit granted access to pretrial and post-trial proceedings in a civil class action challenging prison conditions because it related to “the release or incarceration of prisoners....” *Id.* at 801. Similarly, the Eighth Circuit, acknowledging that a greater interest in access may exist in criminal cases where the “condemnation of the state is involved” than in civil proceedings, justified access to a contempt hearing, which it characterized as a “hybrid containing both civil and criminal characteristics.” *In re Iowa Freedom Council*, 724 F.2d at 661.

<sup>126</sup> See, e.g., *Brown & Williamson Tobacco Corp. v. Fed. Trade Comm’n*, 710 F.2d 1165, 1180-81 (6th Cir. 1983) (litigation involves “the health of citizens” and “[t]he public has an interest in knowing how the government agency” responds to allegations of erroneous testing); *In re Cont’l Ill. Sec. Litig.*, 732 F.2d at 1309 n. 9 (litigation “partakes of the general public interest in adequate and reliable information about securities and the securities markets”); cf. *Gannett*, 443 U.S. at 386 n. 15 (noting that “in some civil cases the public interest in access, and the salutary effect of publicity, may be as strong as, or stronger than, in most criminal cases,” while citing landmark equal rights cases).

<sup>127</sup> 733 F.2d at 1068 (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982)).

moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed.<sup>128</sup>

## 2. Executive Branch courts martial.

As early as 1956, interpreting a defendant’s Sixth Amendment rights, the Court of Military Appeals held that “[i]n military law, unless classified information must be elicited, the right to a public trial includes the right of representatives of the press to be in attendance” at court marshals<sup>129</sup> – which are non-Article III trials conducted by the Executive Branch. And, a quarter century before the Supreme Court explicitly recognized a public right of access to criminal proceedings, in an unrelated context, the Court affirmed that, “[t]he constitutional grant of power to Congress to regulate the armed forces ... itself does not empower Congress to deprive people of trials under Bill of Rights safeguards ....”<sup>130</sup>

Shortly after the Supreme Court’s recognition of a separate First Amendment right of access to criminal trials in Article III courts, the Court of Military Appeals followed suit for courts-martial. In *United States v. Hershey*, a United States Army Staff Sergeant was accused of sexually abusing his thirteen-year-old daughter.<sup>131</sup> Before the daughter was called to the stand, trial counsel requested that the courtroom be closed during her testimony because she would “be

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<sup>128</sup> *Cowley v. Pulsifer*, 137 Mass. 392, 394 (1884) (quoted in *Publicker*, 733 F.2d at 1069).

<sup>129</sup> *United States v. Brown*, 7 C.M.A. 251, 258 (1956), *overruled by United States v. Grunden*, 2 M.J. 116 (C.M.A. 1977). This case is the first Court of Military Appeals ruling on this issue. It predates, and, therefore, does not rely on the United States Supreme Court’s express recognition of public and press access to criminal proceedings in *Richmond Newspapers*, 448 U.S. 555 (1980). However, because the defendant was permitted to have anyone present that he wished, and only the general public and press were excluded, the case foreshadowed the issues raised in *Richmond Newspapers* and its progeny. “We are met at the outset with an issue of fundamental importance which is properly before us for the first time,” the military court wrote in *Brown*. 7 C.M.A. at 254. “[W]e will develop both the civilian and military rule.” *Id.* at 255. Though ultimately relying on the Sixth Amendment right, the *Brown* court’s decision rested largely on the same logic and historical experience later cited by the Supreme Court in *Richmond Newspapers*.

<sup>130</sup> *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 21-22 (1955).

<sup>131</sup> *United States v. Hershey*, 20 M.J. 433, 435 (C.M.A. 1985).

somewhat timid or a little bit uncomfortable” when recounting the sexual abuse inflicted upon her by her father.<sup>132</sup> The military judge granted trial counsel’s request and ordered the bailiff to escort the few spectators (who were all court personnel) out of the courtroom. Following the daughter’s testimony, the Staff Sergeant was convicted and sentenced to five years confinement, forfeiture of all pay and allowances, a reduction in rank, and a bad-conduct discharge.<sup>133</sup>

Hershey appealed his case to the Court of Military Appeals. The issue on appeal was whether the defendant had been deprived of his constitutional right to a public trial. The court determined there to be a constitutional right to a public trial, based not only on Sixth Amendment grounds, but also on the First Amendment. Relying expressly on the Supreme Court’s access decisions, the Court of Military Appeals held that the “stringent” test set forth in *Press-Enterprise Co.* applies equally to courts-martial.<sup>134</sup>

Following *Hershey*, military courts have recognized both that the First Amendment guarantees a right of access to court-martial proceedings and that the press and public have standing to exercise those rights. In a recent challenge to closure of a preliminary hearing brought by a media coalition, the United States Court of Appeals for the Armed Forces held that the right of access to criminal proceedings articulated by the Supreme Court in *Richmond Newspapers, Globe Newspaper Co.*, and *Press-Enterprise Co.* applied with equal force to courts-martial.<sup>135</sup> Subsequent cases have similarly recognized this right.<sup>136</sup>

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<sup>132</sup> *Id.* at 435 (C.M.A. 1985) (internal quotation marks omitted).

<sup>133</sup> *Id.* at, 434-36.

<sup>134</sup> *Id.* at 436. The C.M.A. upheld Hershey’s conviction despite the constitutional infirmities because “there [wa]s no evidence that members of the public were actually barred entry during the short period when the bailiff was asked to prohibit spectators from entering the courtroom.” *Id.* at 438.

<sup>135</sup> *ABC Inc., v. Powell*, 47 M.J., 363, 365 (C.A.A.F. 1993).

<sup>136</sup> *See, e.g., United States v. Scott*, 48 M.J. 663, 665 (A. Ct. Crim. App. 1998) (“It is clear that the general public has a qualified constitutional right under the First Amendment to access to criminal trials. . . . This right of public access to criminal trials applies with equal validity to trials by courts-martial”).



Moreover, its existence is reflected in the Manual for Courts-Martial, which provides that “courts-martial shall be open to the public,”<sup>137</sup> and adds that “ ‘public’ includes both members of the military and civilian communities.”<sup>138</sup> Opening courts-martial to public scrutiny, the Manual explains, “reduces the chance of arbitrary or capricious decisions and enhances public confidence in the court-martial process.”<sup>139</sup> And, as the Court of Military Appeals has stated, “public confidence in matters of military justice would quickly erode if courts-martial were arbitrarily closed to the public.”<sup>140</sup>

### **3. Article I bankruptcy proceedings.**

In bankruptcy proceedings – another non-Article III proceeding – judges have similarly upheld the public’s presumptive right of access. Pointing to the First Amendment, common law, and legislative enactments as its source, judges have held the presumption applies to proceedings ranging from creditor’s meetings to debtor examinations.<sup>141</sup>

As several of these cases note, the presumption of openness is supported by an analysis of the history and function of the bankruptcy laws and by comparison to the public’s right of access to criminal trials. In *Baltimore Sun Co. v. Astri Investment Management & Securities Corp.*,<sup>142</sup> for example, the court considered a newspaper reporter’s request to attend a creditors’ meeting involving Astri as the debtor in a bankruptcy proceeding. Despite the bankruptcy court’s Article I status, the court did not even consider the argument that the Constitution confines access rights

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<sup>137</sup> Rules for Courts-Martial (hereinafter “R.C.M”), 806(a) (2000), in MANUAL FOR COURTS MARTIAL, United States (2000).

<sup>138</sup> *Id.*

<sup>139</sup> R.C.M. 806(b), Discussion ¶ 8; *see also Scott*, 48 M.J. at 665.

<sup>140</sup> *United States v. Travers*, 25 M.J. 61, 62 (C.M.A. 1987).

<sup>141</sup> *In re Symington*, 209 B.R. 678, 692-94 (Bankr. D. Md. 1997); *In re Vance*, 176 B.R. 772 (Bankr. W.D. Va. 1995); *Baltimore Sun Co. v. Astri Investment Mgmt. & Secs. Corp.*, 88 B.R. 730 (Bankr. D. Md. 1988).

