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The Right of Access: Is There a Better Fit than the First Amendment?

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I. INTRODUCTION 1349
II. THE SUPREME COURT AND THE RIGHT OF ACCESS 1351
III. WHY THERE IS NO ROOM IN THE FIRST AMENDMENT FOR A RIGHT OF ACCESS. 1357
A. *The Speeeh Clause: A Verbal Misfit* 1358
B. *The Press Clause: Is the Press the Only Organized Private Business Given Explicit Constitutional Protection?* 1360
C. *Other Possible Constitutional Bases for the Right of Access* 1366
IV. THE RIGHT OF ACCESS AS A SYSTEMIC RIGHT: THE FUNCTIONAL AND STRUCTURAL ARGUMENTS 1367
A. *The Systemic Nature of the Right of Access* 1368
B. *The Functional Argument for Recognizing the Right of Access as a Systemic Right* 1369
C. *The Structural Argument for Recognizing the Right of Access as a Systemic Right* 1370
V. THE SUPREME COURT AND THE SYSTEMIC RIGHT OF ACCESS 1372
VI. THE FREEDOM OF INFORMATION ACT AND OTHER "RIGHT TO KNOW" STATUTES 1374
VII. MODERN RESTRICTIONS ON THE RIGHT OF ACCESS 1378
VIII. CONCLUSION 1384

I. INTRODUCTION

James Madison once said, "a popular Government, without popular information, or a means of acquiring it, is but a Prologue to a Farce or Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives."[1] For almost

1. Branzburg v. Hayes, 408 U.S. 665, 723 (1972) (Douglas, J., dissenting) (quoting *James Madison, to W.T. Barry, Aug. 4, 1822*, 9 Writings of James Madison 103 (G. Hunt ed., 1910)).

forty years, the Supreme Court has anchored the press's and public's right of access to government proceedings and information in the language of the First Amendment.[2] Grounding the right of access in the language of the First Amendment is unsatisfactory not only because it goes beyond the scope of traditional First Amendment values, but also because it does not provide access to the amount of information necessary to ensure the proper functioning of our democratic government. A more intellectually honest, and ultimately more persuasive, conception of the right of access would recognize it as a systemic right, similar to the right to vote, that is both inherent in and essential to a republican system of self-government. Since an informed electorate is essential to the proper functioning of a democracy, access should be protected to the same extent as other systemic rights.[3] Furthermore, courts have recognized that access serves several important functions in a democracy. Access acts as a check on the government, ensures that government does its job properly, enhances the perception of integrity and fairness in government proceedings, and most importantly ensures that the "individual citizen can effectively participate in and contribute to our republican system of self-government."[4] These functions demonstrate the importance of protecting the right of access and the "openness" that it creates, but treating access as a speech right that is protected by the First Amendment fails to recognize that the right of access is more fundamental, that it is part of the foundation upon which the First Amendment is built.

Part II of this Note explores the Supreme Court's historical definition of the right of access in First Amendment terms. Part III argues that the Court's traditional definition is unsatisfactory because it is inconsistent with other First Amendment doctrine. Consequently, the traditional definition does little to secure the ability of the press and the public to access government-held information. Part IV proposes an approach under which the right of access is recognized as a systemic right that is inherent in, and essential to, our established constitutional structure. Parts V and VI examine more recent language in Supreme Court opinions and in several "right to

2. *See infra* Part II and accompanying footnotes. The First Amendment reads, "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for the redress of grievances." U.S. CONST. amend. I.

3. A systemic right is a right that is inherit in our constitutional structure. In addition to the right of access and the right to vote, the constitutional protections for criminal defendants could also be considered systemic rights.

4. Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 604 (1982).

know" statutes suggesting that the right of access is a systemic right. Finally, Part VII considers some modern restrictions on the right of access following the September 11, 2001, terrorist attacks and suggests that these restrictions should be tailored to address the importance of the right of access in a democracy.

II. THE SUPREME COURT AND THE RIGHT OF ACCESS

The Supreme Court first considered the right of access not in the context of the constitutional protection of the press and the newsgathering process, but rather in terms of citizens' general right to access information regarding the functioning of the national government. For example, in *Zemel v. Rusk,* the petitioner raised a First Amendment challenge to the Secretary of State's refusal to validate his passport for travel to Cuba claiming the "travel ban is a direct interference with the First Amendment rights of citizens to travel abroad so that they might acquaint themselves at first hand with the effects abroad of our Government's policies, foreign and domestic, and with conditions abroad which might affect such policies."[5] While the Court acknowledged that the travel ban restricted the free flow of information, it rejected the argument that citizens have a constitutional right of access emphasizing that "[t]here are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow. . . . The right to speak and publish does not carry with it an unrestrained right to gather information."[6] The Supreme Court's early reluctance to accept the argument that First Amendment freedom of speech granted citizens an unrestricted right to gather information foreshadowed the Court's later skepticism of the press's claim for constitutional protection of the newsgathering process.[7]

In the cases following *Zemel,* the Supreme Court explicitly rejected both the argument that the press enjoyed special privileges not enjoyed by average citizens and the argument that the press had a constitutionally mandated right of access. In the first of these cases, *Branzburg v. Hayes,* the Court considered whether requiring reporters to reveal their sources before state or federal grand juries violated the

5. 381 U.S. 1, 16 (1965) (internal quotations omitted).

6. *Id.* at 16-17. The Court elaborated that "[f]or example, the prohibition of unauthorized entry into the White House diminishes the citizen's opportunities to gather information he might find relevant to his opinion of the way the country is being run, but that does not make entry into the White House a First Amendment right." *Id.* at 17.

7. *See* Eugene Cerruti, *"Dancing in the Courthouse": The First Amendment Right of Access Opens a New Round,* 29 U. RICH. L. REV. 237, 248 (1995).

First Amendment.[8] Although the Court admitted that, "without some protection for seeking out the news, freedom of press could be eviscerated,"[9] it reaffirmed the idea that "the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally."[10] In holding that reporters do not have a First Amendment privilege that protects them from being required to reveal their sources in a grand jury investigation, the Court discredited the idea that the press had a special constitutional right to gather information from confidential sources without governmental interference.[11]

Two years later the Court began to define more precisely the scope of the right of access in a series of cases that asked whether the press has a First Amendment right of access to prison facilities generally closed to the public.[12] In *Pell v. Procunier*, the reporter-plaintiffs were denied permission to interview several prison inmates because of a section of the California Department of Corrections Manual that prohibited such press interviews.[13] The reporters challenged the constitutionality of the rule, asserting that it impermissibly interfered with their right to gather information under the First and Fourteenth Amendments.[14] The Supreme Court refused to grant the press a special constitutional right of access and held that because the rule did not "deny the press access to sources of information available to members of the general public"[15] there was no First or Fourteenth Amendment violation. The Court reaffirmed this holding in *Saxbe v. Washington Post Co.*, which it described as "constitutionally indistinguishable"[16] from *Pell*, and again in *Houchins v. KQED, Inc.* In *Houchins*, the Court concluded that there was "no discernible basis for a constitutional duty to disclose or for standards governing disclosure of or access to information . . . . Neither the First Amendment nor the Fourteenth Amendment mandates a right of access to government information."[17]

Although these cases seemed to foreclose any argument supporting the idea that the media had a constitutional right of access

8. 408 U.S. 665, 665 (1972).
9. *Id.* at 681.
10. *Id.* at 684.
11. *See* Cerruti, *supra* note 7, at 249.
12. *See id.* at 250.
13. 417 U.S. 817, 819-20 (1974).
14. *Id.* at 821.
15. *Id.* at 835.
16. 417 U.S. 843, 850 (1974).
17. 438 U.S. 1, 14-16 (1977).

to information, the Supreme Court was forced to reconsider the constitutional implications of interfering with the press's access to government information when lower courts began barring the press from courtroom proceedings in criminal cases. Although the Court had previously rejected the argument that the press or the public had a constitutional right of access to pretrial hearings,[18] in *Richmond Newspapers, Inc. v. Virginia* the petitioners challenged a closure order barring reporters from the courtroom during a criminal trial.[19] The Supreme Court began its analysis by emphasizing the unique question presented by this case. Unlike prior cases where the Court had assessed closure orders in terms of the competing interests of freedom of the press and the defendant's right to a fair trial,[20] in this case the Court focused on whether the right of the press and public to attend criminal trials was guaranteed by the Constitution.[21] Writing for the plurality, Justice Burger began his analysis by emphasizing that throughout history criminal trials have always been presumptively open to "all who care to observe."[22] He went on to say that "[t]he right of access to places traditionally open to the public, as criminal trials have long been, may be seen as assured by the amalgam of the First Amendment guarantees of speech and press. . . ."[23]

It was Justice Brennan's concurring opinion, however, that set forth the dual considerations that would play a vital role in future right of access cases. According to Justice Brennan, the two factors courts must examine when deciding whether a right of access exists are: (1) whether the particular proceeding has historically been open to the public, and (2) whether that openness plays a positive role in the proceeding.[24] In terms of the openness inquiry, Justice Brennan discussed the established tradition of open trials in the United States and the Court's own understanding that "'[a] trial is a public event.'"[25] Justice Brennan further argued that public access to trials "serves to advance several of the particular purposes of the trial,"[26] and "acts as an important check . . . [because] the knowledge that every criminal

18. *See* Gannett Co. v. DePasquale, 443 U.S. 368 (1979).

19. 448 U.S. 555 (1980).

20. *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976); Sheppard v. Maxwell, 383 U.S. 333 (1966); Estes v. Texas, 381 U.S. 532 (1965).

21. *Richmond Newspapers*, 448 U.S. at 558.

22. *Id.* at 564.

23. *Id.* at 577.

24. *See id.* at 589 (Brennan, J., concurring).

25. *Id.* at 593 (Brennan, J., concurring) (quoting Craig v. Harney, 331 U.S. 367, 374 (1947)).

26. *Id.* at 593. Justice Brennan further elaborated that public trials "assure the criminal defendant a fair and accurate adjudication of guilt or innocence" and aid in accurate factfinding. *Id.* at 593, 596.

trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power."[27] Although seven of the eight Justices who participated in the case wrote separate opinions, all seven of those Justices agreed that the First Amendment gives the press and public an affirmative right of access to criminal trials.[28]

In *Globe Newspaper Co. v. Superior Court,* the Supreme Court clarified the rule established in *Richmond Newspapers.* At issue in *Globe* was a Massachusetts Statute that barred the press and public from the courtroom during trials involving sexual offenses with victims under the age of eighteen.[29] Just as in *Richmond Newspapers,* a newspaper denied access to the courtroom challenged the law as violation of the First Amendment.[30] Although the Court applied the dual considerations of *Richmond Newspapers* to find a First Amendment right of access to criminal trials, it cautioned that even though "the right of access to criminal trials is of constitutional stature, it is not absolute."[31] The Court then added elements of the strict scrutiny standard to the right of access inquiry when it concluded that press and public can only be barred from attending criminal trails under limited circumstances, and that "the State's justification in denying access must be a weighty one. . . . [I]t must be shown that the denial is necessitated by a compelling governmental

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27. *Id.*. at 596 (Brennan, J., concurring) (quoting *In re* Oliver, 333 U.S. 257, 270 (1948)).