<sup>142</sup> 88 B.R. 730 (Bankr. D. Md. 1988).

to only Article III judicial proceedings. Instead, it assumed without question that application of the “experience and logic” test required by *Press Enterprise II* was appropriate, holding that, “both the history and the function and policy of our bankruptcy laws require the conclusion that a presumptive First Amendment right of access to creditors’ meetings exists ....”<sup>143</sup> The court traced the history of bankruptcy proceedings in Anglo-American jurisprudence, from “the first English bankruptcy statute ... enacted in 1542” to the present.<sup>144</sup> American bankruptcy laws permitted access to creditors’ meetings as early as the Act of 1898, with later amendments actually requiring “public” examination of the bankrupt.<sup>145</sup> The court went on to explain the significant role the creditors’ meeting plays in the functioning of the bankruptcy process – noting that it is the only mandatory hearing in both Chapter 7 and 11 proceedings:

One purpose of the examination of the debtor at a creditors’ meeting has always been to uncover all of the debtor’s assets, by the obtaining of full and truthful information. Truthfulness by the bankrupt is probably enhanced when the bankrupt testifies in public. In addition, openness will seemingly increase the likelihood that all potential creditors are made aware of the bankruptcy proceedings and are afforded the opportunity to present claims.<sup>146</sup>

Concluding that the test of “tradition and logic” supported access, and finding no reason to deny such access, the denial of the reporter’s request to attend the creditors’ meeting was vacated.<sup>147</sup>

Following the analysis in *Astri*, the court in *In re Symington* applied the “experience and logic test” to bankruptcy examinations, ruling that, like creditors’ meetings, bankruptcy examinations are presumptively open to the public.<sup>148</sup> Bankruptcy examinations, which are

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<sup>143</sup> *Id.* at 740.

<sup>144</sup> *Id.* at 737-40.

<sup>145</sup> *Id.* at 740.

<sup>146</sup> *Id.* at 741.

<sup>147</sup> *Id.* at 741-42.

<sup>148</sup> *In re Symington*, 209 B.R. at 693-94.

governed by Bankruptcy Rule 2004, are designed to locate assets of the estate or to assess whether or not grounds exist to bring an action. Bankruptcy Rule 2004 permits the bankruptcy court, on a motion of any party in interest, to order the examination of any entity about the “acts, conduct, or property or . . . the liabilities and financial condition of the debtor . . . .”<sup>149</sup> With respect to the “experience” prong of the *Press-Enterprise II* test, the court explained that Section 21(a) of the Bankruptcy Act of 1898 was a direct antecedent of Rule 2004.<sup>150</sup> Section 21, the court noted, provided that examinations be held “before the court or before the judge of any State court” – language which had been interpreted to require the proceedings to take place at a public hearing.<sup>151</sup> As for the “structural benefits” prong, the court deferred to the analysis of the *Astri* court, stating that “[b]ecause Rule 2004 examinations have the same *raison d’etre* as meetings of creditors . . . the same rationale exists for the two proceedings to be open to the public.”<sup>152</sup> Moreover, the court said, as in the context of criminal trials, a public proceeding “aids accurate factfinding” and helps “assure that witnesses are treated fairly and equitably.”<sup>153</sup> On these grounds, the court ruled that the public’s interest in maintaining confidence in the bankruptcy system trumped any harm that might result from releasing Mrs. Symington’s financial information.<sup>154</sup>

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<sup>149</sup> FED. R. BANKR. P. 2004(B).

<sup>150</sup> *In re Symington*, 209 B.R. at 693.

<sup>151</sup> *Id.* (internal quotation marks omitted), citing *In re Winton Shirt Corp. v. Elizabeth Trust Corp.*, 104 F.2d 777 (3d Cir. 1939) (holding that “the examination of witnesses pursuant to the provisions of section 21(a) of the Bankruptcy Act must take place at a public hearing”).

<sup>152</sup> *In re Symington*, 209 B.R. at 694.

<sup>153</sup> *Id.* (internal quotation marks omitted), citing *Richmond Newspapers*, 448 U.S. at 597.

<sup>154</sup> *In re Symington*, 209 B.R. at 695

#### 4. Administrative agency adjudications.

The case law on access to administrative agency hearings, before the two recent decisions on deportation hearings, was sparse and inconsistent.<sup>155</sup> For example, in *Society of Professional Journalists v. Secretary of Labor*, a federal trial court in Utah applied the two-part test to a media request for access to a formal fact-finding hearing of the federal Mine Safety and Health Administration examining the cause of a coal mine fire.<sup>156</sup> Although the court found “little historical tradition” of access to the exact proceeding at issue, it found that “analogous” civil trials had been traditionally open, looking to the “broad spectrum of administrative hearings, rather than narrow instances, in order to perceive a tradition.”<sup>157</sup> The court also found openness “crucially important” to the hearings at issue, creating “an emotional catharsis that soothes the community sorrow” and ensuring that the agency “properly does its job.”<sup>158</sup> The court cited numerous exemplary sources on openness, but confined its holding on First Amendment access to “formal administrative fact-finding hearings.”<sup>159</sup>

The Third Circuit has also applied the “tradition and logic” test to administrative proceedings and records in several cases. In *First Amendment Coalition v. Judicial Inquiry and Review Board*,<sup>160</sup> the court, sitting en banc, reviewed an order granting media access to records

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<sup>155</sup> See e.g., *Whiteland Woods L.P. v. Town of West Whiteland*, 193 F.3d 177 (3d Cir. 1999) (holding First Amendment applies to access to, but not request to videotape, township planning commission meeting, citing state code and benefits of open proceedings); *Cal-Almond, Inc. v. Dept. of Agric.*, 960 F.2d 105 (9th Cir. 1992) (finding request for access to USDA list of almond growers raised “a serious constitutional question,” citing six state statutes and “significant positive role” access could play in the function of referendum). But see *United States v. Miami Univ.*, 294 F.3d 797 (6th Cir. 2002) (holding no First Amendment right of access to university student disciplinary records because no history of same, and benefits to judicial process does not apply to academic institution); *El Dia, Inc. v. Colon*, 963 F.2d 488, 495 (1st Cir. 1992) (expressing doubt about applicability of “experience and logic” test to executive order barring access to agency documents).

<sup>156</sup> 616 F. Supp. 569 (D. Utah 1985), *vacated as moot*, 832 F.2d 1180 (10th Cir. 1987).

<sup>157</sup> *Society of Prof'l Journalists*, 616 F. Supp at 575-76.

<sup>158</sup> *Id.* at 576.

<sup>159</sup> *Id.* at 577.

<sup>160</sup> 784 F.2d 467 (3d Cir. 1986).

of a formal hearing of the Judicial Inquiry and Review Board, which had dismissed charges of misconduct against a judge of the Pennsylvania Supreme Court without recommending discipline. State constitutional and statutory provisions had generally prohibited public access to such proceedings, although on several occasions their substance had later been made public.

The majority opinion of Judge Weis found comparisons to the tradition of access to criminal and civil trials “of limited usefulness” and acknowledged that administrative proceedings “do not have a long history of openness.”<sup>161</sup> The majority also expressed concern about the “stifling effect” access could have on judicial disciplinary proceedings and added that appeals to the “structural” value of openness without a historical antecedent “would lead to an unjustifiably expansive interpretation.”<sup>162</sup> Thus, while the majority applied the two-part experience and logic test, it concluded that because the test was not met, no First Amendment access rights attached to the disciplinary proceedings at issue.<sup>163</sup>

In his concurrence, Judge Becker found that the formal hearings at issue could not satisfy the Supreme Court’s “history” prong. He criticized the district court for in effect making “a nullity of the tradition of openness requirement,” noting that the administrative agency at issue decided to disclose the records of its formal inquiries resulting in no disciplinary recommendation in only two out of twelve cases.<sup>164</sup> He also questioned the legitimacy of referring to the practices of the judicial review boards of other states to determine Pennsylvania “experience,” noting that “the historical inquiry implies that states have some flexibility in

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<sup>161</sup> *Id.* at 472.

<sup>162</sup> *Id.* at 473.

<sup>163</sup> *Id.* at 477.