28. *See* Cerruti, *supra* note 7, at 272-73. Justice Burger's plurality opinion expressly left open the question of whether there is a corresponding First Amendment right of access to civil trials. *Richmond Newspapers,* 448 U.S. at 580 n.17 (saying "Whether the public has a right to attend trials of civil cases is a question not raised by this case, but we note that historically both civil and criminal trials have been presumptively open."). On the other hand, Justice Stewart's concurring opinion recognized that "the First and Fourteenth Amendments clearly give the press and the public a right of access to trials themselves, civil as well as criminal." *Id.* at 599 (Stewart, J., concurring). This is a question that the Supreme Court has not yet seen fit to answer.

29. 457 U.S. 596 (1982). The Massachusetts statute provided in relevant part:

> At the trial of a complaint or indictment for rape, incest, carnal abuse or other crime involving sex. where a minor under eighteen years of age is the person upon, with or against when the crime is alleged to have been committed, . . . the presiding justice shall exclude the general public from the court room, admitting only such persons as may have a direct interest in the case.

MASS. GEN. LAWS ANN. ch. 278, § 16A (West 1981).

30. *Globe,* 457 U.S. at 600-01.

31. *Id.* at 606. The *Richmond Newspapers* plurality also warned that "our holding today does not means that the First Amendment rights of the public and representatives of the press are absolute. Just as a government may impose reasonable time, place, and manner restrictions . . . so may a trial judge, in the fair administration of justice, impose reasonable limitations on access to trial." 448 U.S. at 581 n.18 (citation omitted); *see infra* Part VI and accompanying footnotes.

interest, and is narrowly tailored to serve that interest."[32] In the end, the Court held that the statute was unconstitutional because, even though Massachusetts had a compelling interest in protecting the physical and psychological well-being of minors who were of victims of sexual offenses, that interest did not justify the mandatory closure of the courtroom in all such cases.[33]

After *Globe* the press's right of access to criminal trials was firmly established, but it was still unclear whether that right extended to other judicial proceedings. Two years after the Supreme Court decided *Globe*, the Court considered whether the press has a right of access to voir dire proceedings in *Press-Enterprise Co. v. Superior Court* (*Press-Enterprise I*).[34] In *Press-Enterprise I*, the Court for the first time used the dual considerations of *Richmond Newspapers* and *Globe* to assess the press's right of access to proceedings other than criminal trials. The Court again emphasized that jury selection had historically been open to the public and that this openness "plays an important role in the administration of justice"[35] because "people not actually attending trials can have confidence that standards of fairness are being preserved . . . ."[36] The Court then turned to the compelling interest test set forth in *Globe* to determine whether the government had asserted a sufficiently compelling interest to rebut the presumption of openness.[37] While the court noted that "[t]he jury selection process may, in some circumstances, give rise to a compelling interest of a prospective juror when interrogation touches on deeply personal matters the person has legitimate reasons for keeping out of the public domain,"[38] the trial judge in this case failed to explain with sufficient specificity the privacy concerns that justified a six week closure of the voir dire proceedings and his refusal to release any portion of the transcripts of the proceedings even though he admitted that "most of the information [contained in the transcripts was] dull and boring."[39] Any potential privacy concerns could be managed by

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32. *Globe*, 457 U.S. at 606-07.

33. *See id.* at 610-11. Yet the Court emphasized that

> A trial court can determine on a case-by-case basis whether closure is necessary to protect the welfare of a minor victim . . . . Such an approach ensures that the constitutional right of the press and public to gain access to criminal trials will not be restricted except where necessary to protect the State's interest.

Id. at 608-09.

34. 464 U.S. 501, 503 (1984).

35. *Id.* at 508.

36. *Id.*

37. *Id.* at 510.

38. *Id.* at 511.

39. *Id.* at 513.

sealing only those portions of the transcript that warranted anonymity.[40] Accordingly, the Court held that the government had failed to demonstrate that the denial of access was necessitated by a compelling governmental interest and was narrowly tailored to serve that interest.[41]

While the *Press Enterprise I* Court discussed the *Richmond Newspapers* considerations, it did not expressly hold that the two factors considered in those cases were prerequisites to the right of access to voir dire proceedings.[42] Therefore, after *Press-Enterprise I* there was some uncertainty as to the appropriate standard for determining whether or not a right of access exists.[43] For example, in *Waller v. Georgia* the Supreme Court held that it was a violation of the Sixth Amendment guarantee of a public trial to close pretrial suppression hearings to the press and public, but the Court did not even mention the *Richmond Newspaper* considerations, focusing instead on "the importance of the public interest in such hearings."[44]

Finally, two years after deciding *Press-Enterprise I*, the Supreme Court definitively addressed the press's right of access for the last time in *Press-Enterprise Co. v. Superior Court* (*Press-Enterprise II*).[45] In *Press-Enterprise II,* the press and public were excluded from the forty-one day preliminary hearing in the case of a nurse charged with murdering twelve of his patients.[46] At the conclusion of the hearing the judge refused to release the transcript of the proceeding because there was a "reasonable likelihood that release of all or any part of the transcripts might prejudice [the] defendant's right to a fair and impartial trial."[47]

The Supreme Court once again redefined the *Richmond Newspapers* standard for determining whether or not there is a right

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40. *Id.*

41. *Id.*

42. *See id.* at 505-10 (discussing both the historical roots and the public benefits of allowing jury selection to be open to the public); *see also* Michael J. Hayes, *What Ever Happened to "The Right to Know"?: Access to Government-Controlled Information since* Richmond Newspapers, 73 VA. L. REV. 1111, 1119 (1987) ("[T]he opinion did not explicitly state that these two factors were prerequisites to a right of access. Indeed, evidence of historical tradition was referred to merely as 'helpful' to that determination." (citing Press-Enterprise I, 464 U.S. at 505)).

43. Hayes, *supra* note 42, at 1119.

44. 467 U.S. 39, 47-49 (1984); *see* Hayes, *supra* note 42, at 1119-20.

45. 478 U.S. 1 (1986).

46. *Id.* at 3-4. The press and public were excluded under a California statute that allowed such proceedings to be closed if "exclusion of the public is necessary in order to protect the defendant's right to a fair and impartial trial." *Id.* at 4 (quoting CAL. PENAL CODE § 868 (West 1985)).

47. *Id.* at 5 (internal citations and quotation marks omitted).

to government controlled information.[48] The Court framed the dual considerations set forth by Justice Brennan in *Richmond Newspapers* as "considerations of experience and logic"[49] and established that a "qualified" right of access attaches to a particular proceeding if it "passes these tests of experience and logic."[50] This right is qualified because it can be overcome if the government can withstand the strict scrutiny standard of *Globe*.[51] In *Press Enterprise II,* the Court applied this standard to hold that the right of access applies to preliminary hearings. Accordingly, the government has to demonstrate that "closure is essential to preserve higher values and is narrowly tailored to serve that interest."[52] Since the lower court failed to consider less burdensome alternatives than complete closure, and because the "reasonable likelihood" standard used by the lower court "failed to consider the First Amendment right of access to criminal proceedings," the Supreme Court held the closure was unconstitutional.[53]

III. WHY THERE IS NO ROOM IN THE FIRST AMENDMENT FOR A RIGHT OF ACCESS.

As these cases illustrate, the First Amendment has been instrumental in the Supreme Court's fashioning of an affirmative right of access to governmental proceedings and information.[54] The First Amendment, however, is an unsatisfactory basis for the right of access because there is no textual reference to the right of access in the First Amendment. Courts should not expand the textual meaning of the First Amendment beyond the scope of traditional First Amendment values to encompass an institutional privilege for the press.

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48. *See* Hayes, *supra* note 42, at 1120.

49. *Press-Enterprise II,* 478 U.S. at 9.

50. *Id.*

51. *Id.* Namely the compelling interest test.

52. *Id.* at 13-14. The Court further specified that

> If the interest asserted is the right of the accused to a fair trail, the preliminary hearing shall be closed only if specific findings are made demonstrating that, first, there is a *substantial probability* that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent and, second, reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights.

Id. at 14 (emphasis added).

53. *Id.* at 15.

54. In particular, the parts of the First Amendment relating to speech and the press are most relevant to the right of access. U.S. CONST. amend. I ("Congress shall make no law . . . abridging freedom of speech, or of the press . . . ."); *see supra* Part II and accompanying notes.

A. The Speech Clause: A Verbal Misfit

Nowhere in the language of the First Amendment is the right of access specifically mentioned. Furthermore, the ability of the press to access government information and proceedings is inconsistent with the types of speech historically protected by the First Amendment. The general ability of the press to attend government proceedings and access government documents constitutes behavior, not speech, and behavior as such traditionally has not been included in our notions of free expression.

Moreover, it can be argued that the Constitution, and more specifically the Bill of Rights, does not contain any affirmative rights. There are two basic types of provisions found in the United States Constitution: (1) those that distribute governmental power among federal and state government and among the different branches of the federal government and (2) those that place restrictions on the exercise of those delegations of power which are designed to protect individuals from government excess.[55] With respect to the first type of provision, the Framers envisioned the Constitution as acting so it granted powers, most of which are found in the body of the Constitution and deal with relationships between governmental units.[56] With respect to the second type of provision, the Framers envisioned the people as not wanting the government to act against them, so restrictions were placed on government actions. These restrictions are primarily found in the Bill of Rights and deal with the relationships between governmental units and individuals.[57] Since the Framers drafted the language of the Bill of Rights to place restrictions on government action, it follows that the Framers did not intend the First Amendment to function as a grant of an affirmative right of access. More specifically, the language of the First Amendment secures the "freedom . . . of the press" from any "law abridging" it, which suggests that the purpose of the First Amendment

55. I am grateful to Professor Thomas McCoy, Vanderbilt University Law School, for his explanation of the history and structure of the Constitution, some of which is described in the text accompanying this footnote.

56. For example, Article I Section 8, among others, enumerates certain powers granted to Congress. U.S. CONST. art. I, § 8. Also, Article II, Section 2, among others, enumerates powers granted to the President. U.S. CONST. art. II, § 2.