<sup>164</sup> *Id.* at 480.

deciding which of their institutions may be open and which closed to the public” and that differences between state practices “are elemental to our system of federalism.”<sup>165</sup>

A few months later, in *Capital Cities Media, Inc. v. Chester*,<sup>166</sup> the Third Circuit again denied a press request for access to the records of a state environmental agency by using an extremely demanding historical standard. The court asserted that the Executive Branch “from the early days of the Republic” operated in a way that was inconsistent with a constitutionally protected right of access to government and stated that “decisions as to how much governmental information must be disclosed in order to make democracy work historically have been regarded as political decisions to be made by the people and their elected representatives.”<sup>167</sup> Although the press had put forth affidavits stating that documents of a similar nature had been disclosed in the past, the court found that “[i]nconsistent government practice does not constitute the kind of historical tradition” referred to in the Supreme Court and its own decisions, which primarily dated back to the time of the Framers.<sup>168</sup> Moreover, it found that reference to the practices of merely one state agency that was a party to the litigation was too narrow a view, and that the media had failed to show more broadly that this “particular type of government proceeding had historically been open in our free society.”<sup>169</sup>

While the various judges in *Society of Professional Journalists, First Amendment Coalition*, and *Capital Cities* came to differing conclusions regarding whether access rights attached to the particular administrative proceedings and documents at issue, they all reached their decisions by applying the First Amendment access test of *Richmond Newspapers*.

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<sup>165</sup> *Id.* at 481.

<sup>166</sup> 797 F.2d 1164 (3d Cir. 1986).

<sup>167</sup> *Id.* at 1170-71.

<sup>168</sup> *Id.* at 1175 & n. 27.

<sup>169</sup> *Id.* at 1175.

## 5. INS deportation proceedings.

Shortly after the September 11 attacks, the INS put into effect a regulation providing that any deportation case it classified as a “special interest” proceeding would be closed to the public and press. Challenges to the blanket closures were brought in both the Third and Sixth Circuits, and each rejected arguments advanced by the Department of Justice that no constitutional right was at stake.

The Sixth Circuit, in *Detroit Free Press v. Ashcroft*,<sup>170</sup> faced an appeal of a preliminary injunction striking down the closure of a “special interest” hearing involving a Muslim man in Detroit who had overstayed his tourist visa. Finding the administrative action to have violated the First Amendment right of access, the opinion offered a ringing endorsement of the importance of openness as a check upon the abuse of governmental power:

Today, the Executive Branch seeks to take this safeguard away from the public by placing its actions beyond public scrutiny. Against non-citizens, it seeks the power to secretly deport a class if it unilaterally calls them “special interest” cases. The Executive Branch seeks to uproot people’s lives, outside the public eye, and behind closed doors. Democracies die behind closed doors. The First Amendment, through a free press, protects the people’s right to know that their government acts fairly, lawfully, and accurately in deportation proceedings. When government begins closing doors, it selectively controls information rightfully belonging to the people. Selective information is misinformation.<sup>171</sup>

The court then examined both the tradition of openness in deportation proceedings and the structural benefit of open deportation hearings. The court rejected the Government’s insistence that there must be a historical tradition dating back to the time “when our organic laws were adopted”<sup>172</sup> before a First Amendment right could be found. It noted that *Press Enterprise*

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<sup>170</sup> 303 F.3d 681 (6th Cir. 2002).

<sup>171</sup> *Id.* at 683.

<sup>172</sup> *Id.* at 700 (quoting *Richmond Newspapers*, 448 U.S. at 569).

*II* and several circuit courts had “relied on exclusively post-Bill of Rights history,”<sup>173</sup> and found that deportation proceedings had for the most part been conducted openly since the enactment of the first immigration statute in 1882.<sup>174</sup> The court said it “should look to proceedings that are similar in form and substance” and found that deportation hearings “‘walk, talk and squawk’ very much like a judicial proceeding” and are comparable to a statutory criminal sentencing statute authorizing removal.<sup>175</sup> Even if the historical practice was not uniform “it makes more sense to look to more recent practice, similar proceedings, and concentrate on the ‘logic’ portion of the test.”<sup>176</sup>

The court had little difficulty concluding that access would play “a significant positive role” in deportation proceedings, noting that “the press and the public serve as perhaps the only check on abusive government practices.”<sup>177</sup> The court then discussed some of the benefits of access to such proceedings, including: improved government performance, a “cathartic” effect on the community, the “perception of integrity and fairness,” and a more informed public.<sup>178</sup> The Government had not identified “one persuasive reason why openness would play a negative role in the process.”<sup>179</sup> Thus, the governing standard was satisfied, and the Sixth Circuit found the right of access to extend to deportation proceedings.

Taking up the question of whether the qualified access right was overcome on the facts presented by the Government, the court concluded it was not. Although the Government had demonstrated a compelling interest in preventing the disclosure of information that might impede

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<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 701-02.

<sup>175</sup> *Id.* at 702 (citing 8 U.S.C.A. § 1228(c) (2003)).

<sup>176</sup> *Id.* at 703 n. 14.

<sup>177</sup> *Id.* at 704.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* at 705.



its ongoing anti-terrorism investigation, its blanket ban on access to all “special interest” hearings failed to satisfy two other requirements mandated by the First Amendment: that the closure order be narrowly tailored and that it be based on individualized “specific findings on the record so that a reviewing court can determine whether closure was proper and whether less restrictive alternatives exist.”<sup>180</sup> The opinion characterized open deportation proceedings as a vital demonstration of democratic values “that Americans should not discard in these troubling times.”<sup>181</sup>

The Third Circuit case, *North Jersey Media Group v. Ashcroft*,<sup>182</sup> decided six weeks later, also rejected the Government’s argument that the First Amendment access test of *Richmond Newspapers* had no application outside of Article III proceedings. However, in applying the two-prong test for determining whether the right of access attached to deportation hearings, Chief Judge Becker took a strict view of the “tradition” requirement. Writing for the majority, he noted that Congress had never explicitly guaranteed public access to deportation hearings and that numerous federal administrative hearings, ranging from those involving Social Security disability to employee ethics, were either mandatorily or presumptively closed.<sup>183</sup> INS regulations enacted in 1964 confirming a “rebuttable presumption of openness” for most deportation cases were deemed by Judge Becker to be too recent and too qualified to establish the “unbroken, uncontradicted history” of openness present in *Richmond Newspapers*.<sup>184</sup> Although Judge Becker considered a “1000-year history”<sup>185</sup> unnecessary, he rejected the press

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<sup>180</sup> *Id.* at 707.

<sup>181</sup> *Id.* at 711 (citing *Press-Enterprise II*, 478 U.S. at 13).

<sup>182</sup> 308 F.3d 198 (3d Cir. 2002).

<sup>183</sup> *Id.* at 209-10.

<sup>184</sup> *Id.* at 201.

<sup>185</sup> *Id.* at 213.

position that the court could rely solely on the “structural benefits” of open deportation hearings, so long as there was no history of closed proceedings—an approach taken in several Third Circuit cases involving modern criminal procedures.<sup>186</sup> Judge Becker concluded that a strict demonstration of a history of openness was required in order to “preserve administrative flexibility and avoid constitutionalizing ambiguous, and potentially unconsidered, executive decisions.”<sup>187</sup>

With regard to the structural benefits (or “logic”) prong of the test, the court first noted that it “does not do much work” because no case had yet found an access request that satisfied the “experience” prong, but failed the “logic” prong.<sup>188</sup> The court then read the *Press Enterprise II* formulation of “whether public access plays a significant positive role in the functioning of the particular process in question”<sup>189</sup> to require an examination of the “flip side” of that inquiry: “the extent to which openness impairs the public good.”<sup>190</sup> Judge Becker criticized the lower court for not fully crediting the declaration of the FBI’s Counterterrorism Chief outlining how disclosure of seemingly minor and innocuous information about a deportation proceeding could be valuable to a person within a terrorist network, and could thwart the government’s efforts to investigate and prevent future acts of violence.<sup>191</sup> Although the court characterized these statements as “to some degree speculative,” it relied upon judicial deference to executive expertise, stating that “[t]o the extent that the Attorney General’s national security concerns seem

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<sup>186</sup> See e.g., *United States v. Criden*, 675 F.2d 550 (3d Cir. 1982).

<sup>187</sup> *N. Jersey Media Group v. Ashcroft*, 308 F.3d 198, 216 (3d Cir. 2002).

<sup>188</sup> *Id.* at 217.

<sup>189</sup> *Id.* at 216 (internal quotation marks omitted) (quoting *Press-Enterprise II*, 478 U.S. at 8).

<sup>190</sup> *Id.* Judge Becker recognized that considering evidence of how open deportation hearings could threaten national security as part of the threshold inquiry into the existence of a presumptive access right created an “evidentiary overlap” with the “compelling government interest” analysis that is taken up to decide whether a presumptively open proceeding could be closed, but was not bothered by this inconsistency in the analysis. *Id.* at 217 n. 13.

<sup>191</sup> *Id.* at 218.

credible, we will not lightly second-guess them.”<sup>192</sup> In a confusing conclusion, however, the court seemed to limit its analysis to “special interest” deportation hearings only. “On balance,” stated Judge Becker, “we are unable to conclude that openness plays a positive role *in special interest deportation hearings* at a time when our nation is faced with threats of such profound and unknown dimension.”<sup>193</sup>

In a vigorous dissent, Judge Sirica found that the two-step analysis for the existence of the First Amendment right was plainly satisfied. He found an adequate historical record of open proceedings, and relied on cases applying the Supreme Court precedents to civil trials as equally applicable given the similar procedures used at deportation hearings.<sup>194</sup>

#### **IV. APPLYING THE “TRADITION” AND “STRUCTURAL BENEFIT” ANALYSIS TO ADMINISTRATIVE ADJUDICATORY PROCEEDINGS**

Typical regulatory proceedings and “esoteric” proceedings are conducted largely like Article III trials and should presumptively be open to the same extent as a civil trial.

##### **A. Constitutional “Due Process” Constraints on Administrative Hearings**

The Supreme Court sanctioned the vast delegation of powers to administrative agencies only upon its conclusion that proceedings in such agencies would remain subject to due process rights and other constitutional constraints. In its early decisions, the Court construed due process of law, in its “primary” sense, to require “an opportunity to be heard” and “to defend” rights in judicial proceedings.<sup>195</sup> By the 1930s, however, with the dawn of the New Deal, the Court came to apply these “due process” concepts to the new administrative agencies exercising vast powers

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<sup>192</sup> *Id.* at 219.

<sup>193</sup> *Id.* at 220. (emphasis supplied).

<sup>194</sup> *Id.* at 222 (Scirica, J., dissenting).

<sup>195</sup> *E.g.*, *Chicago, Milwaukee and St. Paul Ry. Co. v. Polt*, 232 U.S. 165, 168 (1914) (the right to a hearing is one of “the rudiments of fair play”); *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 678 (1930) (due process of law demands an opportunity to be heard and to defend substantive rights).

in new forums, repeatedly emphasizing that the due process requirement that administrative proceedings be *open* served as an essential safeguard. For example, in its 1938 decision in *Morgan v. United States*,<sup>196</sup> the Court held that a “*fair and open hearing*” is an essential element required by due process in any quasi-judicial administrative proceeding involving liberty or property interests:

The vest [sic] expansion of this field of administrative regulation in response to the pressure of social needs is made possible under our system by adherence to the basic principles that the Legislature shall appropriately determine the standards of administrative action and that in administrative proceedings of a quasi-judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. These demand “a fair and open hearing,” essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process. Such a hearing has been described as an “inexorable safeguard.”<sup>197</sup>

The *Morgan* case involved highly controversial authority granted to the Secretary of Agriculture to fix maximum rates for buying and selling livestock under the Packers and Stockyards Act, 1921.<sup>198</sup> That Act granted the Secretary the power to fix “reasonable” maximum rates, but only if, after a “full hearing,” he determined that existing market rates were “unjust, unreasonable or discriminating.”<sup>199</sup> In fifty consolidated lawsuits challenging the rates fixed by the Secretary, the Supreme Court addressed plaintiffs’ contention that the administrative procedures that had been employed did not afford the “full hearing” required by statute and mandated by the constitutional requirement of due process.<sup>200</sup> On its second review of the case

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<sup>196</sup> 304 U.S. 1 (1938).

<sup>197</sup> *Id.* at 14-15 (citations omitted).

<sup>198</sup> 7 U.S.C. §§ 181-229 (2003).

<sup>199</sup> *Morgan v. United States*, 298 U.S. 468, 473 (1936) (quoting 7 U.S.C. §211).

<sup>200</sup> The Court considered the obligations of due process subsumed in the statutory requirement of a “full hearing,” and therefore did not separately address the scope of constitutional due process. *Id.* at 477.

after an initial remand, the Supreme Court struck down the Secretary's determination.<sup>201</sup> It found that his failure to afford plaintiffs an opportunity to review and respond to proposed findings that had been prepared by the Bureau of Animal Industry, before those recommendations were acted upon by the Secretary, had denied the participants the "fair and open" proceeding demanded by due process.<sup>202</sup>

The Court had first articulated the "fair and open hearing" formulation of the due process requirement in *Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio*,<sup>203</sup> a 1937 case decided while *Morgan* was on its initial remand. In that case, the Court struck down a regulator's order requiring a telephone company to pay rebates, because the determination that the rates were excessive had been made on the basis of information reviewed by the Commission that was never made a part of the administrative record nor disclosed to the telephone company. In the words of Justice Cardozo, the informed opinions of administrative agencies are entitled to deference from the courts only when they comply with "constitutional restraints," including due process:

[M]uch that they do within the realm of administrative discretion is exempt from supervision if those restraints have been obeyed. ***All the more insistent is the need, when power has been bestowed so freely, that the "inexorable safeguard" of a fair and open hearing be maintained in its integrity.*** The right to such a hearing is one of "the rudiments of fair play" assured to every litigant by the Fourteenth Amendment as a minimal requirement.<sup>204</sup>

Two decades later, in *Hannah v. Larche*,<sup>205</sup> the Court considered the "due process" validity of procedures adopted by the Commission on Civil Rights to conduct an administrative

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<sup>201</sup> 304 U.S. 1 (1938).

<sup>202</sup> *Id.* at 18, 19.

<sup>203</sup> 301 U.S. 292 (1937).

<sup>204</sup> 301 U.S. at 304-305 (citations omitted; emphasis added).

<sup>205</sup> 363 U.S. 420 (1960).

investigation into claims by African-Americans that their right to vote was being systematically denied. Citizens called to testify before the Commission challenged the Commission's refusal to disclose the identities of the individuals who had submitted complaints and the denial of their right to cross-examine other witnesses called to testify.<sup>206</sup> Rejecting the due process challenge to these hearings, the Supreme Court stated:

'Due process' is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts. Thus, *when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process*. On the other hand, when governmental action does not partake of an adjudication, as for example, when a general fact-finding investigation is being conducted, it is not necessary that the full panoply of judicial procedures be used. Therefore, as a generalization, it can be said that due process embodies the differing rules of fair play, which through the years, have become associated with differing types of proceedings. Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account.<sup>207</sup>

In allowing the development of the modern administrative state the Supreme Court has thus embraced two fundamental propositions: (1) constitutional due process requirements constrain the procedures that may be adopted by administrators, and (2) when liberty and property interests are at stake in proceedings that Congress has directed to be conducted as quasi-judicial "hearings," due process demands a "fair and open" hearing. This due process mandate of "fair and open" administrative adjudications has since been widely recognized.<sup>208</sup>

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<sup>206</sup> 363 U.S. at 423, 424.

<sup>207</sup> 363 U.S. at 442 (emphasis added).

<sup>208</sup> See, e.g., *Petition of New England Tel. and Tel.Co.*, 136 A.2d 357, 362 (Vt. 1957) ("A fair and open hearing is the absolute demand of all judicial inquiry"); *State v. Duluth M. & I. R. Ry. Co.*, 75 N.W.2d 398, 409 (Minn. 1956) ([Administrative proceedings of a quasi-judicial character] demand a 'fair and open hearing' essential ... to the legal

For example, in *Fitzgerald v. Hampton*,<sup>209</sup> the D.C. Circuit reviewed the due process obligation of openness in a case involving a former government employee, A. Ernest Fitzgerald, who was entitled to a reinstatement hearing as a matter of statutory right, after he was fired from a federal job. On appeal from a decision by the U.S. Civil Service Commission to close Fitzgerald's hearing to the public, the D.C. Court of Appeals held that due process required the reinstatement hearing to be open if requested by Fitzgerald.<sup>210</sup> In administrative adjudications, the D.C. Circuit concluded, the rule of the "open" forum is paramount, whether by statutory mandate, regulation, or practice.<sup>211</sup>

Other courts have likewise found that due process mandates that administrative adjudications be open. *Adams v. Marshall*,<sup>212</sup> for example, was a mandamus action by a suspended policeman who sought to compel members of the Civil Service Commission to follow certain procedures at a scheduled hearing of his appeal. The Civil Service closed the hearing to the public and the press. Citing *Morgan*, the Kansas Supreme Court held that a closed hearing offended due process and that "proceedings of a judicial nature held behind closed doors and shielded from public scrutiny have long been repugnant to our system of justice."<sup>213</sup> Noting that this basic principle applies with equal force to administrative agencies, the *Adams* court

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validity of the administrative regulation ...."); *Juster Bros. v. Christgau*, 7 N.W.2d 501, 508 (Minn. 1943) (quoting *Morgan v. United States*); 73A C.J.S., *Public Administrative Law and Procedure* § 136 (2003) ("An administrative hearing, particularly where the proceedings are judicial or quasi-judicial, must be fair, or ... fair and open").