57. For example, the Fourth Amendment says that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, *shall not be violated* . . . ." U.S. CONST. amend. IV (emphasis added). Likewise, the First Amendment says that the "Congress *shall make no law* respecting the establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I (emphasis added). In terms of "rights" these restrictions could be viewed as a right to be free of the governmental activity that the restriction prohibits.

was to protect against "coercive government interference [with speech] rather than to require the government to conduct its business openly."[58] Under this interpretation, the language of the First Amendment is "technically ill-designed" to impose on the government an obligation to conduct its affairs in the open and accordingly to grant the press an affirmative right of access.[59]

In addition to the fact that the First Amendment does not explicitly mention an affirmative right of access, historical evidence suggests that the Framers of the Constitution were not concerned with implicitly assuring the press access through the First Amendment.[60] In fact, not only was the press excluded from the constitutional convention, the delegates were forbidden from even discussing the proceedings with reporters.[61] The Framers considered the secrecy of the proceedings to be necessary for ratification of the Constitution.[62] Additionally, the press had limited access to the debates regarding the Bill of Rights because only the debates in the House were open to the public.[63] The Senate, which actually drafted

58. U.S. CONST. amend. I; Lillian R. BeVier, *An Informed Public, an Informing Press: The Search for a Constitutional Principle*, 68 CAL. L. REV. 482, 500 (1980) (noting that the First Amendment "seems to secure citizens against coercive governmental interference rather than to require the government to conduct its business openly").

59. BeVier, *supra* note 58, at 500 (describing the First Amendment as "technically ill-designed to impose upon government the affirmative obligation to disclose its affairs which must be the correlative of a 'right to know'"); *see* David M. O'Brien, *The First Amendment and the Public's "Right to Know"*, 7 HASTINGS CONST. L.Q. 579, 582 (1980) (stating that "[T]he First Amendment imposes no requirement that the government act affirmatively either to inform citizens of or to grant them special access to policy-making institutions and processes. In other words, the First Amendment, as judicially construed, guarantees individuals' freedom from restraints on their communications, but not the liberty to demand and obtain information from governmental and non-governmental sources.").

60. Timothy B. Dyk, *Newsgathering, Press Access, and the First Amendment*, 44 STAN. L. REV. 927, 933 (1992) ("[H]istory does not, of course, establish that the framers were concerned with assuring press access. Indeed, it is unlikely that the framers had any such specific purpose."). However, at the Virginia ratification convention Patrick Henry emphasized the importance of openness, arguing that "[Congress] may carry on the most wicked and pernicious schemes under the dark veil of secrecy. The liberties of a people never were, nor ever will be, secure, when the transactions of their rulers may be concealed from them." North Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198, 209 (3d Cir. 2002) (quoting 3 ELLIOT'S DEBATES 169-70 (J. Elliot ed., 1881)).

61. Dyk, *supra* note 60, at 500; Martin E. Halstuk, *Policy of Secrecy—Pattern of Deception: What Federalist Leaders Thought About a Public Right to Know*, 7 COMM. L. & POL'Y 51, 58-59 (2002).

62. Alexander Hamilton said if the ratification debates had been open, "the clamours of faction would have prevented any satisfactory result .... Propositions, made without due reflection, would have been handles for a profusion of ill-natured accusation." Halstuk, *supra* note 61, at 59 (quoting Alexander Hamilton, *Reply to Anonymous Charges*, *in* 3 THE RECORDS OF THE FEDERAL CONVENTION 368 (Max Farrand ed., 1966)).

63. *Id.*

the final language of the First Amendment, kept its proceedings secret.[64] Finally, five different versions of the First Amendment were considered by Congress and the final language was the result of a compromise between the House and Senate.[65] Considering the careful attention paid to the drafting of constitutional language, if the Framers had intended to include a right of access as a component of the First Amendment freedoms of speech and the press, they would have done so explicitly.[66]

B. The Press Clause: Is the Press the Only Organized Private Business Given Explicit Constitutional Protection?

Many of the arguments advanced by the media for more inclusive rights of access and greater freedom to gather information are grounded in the press clause of the First Amendment.[67] Increased government secrecy in the wake of the terrorist attacks on September 11, 2001, has made the media even more eager to argue that the First Amendment was intended to ensure total freedom of the press by allowing unrestricted access to all governmental proceedings.[68] The media, however, may be giving the press clause far more constitutional significance than it deserves. The legislative history surrounding the adoption of the First Amendment shows that the phrase "freedom of the press" was meant to ensure that people were free to express their views through the use of the printing press, as well as through the spoken word.[69] For example, the 1776 Pennsylvania Declaration of Rights suggested, "[t]hat the people have

64. *Id.* The Senate continued to meet behind closed doors until 1794 as did the House until after the War of 1812. *North Jersey Media Group*, 308 F.3d at 209-10. Furthermore, the doors were only open to floor debate and committee sessions were not open to the public until the mid-1970s. *Id.*.

65. According to David Anderson there was the version that James Madison introduced, a version by a House select committee, the Senate's initial revision of the House language, a second Senate version created by a floor amendment, and the final version produced by a conference committee. David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 476 n.126 (1983).

66. The *expressio unius est exlusio alterius* canon of construction holds that to express or include one thing implies the exclusion of the other. BLACK'S LAW DICTIONARY 602 (7th ed. 1999).

67. *See* Anderson, *supra* note 65, at 456 ("In the last decade . . . the press has begun to assert rights arising specifically from the press clause - the right to maintain the confidentiality of sources, the right of access to prisons and courtrooms, the right to keep police from searching newsrooms, and the right to prevent libel plaintiffs from inquiring into journalists' thought processes."). The "press clause" of the First Amendment refers to the language "Congress shall make no law . . . abridging . . . . freedom of . . . the press." U.S. CONST. amend. 1.

68. *See* Detroit Free Press Ass'n v. Ashcroft, 303 F.3d 681 (6th Cir. 2002).

69. David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 446 n.90 (2002).

a right to freedom of speech, and of writing and publishing their sentiments; therefore the freedom of the press ought not to be restrained."[70] In this sense, the press clause of the First Amendment was not designed to grant the press special institutional privileges, but simply to guarantee freedom of expression in both oral and written form.

Likewise, First Amendment historian Leonard Levy has argued that the freedom of the press simply means freedom from restraints on the press prior to publication.[71] Levy focused on the phrase "Congress shall make no law . . .,"[72] asserting that the press clause was "intended to prohibit any Congressional regulation of the press . . . . The Framers meant Congress to be totally without power to enact legislation respecting the press."[73] He argued that the motivation for the special protection of the press, that is the protection against Congressional legislation, stems from the "special relationship" between the press and popular government.[74] Levy maintained that this type of press protection was essential to ensure an informed electorate in our democratic system and that "[t]he electoral process would have been a sham if voters did not have the assistance of the press in learning what the candidates stood for and what their records showed about past performance and qualifications."[75] Levy further emphasized the crucial role the press plays as the so-called Fourth Estate,[76] acting as an informal check on

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70. 1 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 266 (Bernard Schwartz ed., 1971), *quoted in* Anderson, *supra* note 69, at 446 n.90. The initial language proposed by James Madison for the First Amendment said that "[t]he people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable." Anderson, *supra* note 69, at 446 n.90 (quoting James Madison, *Fourth Proposal to the House (1789), in* 1 DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES 451 (J. Gales & W. Seaton eds., 1834)). Professor Anderson explains that:

> Although Madison's language could be read as recognizing a meaning of freedom of the press distinct from the people's rigbt to publish their sentiments, nothing in the debates of the First Congress or the ratifying convention suggests that either this language or the final language of the First Amendment was so intended.

Id.

71. Leonard W. Levy, *Introduction* to FREEDOM OF THE PRESS FROM ZENGER TO JEFFERSON lv (L. Levy ed., 1966), *noted in* Anderson, *supra* note 65, at 495.

72. U.S. CONST. amend. 1

73. Levy, *supra* note 71, at lvi-lvii, *quoted in* Anderson, *supra* note 65, at 496.

74. LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 213 (1988) [hereinafter LEVY, ORIGINAL INTENT], *quoted in* Halstuk, *supra* note 61, at 57; *see* LEONARD W. LEVY, EMERGENCE OF A FREE PRESS 291 (1985), *noted in* Halstuk, *supra* note 61, at 57.

75. LEVY, ORIGINAL INTENT, *supra* note 74, at 213, *quoted in* Halstuk, *supra* note 61, at 57.

76. This term was first used by Thomas Carlyle to describe the British Government saying, "Burke said tbere were Three Estates in Parliament; but, in the Reporters' Gallery yonder, there sat a Fourth Estate more important than they all. It is not a figure of speech or a witty saying; it

government by "expos[ing] public mismanagement and keep[ing] power fragmented, manageable, and accountable."[77] These arguments indicate that the purpose of the press clause was to guard against prior restraints of the press and to place additional checks on government power, not to necessarily secure a First Amendment right of access.[78]

Other constitutional scholars argue that the press clause of the First Amendment not only protects the ability of the press to speak, but also protects certain types of press behavior.[79] The argument that the First Amendment protects press behavior stems from the observation that "[t]here are many actions that are understood . . . as functions of the press that might never blossom into publication, yet they clearly serve First Amendment interests. . . . The press is the press because it does something, not necessarily because it says something."[80] In this respect, the press is a "political citizen" whose function is to scrutinize and report on the actions of the government.[81] Therefore, the argument goes, the First Amendment protects press behavior because the press acts as a "politically engaged citizen intending to communicate information" and such political "speech" is the core of First Amendment protection.[82] It has likewise been argued that the First Amendment protects "not the *institution*, but the *role* of the press: To afford a vehicle of information and opinion, to inform and educate the public . . . and to act as a surrogate to obtain for readers

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is a literal fact – very momentous to us in these times." Potter Stewart, *"Or of the Press,"* 26 HASTINGS L.J. 631, 634 (1975) (excerpted from an address on November 2, 1974, at the Yale Law School Sesquicentennial Convocation, New Haven, Connecticut). *Id.*

77. LEVY, ORIGINAL INTENT, *supra* note 74, at 213, *noted in* Halstuk, *supra* note 61, at 57. Another scholar has commented that the press was established as the Fourth Estate because:

> The Press was to play a crucial role in the embryonic government – it was to serve as investigator and reporter of government actions so that an informed citizenry could be actively involved in a participatory democracy. The Framers ensured that the workings of the government, and society at large, would continuously be made available to the People; and that the thoughts, ideas, and opinions of the common man would, conversely be made known to public officials.

Christopher G. Blood, Note, *The Eroded Power of the Press and the Need to Apply Separation of Powers Principles*, 15 J.L. & POL. 781, 786-87 (1999).

78. The term "prior restraint" basically refers to government restrictions on speech prior to its publication. Levy may have based his argument on the ideas of Blackstone who has commented that "[t]he liberty of the press [consists] in laying no previous restraints on publication . . . ." KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 957 (14th ed. 2001) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIESat 151-52).