<sup>209</sup> 467 F.2d 755 (D.C. Cir. 1972).

<sup>210</sup> *Id.* at 766.

<sup>211</sup> *Id.* at 764. Citing *Fed. Communications Comm'n v. Schreiber*, 381 U.S. 279 (1965), a case enforcing a procedural rule of the FCC favoring public proceedings, the *Fitzgerald* court noted a general policy which favors open administrative agency proceedings, unless disclosure in some way compromises the public interest, the dispatch of business, or the ends of justice.

<sup>212</sup> 512 P.2d 365 (Kan. 1973).

<sup>213</sup> *Id.* at 371.

concluded that “[a] hearing before an administrative agency exercising judicial, quasi-judicial, or adjudicatory powers must be fair, open, and impartial . . . .”<sup>214</sup>

Similarly, in *Pechter v. Lyons*,<sup>215</sup> due process was held to require an open administrative adjudication where a liberty interest was at stake. *Pechter* involved the INS deportation hearing of Boleslavs Maikovskis that was closed in the interest of security. Maikovskis was charged with having concealed his Nazi past at the time he entered the United States in the early 1950s. The immigration judge closed the hearings to the public because of the volatile emotions and hostility of the public towards Maikovskis. He banned the press as well for fear of the press reporting the proceedings to the public.<sup>216</sup> Members of the general public challenged the administrative closure under 8 C.F.R. §246.16(a), an INS regulation requiring deportation hearings to be open to the public unless the administrative law judge orders closure to protect witnesses, respondents, or the public interest. The court granted the plaintiffs standing to assert rights under the governing regulation because of the important interests advanced by openness:

This regulation is but one of countless manifestations of a public policy centuries old that judicial proceedings, especially those in which the life or liberty of an individual is at stake, should be subject to public scrutiny, not only for the protection of the individual from unwarranted and arbitrary conviction, but also to protect the public from lax prosecution.<sup>217</sup>

The Supreme Court’s articulation in the 1930s of a constitutional mandate that administrative adjudicatory proceedings be “fair and open,” meant that the obligation for openness was not subject to dispute when Congress adopted the Administrative Procedure Act

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<sup>214</sup> *Id.* at 372 (citation omitted).

<sup>215</sup> 441 F. Supp. 115, 120 (S.D.N.Y. 1977).

<sup>216</sup> *Id.* at 117.

<sup>217</sup> *Id.* at 117-18.



(“APA”) in 1946.<sup>218</sup> The legislative history of the APA itself contains substantial evidence of a tradition of open administrative adjudications before 1946, and indicates that Congress fully intended this tradition of openness to continue.

The effort to pass the APA spanned more than seven years. The Walter-Logan Bill,<sup>219</sup> introduced in 1939, was the first of a number of measures considered by Congress to standardize agency practices and to provide adequate avenues for review of agency determinations. Responding to concerns that lack of meaningful review of administrative actions had bred bureaucrats who displayed “contemptuous disregard for both Congress and the courts,”<sup>220</sup> the Walter-Logan Bill provided uniform procedures for administrative rule-making and adjudication. The bill stated that agencies could adopt rules “only after publication of notice and public hearings;”<sup>221</sup> and it required adjudications before agencies headed by boards or commissions to be “made in all instances . . . after reasonable public notice and a full and fair hearing. . . .”<sup>222</sup> At the “full and fair hearing” the public was required to be notified about, a stenographer would be present to record testimony, and all evidence would be entered into a record filed with the agency and provided to the aggrieved party.<sup>223</sup>

The Walter-Logan Bill passed both houses of Congress, but was vetoed by President Roosevelt in 1940 for reasons unrelated to its public access provisions. Roosevelt had previously asked his Attorney General to appoint a committee to study administrative procedure in the United States and to develop recommendations for reform. In rejecting the bill, Roosevelt

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<sup>218</sup> 5 U.S.C. §551 (2004).

<sup>219</sup> S. 915, H.R. 6324, 76th Cong. (1939).

<sup>220</sup> S. REP. NO. 76-442, at 9 (1939); H.R. REP. NO. 76-1149, at 2 (1939).

<sup>221</sup> H.R. 6324 § 2(a).

<sup>222</sup> *Id.* at § 4(d).

<sup>223</sup> *Id.* at § 4(b).

stated that he wished to receive that committee's report before approving any legislation relating to administrative procedure.<sup>224</sup>

The Attorney General's Committee produced twenty-seven monographs reporting on the procedures used in numerous different agencies, and issued its final report on administrative procedure in 1941.<sup>225</sup> That Report documented that open adjudicatory proceedings were the well-established norm by 1941, and endorsed this norm as an important safeguard against arbitrary government action:

It is obvious, as we have noted, that a litigant coming before an administrative agency should be afforded a proper and fair forum in which he can present his case. . . . *Hearings should be, and almost invariably are, public.* The few exceptions where hearings are private are for the benefit of the individual involved. For example [h]earings conducted by the Social Security Board are private whenever "intimate matters of scandalous nature are involved." Veterans' Administration cases, usually involving medical testimony, are private, unless the veteran waives his right to privacy. . . .

*In all cases except ones such as these, hearings are open to the public.* This is as it should be; the practice is an effective guarantee against arbitrary methods in the conduct of hearings. Star chamber methods cannot thrive where hearings are open to the scrutiny of all.<sup>226</sup>

The lack of an explicit statutory mandate for open hearings in the APA subsequently enacted by Congress reflects the contemporaneous understanding that adjudicatory hearings

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<sup>224</sup> H.R. DOC. 986, 76th Cong., 3d Sess. (1940).

<sup>225</sup> ATTORNEY GENERAL'S COMMITTEE, 77<sup>TH</sup> CONG., ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, S. DOC. NO. 8 (1st Sess. 1941). The Final Report of the Attorney General's Committee included reform recommendations and proposed bills. The Senate held hearings on those bills in 1941. See *Hearings Before a Subcommittee on the Judiciary, United States Senate, on S. 674, S. 675, and S. 918, 77th Cong.*, pp. 1-1616 (1941). However, "[i]n August 1941, the increasingly threatening international situation moved the Senate Judiciary Committee to postpone further consideration of the legislative proposals." H.R. REP. NO. 1980 (1946) reprinted in 1946 U.S.C.C.A.N. 1195, 1202. In 1944 and 1945, with World War II winding down, several new bills were introduced in Congress, including S. 7, the bill that eventually was enacted into law as the APA. These bills, for the most part, followed the recommendations of the Attorney General's Committee Report.

<sup>226</sup> S. DOC. NO. 8 . at 68 (emphasis added).

would in fact be open, as required by due process—an understanding that was consistent with historical practice and the conclusions of the Attorney General’s Committee, and is reflected in various disclosure and other provisions contained in the APA<sup>227</sup> and later bills.<sup>228</sup> As the Senate Judiciary Committee Report accompanying the APA stated, the various provisions for public disclosure were to be interpreted broadly because “all administrative operations should as a matter of policy be disclosed to the public.”<sup>229</sup>

In keeping with both the letter and the spirit of the law, it is not surprising that administrative agencies routinely mandate open adjudicatory proceedings within their own regulations.<sup>230</sup>

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<sup>227</sup> Among other publicity provisions, the statute as passed required agency rules and regulations to be published in the Federal Register, Pub. L. No. 79-404 Sec. 3(a), and required that all decisions of adjudicatory proceedings to be made on a record available not just to the parties, but also to any “persons” properly concerned. Pub. L. No. 79-404 Sec. 3(c). The Supreme Court has cited the mandatory availability of the administrative record as evincing Congress’s “general policy favoring disclosure of administrative agency proceedings.” *Fed. Communications Comm’n v. Schreiber*, 381 U.S. 279, 293 (1965) (finding an F.C.C. rule establishing investigative hearings as presumptively open to the public to be authorized by Section 3(c) of the APA).