79. *See* Jon Paul Dilts, *The Press Clause and Press Behavior: Revisiting the Implications of Citizenship*, 7 COMM. L. & POL'Y 25, 31 (2002).

80. *Id.* (giving examples of press actions that do not involve publication, including unpublished interviews, undercover investigations, and attendance of government meetings).

81. *See id.* at 33.

82. *Id.* at 34.

news and information that [citizens] could not or would not gather on their own."[83] This line of reasoning would seem to support the argument that there is a First Amendment right of access; however, the idea that the press clause protects nonexpressive press behavior like newsgathering is inconsistent with traditional First Amendment principles under which the First Amendment only protects actual expression and expressive conduct.[84]

Certain members of the Supreme Court have been outspoken in arguing that the Framers intended to grant the press special privileges, but even these Justices have stopped short of recognizing a special right of access guaranteed by the First Amendment. For example, in an address delivered at Yale Law School in 1974, Justice Potter Stewart argued that "[i]f the Free Press guarantee meant no more than freedom of expression, it would be a constitutional redundancy.... By including both guarantees in the First Amendment, the Founders quite clearly recognized the distinction between the two."[85] Justice Stewart further suggested that, "[t]he primary purpose of the constitutional guarantee of a free press was ... to create a fourth institution outside the Government as an additional check on the three official branches."[86] Therefore, "[t]he publishing business is, in short, the only organized private business that is given explicit constitutional protection."[87] He later asserted: "That the First Amendment speaks separately of freedom of speech and freedom of the press is no constitutional accident, but an acknowledgment of the critical role played by the press in American society."[88] Nonetheless, even though Justice Stewart believed the First Amendment granted the press institutional privileges above those enjoyed by ordinary citizens, he did not think that the First Amendment granted the press a special right of access to government information.[89]

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83. Robert Sack, *Reflections on the Wrong Question: Special Constitutional Privilege for the Institutional Press*, 7 HOFSTRA L. REV. 629, 633 (1979). This idea contradicts Justice Stewart's theory of an institutional privilege for the press granted by the First Amendment. *See supra* notes 85-89 and accompanying text.

84. For example, symbolic speech such a burning a draft card to protest a war.

85. Stewart, *supra* note 76, at 633-34.

86. *Id.* at 634.

87. *Id.* at 633.

88. Houchins v. KQED, Inc., 438 U.S. 1, 17 (1977) (Stewart, J., concurring).

89. Stewart, *supra* note 76, at 636. Justice Stewart noted that

> [T]he autonomous press may publish what it knows, and may seek to learn what it can.
>
> ... The press is free to do battle against secrecy and deception in government. But the press cannot expect from the Constitution any guarantee that it will succeed. There is no constitutional right to have access to particular government information, or to require openness from tbe bureaucracy ....

Nonetheless, even if the First Amendment can be read as granting the press special institutional privileges above those enjoyed by ordinary citizens, it does not necessarily follow that the First Amendment grants the press a right of access. One reason why the right of access falls outside the ambit of First Amendment protection is that there are significant distinctions between the interests protected by the right of access and the rights protected under traditional First Amendment doctrine.[90] If the press clause of the First Amendment is designed to act primarily as a check on the ability of the government to restrain or punish publication, then the government's failure to allow access to certain types of information threatens different values than the freedoms protected by the First Amendment.[91] On the one hand, the freedom of the press to publish information regarding the activities of the government is at the core of First Amendment protection.[92] A necessary corollary of the freedom of the press to publish information regarding government activities is the freedom of the press to *gather* the information it seeks to publish about those activities.[93] Therefore since it would be a violation of the First Amendment for the government to place restrictions on the publication of the information, it would also violate the First Amendment for the government to restrain or punish the process of gathering the information in the first place.[94] On the other hand, even if it would violate the First Amendment for the government to restrain or punish the press's ability to gather information, there is no antecedent First Amendment violation when the government merely denies the press access to the information because when the government denies the press access to the information it possesses "it

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The Constitution, in other words, establishes the contest, not its resolution.

Id. Justice Stewart echoed these sentiments in his concurring opinion in the *Pentagon Papers* cases. *See* N.Y. Times Co. v. United States, 403 U.S. 713, 727-30 (1971) (Stewart, J., concurring); *see also* Ethel S. White, *The Protection of the Individual and the Free Exchange of Ideas: Justice Potter Stewart's Role in First and Fourth Amendment Cases*, 54 U. CIN. L. REV. 87, 96 (1985).

90. BeVier, *supra* note 58, at 498.

91. *Id.* Constitutional scholar Leonard Levy argued that the freedom of the press simply means freedom from restraints on the press prior to publication. *See supra* notes 71-78 and accompanying text.