<sup>228</sup> The 1976 Government in the Sunshine Act required all meetings where agency business is conducted to be “open to public observation.” Government in the Sunshine Act, Pub. L. No. 94-409, §3(a), 90 Stat. 1241 (1976) (codified at 5 U.S.C. § 552b(a)(3)). One exception to this public access requirement is a meeting that specifically concerns the “initiation, conduct, or disposition by the agency of a particular case of formal agency adjudication....” 5 U.S.C. § 552b(c)(10)). The rationale for this exception was that:

it would be inappropriate for several reasons to require agencies to open meetings discussing specific cases of adjudication. Public disclosure of an agency’s legal strategy in a case before the agency or in the courts could make it impossible to litigate successfully the action. . . . *Finally, many aspects of the adjudicative process, such as the trial before an administrative law judge or appellate arguments before the commission are generally now open to the public.*

S. REP. NO. 94-354, at 26 (1975)..

<sup>229</sup> S. REP. NO. 79-752, at 8 (1945).

<sup>230</sup> *E.g.*, 12 C.F.R. § 263.33 (2003) (hearings conducted by Federal Reserve Board presumptively open to the public); 16 C.F.R. § 3.41 (2003) (Federal Trade Commission adjudicatory hearings shall be open except in enumerated circumstances); 17 C.F.R. § 201.301 (2003) (S.E.C. hearings generally required to be open); 21 C.F.R. § 10.203 (2003) (public right to attend formal evidentiary hearings conducted by Food & Drug Administration); 29 C.F.R. § 18.43 (2003) (adjudicatory hearings conducted by the Dep’t of Labor shall be open to the public except in “unusual circumstances”); 29 C.F.R. § 101.10 (2003) (hearings before the National Labor Relations Board are open to the public except “in extraordinary circumstances”); 47 C.F.R. § 1.221, 1.225 (2003) (Federal Communications Commission gives public notice of hearings and allows participation by “any person”).

## **B. Applying the *Richmond Newspapers* Analysis to Administrative Hearings**

The constitutional due process obligations and a history of openness dating from the advent of the administrative state lead to the inexorable conclusion that the First Amendment’s presumptive right of access attaches to administrative adjudicatory proceedings. At a minimum, those proceedings that are required by due process to be “fair and open” must necessarily be subject to the First Amendment right of access under the *Richmond Newspapers* analysis.

### **1. The “tradition” of openness.**

Although administrative adjudications were largely unknown before the last century, the widely-accepted tradition since then is that such adjudications “should be, and almost invariably are, public.”<sup>231</sup> Just as a “near uniform” practice of openness for newly developed pre-trial criminal proceedings was sufficient in *Press Enterprise II*,<sup>232</sup> the nearly “invariabl[e]” practice of open administrative hearings since the dawn of the administrative state equally provides the “favorable judgment of experience.”<sup>233</sup> As *Press Enterprise II* establishes, it is not necessary to demonstrate a historical practice pre-dating our country’s founding to find a constitutional right of access to a government proceeding.

Indeed, few aspects of modern criminal prosecutions can boast a pedigree of public access dating back to the Founders and beyond to Magna Carta such as the history of criminal trials reviewed by the Supreme Court in *Richmond Newspapers*.<sup>234</sup> Yet, lower courts have widely found a right of access to phases of criminal proceedings that have no historical counterpart--such as plea hearings, pretrial suppression hearings, and motions for judicial

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<sup>231</sup> S. DOC. NO. 8, *supra* note 225, at 68.

<sup>232</sup> *Press-Enterprise Co. v. Superior Court of California for the County of Riverside*, 478 U.S. 1 (1986).

<sup>233</sup> *Id.* at 8 (quoting *Globe Newspaper Co. v. Superior Court for Norfolk County*, 457 U.S. 596, 605).

<sup>234</sup> 448 U.S. 555 (1980).

disqualification.<sup>235</sup> Some courts have cited the consistent modern practice of openness as sufficient under the *Press Enterprise II* analysis, while others have concluded that the “favorable judgment of history” is not necessary where the structural benefits of openness are irrefutable.<sup>236</sup> In *Seattle Times Co. v. United States District Court*,<sup>237</sup> for example, the Ninth Circuit reasoned that new procedures introduced by the Bail Reform Act of 1984 that did not exist at common law, rendered “the historical tradition surrounding bail proceedings ... much less significant.”<sup>238</sup> As the Fifth Circuit similarly noted, First Amendment access rights “should not be foreclosed because these proceedings lack the history of openness relied on by the *Richmond Newspapers Court*.”<sup>239</sup>

Only where there is a strong tradition of holding closed proceedings, as with grand jury proceedings and plea negotiations, have courts consistently found the “tradition” factor material

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<sup>235</sup> See, e.g., *United States v. Haller*, 837 F.2d 84, 86 (2d Cir. 1988) (plea hearings “have typically been open to the public”); *Washington Post v. Robinson*, 935 F.2d 282, 288 (D.C. Cir. 1991) (“plea agreements have traditionally been open to the public”); *In re Providence Journal*, 293 F.3d 1, 9 (1st Cir. 2002) (documents submitted in criminal proceedings); *Application of NBC v. Presser*, 828 F.2d 340, 344 (6th Cir. 1987) (pretrial motion to disqualify judge, citing Sixth Circuit practice from 1924-1984).

<sup>236</sup> See, e.g., *United States v. Cojab*, 996 F.2d 1404, 1407 (2d Cir. 1993) (pretrial hearing); *United States v. Criden*, 675 F.2d 550, 555 (3d Cir. 1982) (“societal interests” rather than historical analysis should determine First Amendment right of access to suppression hearing).

<sup>237</sup> 845 F.2d 1513, 1516 (9th Cir. 1988).

<sup>238</sup> See also *United States v. Chagra*, 701 F.2d 354, 362-64 (5th Cir. 1983) (same; noting increased significance of bail procedures, citing Bail Reform Act of 1966); *Criden*, 550 F.2d at 555 (“We do not think that historical analysis is relevant to determining whether there is a first amendment right of access to pretrial criminal proceedings”). How the proceeding at issue is defined greatly affects the outcome of the historical analysis, and judges in several cases both in the Supreme Court and lower courts have differed on the proper approach. For example, although Justice Brennan in the majority opinion in *Globe Newspapers* alluded to the openness of criminal trials generally (457 U.S. at 605), Chief Justice Burger in his dissent found the more relevant comparison in that case to be trials involving sex crimes against a minor, which he asserted were traditionally shielded from view. See *Globe Newspaper Co. v. Super. Court for County of Norfolk*, 457 U.S. 596, 614 (1982) (Burger, C.J., dissenting). Similarly, there is little uniformity in geographical scope of judicial sources of “experience.” Some courts have looked only at the “experience” of their own jurisdiction. See, e.g., *Application of NBC (United States v. Presser)*, 828 F.2d 340, 345 (6th Cir. 1987). Others courts have looked beyond their own jurisdiction for guidance. See, e.g., *Rivera-Puig v. Garcia-Rosario*, 983 F.2d 311, 323 (1<sup>st</sup> Cir. 1992) (although Puerto Rico typically held preliminary hearings in private, *Press Enterprise II* “refers to the experience in that type or kind of hearing throughout the United States, not the experience in only one jurisdiction”).

<sup>239</sup> *United States v. Chagra*, 701 F.2d 354, 363 (5th Cir. 1983).

to the First Amendment analysis.<sup>240</sup> And the presumption in favor of openness is so strong that, even when a proceeding has historically been *closed*, courts have applied the *Richmond Newspapers* test flexibly and found that the structural benefits of public access alone may still tip the balance in favor of the recognition of a presumptive First Amendment right of access. For example, in *Herald Company, Inc. v. Board of Parole*,<sup>241</sup> the New York Board of Parole defended its policy of conducting closed parole revocation proceedings on the ground that they had historically been closed and were “neither the equivalent of criminal trials nor post trial proceedings as such.”<sup>242</sup> Nonetheless, the court found a presumptive public right of access that could only be overcome on a case-by-case showing:

The public has a legitimate interest in the conduct of parole revocation hearings, since those hearings deal with issues of crime and punishment which touch the lives of all citizens. It is not idle curiosity which leads us to scrutinize the process whereby a parolee who has evinced dangerous propensities while free on parole may be granted the freedom to strike again. Nor is it simply voyeurism which leads us to watch closely the workings of a process which lets criminals free among us in order to rehabilitate them and then reincarcerates those who violate the conditions placed upon that freedom.

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Despite the fact that there is no evidence that parole revocation hearings have historically been open to the public and press, access to the parole revocation process is “important in terms of that very process” (*Richmond Newspapers, Inc.*, *supra*, 448 U.S. at 589, 100 S.Ct. at 2834 [Brennan, J., concurring] ). At a time when the merits of the parole process are being hotly debated, the “structural value of public access” (*id.* at 598, 100 S.Ct. at 2839) can scarcely be doubted. By opening parole revocation hearings to the public and

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<sup>240</sup> See *United States v. Smith*, 123 F.3d 140, 150 (3d Cir. 1997) (denying access to sentencing hearing due to potential disclosure of grand jury material, citing Fed. R. Crim. Pro. 6(e)); *Ex parte Birmingham News Co.*, 624 So.2d 1117 (Ala. Crim. App. 1993) (pretrial hearing involving grand jury information and plea negotiations); *In re Subpoena to Testify Before Grand Jury*, 864 F.2d 1559, 1563 (11th Cir. 1989) (documents produced in response to grand jury subpoena); *Baltimore Sun Co. v. Goetz*, 886 F.2d 60, 64-65 (4th Cir. 1989) (affidavits relating to issuance of search warrants).

<sup>241</sup> 499 N.Y.S.2d 301 (Onondaga Co. 1985), *aff'd as modified*, 125 A.2d 985, 510 N.Y.S.2d 382 (4th Dep't 1986).

<sup>242</sup> 499 N.Y.S.2d at 306.

press, the free, open, and informed discussion of the parole process would be furthered. The time has come for parole revocation hearings to be exposed to “the salutary scrutiny of the public and the press” (*Press-Enterprise Company, supra*, 104 S.Ct. at 830 [Marshall, J., concurring] ).<sup>243</sup>

New York’s decision to open juvenile proceedings to public view after a history of secrecy<sup>244</sup> further demonstrates that the absence of a tradition of openness should not be fatal to the constitutional analysis of First Amendment right of access.<sup>245</sup>

Given that most administrative adjudications have invariably been open to the public since the creation of the modern administrative state – both as a matter of due process and legislative policy – the historical record unquestionably evinces a tradition of access under the *Richmond Newspapers* analysis.

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<sup>243</sup> *Id.* at 308. In affirming on appeal (as modified), New York’s Appellate Division, Fourth Department specifically avoided reaching the First Amendment access issue, and instead affirmed on the narrower ground that there is “no specific statutory language requiring closure of [parole revocation] hearings.” 510 N.Y.S.2d at 382. In contrast to parole revocation, administrative proceedings relating to parole release generally do not implicate a constitutionally protected liberty interest, at least where the relevant parole statute is framed in discretionary terms and creates no presumption or expectancy of early parole release. *See, e.g., Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1, 12 (1979); *Board of Pardons v. Allen*, 482 U.S. 369, 372 (1987). Concomitantly, courts have held that there is no entitlement to a public or open hearing in connection with an application for discretionary parole or commutation of a sentence. *See, e.g., Guerrero v. Hudson*, 880 F.2d 1321 (Table), 1989 WL 85849 at \*1 (6th Cir. Aug. 2, 1989); *Geiger v. Pennsylvania Bd. Of Probation and Parole*, 655 A.2d 215 (Pa. Commw. Ct. 1995).

<sup>244</sup> As the Supreme Court recognized in *Smith v. Daily Mail Publ’g Co.*, “[i]t is a hallmark of our juvenile justice system in the United States that virtually since its inception at the end of the last century its proceedings have been conducted outside of the public’s full gaze and the youths brought before our juvenile courts have been shielded from publicity”. 443 U.S. 97, 107 (1979). Hearings “out of the public gaze” were considered essential “to hide youthful errors from the full gaze of the public and bury them in the graveyard of the forgotten past.” *Application of Gault*, 387 U.S. 1, 24 (1967).

<sup>245</sup> Despite longstanding rules mandating open proceedings, decisions in three high profile juvenile cases revealed a desire among family court judges for closed proceedings. *See In re Katherine B.*, 596 N.Y.S.2d 847 (App. Div. 2nd Dep’t 1993) (attempts to balance the right of access of press and public with the interest in protecting the welfare of the child resulted in the appellate court not recognizing the constitutional and statutory presumption of openness in family court proceedings); *In the Matter of Ruben R.*, 641 N.Y.S.2d 621, 626 (App. Div. 1st Dep’t 1996) (relying on New York’s Family Court Act §1043 allowing the exclusion of the public and finding that “the presence of the press would further . . . dilute the proceeding by influencing the law guardian as to what testimony she is able to present); *P.B. v. C.C.*, 647 N.Y.S.2d 732 (App. Div. 1996) (allowing the press to attend the hearings would not serve the best interest of the six children). As a result of such decisions, New York’s Chief Judge Judith S. Kaye announced revisions to §205.4 of the Uniform Rules for the Family Court at 22 NYCRR §205.4. The revised rules explicitly stated that “[t]he Family Court is open to the public” and “[m]embers of the public, including the news media, shall have access to all courtrooms, lobbies, public waiting areas and other common areas of the Family Court. . . .”

## 2. The “structural benefits” of openness.

Public access to administrative adjudications also satisfies the second prong of *Richmond Newspapers*. The structural similarities of administrative adjudications to Article III trials are abundant, and confirm that the same benefits of openness exist in the context of an administrative hearing. When a proceeding is conducted like a trial the value of openness to “the very process” itself is the same as in a judicial trial. Participants in administrative adjudicatory hearings are entitled to notice and a fair opportunity to be heard,<sup>246</sup> including the right to know the nature and contents of the evidence adduced in the matter<sup>247</sup> and to submit their own evidence.<sup>248</sup> They are entitled to cross-examine,<sup>249</sup> to legal representation,<sup>250</sup> and to a decision based upon a meaningful consideration of the evidence presented at the hearing.<sup>251</sup> At least in administrative proceedings where such rights attach, the First Amendment right plainly exists, and such proceedings must presumptively be open. If a “proceeding ‘walks, talks and squawks very much like a lawsuit’ ... [i]ts placement within the Executive Branch cannot blind us to the fact that the proceeding is truly an adjudication.”<sup>252</sup>

The INS deportation proceedings at the center of the recent court battles typify the type of process often followed in administrative hearings, even though the APA does not apply. Immigration hearings are presided over by hearing officers, who are not ALJs but who are

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Furthermore, the new rules permitted closure only on “a case-by-case basis, based upon supporting evidence, considering factors such as privacy and protecting litigants from further harm.” *Id.*

<sup>246</sup> *McCormick v. Pennsylvania Pub. Util. Comm’n*, 30 A.2d 327, 329 (Pa. Super. Ct. 1943).

<sup>247</sup> *Juster Bros. v. Christgau*, 7 N.W.2d 501, 507 (Minn. 1943).

<sup>248</sup> *State v. Duluth*, 75 N.W.2d 398, 410 (Minn. 1956).

<sup>249</sup> *Gottshall v. Batt*, 18 Pa.D. & C.2d 137, 150 (Pa.Com.Pl. 1958).

<sup>250</sup> *Vermont Real Estate Comm’n v. Martin*, 318 A.2d 670, 672-73 (Vt. 1974).

<sup>251</sup> *Orbach v. New York State Urban Dev. Corp.*, 442 N.Y.S.2d 900, 903 (N.Y. Sup. Ct. 1981); *State ex. rel. Ormet Corp. v. Indus. Comm’n of Ohio*, 561 N.E.2d 920, 925 (Ohio 1990).

<sup>252</sup> *S. Carolina State Ports Auth. v. Fed. Maritime Comm’n*, 243 F.3d 165, 174 (4th Cir. 2001).



“neutral,”<sup>253</sup> and have authority to make binding decisions, subject only to limited review.<sup>254</sup> In fact, for most of the century, the immigration judges were INS employees,<sup>255</sup> but because of their decision making role, that structure was routinely criticized and, in 1983, the arrangement ended.<sup>256</sup>

Second, just like Article III judicial proceedings, immigration removal proceedings are adversarial. Over time, the INS has developed a specialized staff of attorneys who are almost solely responsible for the prosecutorial functions of a removal hearing and these attorneys generally present the case for removal to the judge. An alien has a right to counsel in removal proceeding under the Fifth Amendment’s due process clause. The INS must inform the alien of her right to counsel (if the alien requests one), and that free counsel may be available; the INS must also give the alien a list of attorneys in the area that may work for free. Although the immigration judge may take an active role in questioning a witness – as Federal Rule of Evidence 614 permits a judge to do during a civil trial – in practice, these judges rarely do so.<sup>257</sup>

In addition, the procedural nuts and bolts of a removal hearing closely track those of an Article III proceeding. Removal proceedings begin with the service of a “Notice to Appear,” Form I-862, before an immigration judge.<sup>258</sup> As a civil or criminal complaint does, the notice

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<sup>253</sup> The Department of Justice has declined the extension of immigration judges to ALJs perhaps because Supreme Court decisions permit it and the Department of Justice can keep its hearing officers in check more than if ALJs heard the cases. See Paul R. Verkuil, *Reflections Upon the Federal Administrative Judiciary*, 39 U.C.L.A. L. Rev. 1341, 1357 (1992).

<sup>254</sup> An alien may file a motion to reopen before the immigration judge or the Board of Immigration Appeals. See 8 C.F.R. §§ 1003.2(c), 1003.23(b)(3), 103.5(a)(3) (2004). Under the Immigration and Nationality Act, 8 U.S.C.A. §§ 1101-1537 (West 1999 & Supp. 2004) [hereinafter INA], an alien may also appeal a removal order directly to the Court of Appeals, within 30 days of the removal order’s issuance. INA § 242(b)(1) (2004).

<sup>255</sup> This practice was upheld in *Marcello v. Bonds*, 349 U.S. 302 (1955).

<sup>256</sup> See 8 C.F.R. § 1003.0 (2004). Confirming their judicial role in the deportation and removal process, responsibility for supervising immigration judges shifted to the Executive Office for Immigration Review and, more recently, to Bureau of Homeland Security under the Homeland Security Act.

<sup>257</sup> See INA § 240(b)(1) (2004); 8 C.F.R. § 1240.2 (2004).

<sup>258</sup> INA § 239(a)(1) (2004); 8 C.F.R. § 239.1(a) (2004).

lays out elements of the government’s claim against the recipient.<sup>259</sup> Similarly, removal proceedings are conducted in two stages: a master calendar hearing and the individual merits hearing.<sup>260</sup> The master calendar hearing is analogous to a civil calendar call or a criminal arraignment.<sup>261</sup> It is used to determine if an individual merits hearing is required; if there are disputed issues of fact, the immigration judge will set an individual merits hearing for some future date, as an Article III judge will do if a trial is warranted.

Although, as with most administrative proceedings, the formal rules of evidence do not apply in removal hearings, the regulations take care to ensure that only reliable evidence will be considered. Unauthenticated documents, hearsay, and other information that are not inherently trustworthy can be considered only after the immigration judge finds the specific evidence to be probative *and* reliable.<sup>262</sup> The different burdens of proof and levels of proof required within a removal proceeding also track the structure of civil cases in Article III courts.<sup>263</sup> A comparison

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<sup>259</sup> FED. R. CIV. P. 8(a), INA § 239.1 (a)(1)(A) – (E) (2004).

<sup>260</sup> INA § 240 (2004).

<sup>261</sup> See, e.g., *Cody v. Mello*, 59 F.3d 13, 15 (2d Cir. 1995), citing BLACK’S LAW DICTIONARY 203 (6th ed. 1990), brackets internal. (“A calendar call is ‘[a] court session given to calling the cases awaiting trial to determine the present status of each case and commonly to assign a date for trial.’”)

<sup>262</sup> See 8 C.F.R. § 240.7(a); *Bustos-Torres v. INS*, 898 F.2d 1053, 1055-56 (5th Cir. 1990). But see *Cunanan v. INS*, 856 F.2d 1373, 1374-75 (9th Cir. 1988) (alien wife’s affidavit excluded where INS had not attempted to produce her as a witness); *Iran v. INS*, 656 F.2d 469, 472-73 (9th Cir. 1981) (unauthenticated INS form and consulate letter inadmissible).

<sup>263</sup> In most civil trials, the burden of proof on most issues is a “preponderance of the evidence.” See, e.g., *Concrete Pipe & Products of California. v. Constr. Laborers Pension Trust for Southern California*, 508 U.S. 602, 622 (1993). In some instances, however, the burden of proof is higher. See *New York Times v. Sullivan*, 376 U.S. 254 (1964) (requiring proof of actual malice by “clear and convincing” evidence). Similarly, in removal proceedings, burdens of proof vary depending on a variety of factors including whether the alien has been admitted into the United States. See INA § 240(c) (2004). The regulations now provide that:

[T]he Service must first establish the alienage of the respondent. Once alienage has been established, unless the respondent demonstrates by clear and convincing evidence that he or she is lawfully in the United States pursuant to a prior admission, the *respondent* must prove that he or she is clearly and beyond a doubt *entitled to be admitted* to the United States and is not inadmissible as *charged*.

of the regulations governing removal proceedings to the federal rules reveals numerous other parallels.

The decisions made in immigration proceedings have a significant impact on the individual subject, often even more of an impact than a civil lawsuit seeking only financial compensation. As a result, to ensure fairness and conformance with constitutional due process requirements, immigration proceedings, although conducted under the auspices of the executive branch's administrative apparatus, act and look very much like judicial proceedings.<sup>264</sup>

For the same reasons there is an independent, First Amendment right of access to proceedings held in Article III courts, the structural benefits of openness to the process itself dictate that same right of access applies in immigration and other administrative adjudications that “walk, talk, and squawk” like those presided over by an Article III judge.

## CONCLUSION

The First Amendment test established in *Richmond Newspapers* for determining whether the presumption of access applies to a particular proceeding broadly governs all branches of Government. The current effort by the Department of Justice to restrict access rights to criminal proceedings in the judicial branch not only perverts history but disregards the fundamental democratic principles assured by this precedent. Thus, it is inconsistent with history, with Supreme Court precedent and, most fundamentally, with the public's core “rights of access to information about the operation of their government . . . .”<sup>265</sup>

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8 C.F.R. § 240.8(c) (2004) (emphasis added). Although not explicit, the statute suggests that the INS must show that the person is an alien by “clear and convincing” evidence. INA § 240(c)(3)(A) (2004). Once the alien establishes admission or entitlement to admission, “the Service has the burden of establishing by clear and convincing evidence that, in the case of an alien who has been admitted to the United States, the alien is deportable. No decision on deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.” *Id.*

<sup>264</sup> Paul R. Verkuil, *Reflections Upon the Federal Administrative Judiciary*, 39 U.C.L.A. L. REV. 1341, 1341 (1992).

<sup>265</sup> *Richmond Newspapers*, 448 U.S. at 584 (Stevens, J., concurring).

Moreover, the purported concerns the Government has raised regarding access to administrative proceedings are already amply addressed in the very requirements of the two-part access test and by the qualified nature of the right. Thus, while the test of *Richmond Newspapers* compels the conclusion that public access rights attach to certain quasi-judicial administrative trials, it is equally clear that no right of public entrée attaches to many other governmental proceedings (Cabinet meetings, FBI interrogations, meetings of the Joint Chiefs of Staff), given their particular historical tradition of being closed and given their structural features. In other words, the *Richmond Newspapers* test already separates out the access wheat from the non-access chaff. Moreover, even where the right of public access *does* attach to a particular proceeding, it is of course a qualified right and may be overcome by a specific showing that closure in that specific case is necessary because of national security or other compelling interests. While the Government is free to raise these issues of whether the qualified right attaches to a particular proceeding and, if so, whether it has been overcome, it is *not* free to assert that all political branch proceedings may be held in secret by fiat without any First Amendment scrutiny.

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