92. BeVier, *supra* note 58, at 498.

93. *Id.*

94. *Id.* In *Near v. Minnesota*, the Supreme Court recognized that government prior restraint of the press violated the First Amendment, saying, "it is the chief purpose of the [free press] guaranty to prevent previous restraints upon publication." 283 U.S. 697, 713 (1931) However, the Court further recognized that prior restraints on publication would not violate the First Amendment in certain situations; for example when the speech is obscene or involved the publication of military secrets in times of war. *Id.* at 716.

neither directly restrains nor imposes punishment on the information-gathering process."[95]

On the other hand, the effect of the denial of access is arguably similar to prior restraint in that both actions would restrict the press's right of access and the free flow of information. Nonetheless, "failure of the government to take affirmative action to remove the impediment caused by denial of access cannot credibly be argued to be the constitutional equivalent of punishment or censorship."[96] Furthermore, prior restraint of publication has a different effect on the publisher than does the denial of access because prior restraint directly interferes with the publisher's freedom to publish while there is no such interference when all that is denied is access to the information.[97] If access is denied the publisher is still free to publish the fact that the government denied access, as well as any other information that the publisher is able to acquire from other sources.[98] Finally, prior restraint and government censorship of speech implicate different values than does the government's denial of access to information because "censorship directly undermine[s] the value of *free* speech, while the denial of access to information undermines the value of *well-informed* speech."[99] The availability of less information may result in less informed speech, but it will not make that speech any less "free" because the government's denial of access to certain information does not restrain the press from publishing information that it already has or that it can otherwise obtain.[100] Accordingly, since denying the press access to information cannot be considered prior restraint, and because ensuring that the government does not impose restraints on the press's publication of information prior to its actual publication is one of the core values underlying the First Amendment, the right of access implicates different values that those underlying the First Amendment. Therefore grounding the right of access in the First Amendment is unsatisfactory.

Another reason that the First Amendment is an unsatisfactory basis for the right of access is that the Supreme Court has repeatedly held that the press clause of the First Amendment does not grant rights to the press above and beyond those granted to ordinary

95. BeVier, *supra* note 58, at 498.
96. *Id.*
97. *Id.*
98. *Id.* at 499.
99. *Id.*
100. *Id.*

citizens.[101] For example, in his concurring opinion in *First National Bank of Boston v. Bellotti*, Chief Justice Burger argued that the press was not entitled to special First Amendment protection noting, "the history of the Clause does not suggest that the authors contemplated a 'special' or 'institutional' privilege [for the press]."[102] In the same opinion, Chief Justice Burger also argued that the "Speech Clause standing alone may be viewed as a protection of the liberty to express ideas and beliefs, while the Press Clause focuses specifically on the liberty to disseminate expression broadly . . . ."[103] Likewise, in *Branzburg v. Hayes* Justice White cautioned that the "First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally."[104] In recent decades, the Supreme Court has refused to rest a decision squarely on the press clause independent from the speech clause, and it has declined to grant the press any greater protection than ordinary citizens enjoy under the speech clause.[105]

The Supreme Court's reluctance to grant the press special First Amendment privileges not only suggests that the press freedom envisioned by the First Amendment was merely the freedom of the people to speak through the press (e.g. newspapers), and the freedom of the press to speak without government intervention (e.g. prior restraint), but also that the First Amendment right of access, as fashioned by the Supreme Court, does little to secure the ability of the press and public to access the information necessary for the effective functioning of a republican system of self-government.[106]

C. Other Possible Constitutional Bases for the Right of Access

Although the First Amendment does not explicitly mention the right of access, there is language elsewhere in the Constitution that is

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101. *See, e.g.*, Branzburg v. Hayes, 408 U.S. 665, 684 (1972) ("[T]he First Amendment does not guarantee the press a constitutional right of access to information not available to the public generally.").

102. 435 U.S. 765, 798 (1978) (Burger, C.J., concurring) (citing David Lange, *The Speech and Press Clauses*, 23 UCLA L. REV. 77, 88-99 (1975)).

103. *Id.* at 799-800; *see* Anderson, *supra* note 69, at 447 n.91 ("[T]he Speech Clause was intended to protect 'the liberty to express ideas and belief,' while the Press Clause described 'the freedom to communicate with a large, unforeseen audience.'" (quoting *Bellotti*, 435 U.S. at 799, 800 n.5 (Burger, C.J., concurring))).

104. 408 U.S. at 684.

105. Anderson, *supra* note 69, at 449-50 ("[I]n the 1970s, 1980s, and 1990s, the Court seemed to lose its enthusiasm for the Press Clause. Whenever possible, it treated media cases as free-speech cases rather than free-press cases. When confronted with claims that could only be based on the Press Clause, it rejected them . . . .").

106. *See* discussion *infra* Part IV and accompanying footnotes.

suggestive of a right of access. For example, Article I of the Constitution mandates that "[e]ach House shall keep a Journal of its Proceedings, and from time to time publish the same."[107] Article I also provides that "a regular Statement and Account of Receipts and Expenditures of all public Money shall be published from time to time."[108] Moreover, Article II provides that the President "shall from time to time give to the Congress Information on the State of the Union."[109] In addition, the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and *public* trial."[110] These provisions demonstrate that the Framers were aware that government openness is a value inherent in our constitutional structure, and that it is essential to the effective functioning of a democratic government. The explicit textual recognition of some right of access to government-held information and proceedings in these provisions lends additional support to the idea that the First Amendment does not include the right of access because it shows a conscious decision on the part of the Framers to exclude the right of access from the ambit of First Amendment protection.

IV. THE RIGHT OF ACCESS AS A SYSTEMIC RIGHT: THE FUNCTIONAL AND STRUCTURAL ARGUMENTS

As discussed in the previous section, efining the right of access in terms of the First Amendment is unsatisfactory for several reasons. First, the right of access is not explicitly mentioned in the language of the First Amendment and there is considerable evidence that access was not an interest the Framers of the Constitution intended to protect through the First Amendment.[111] Second, while the language of the First Amendment prevents the government from punishing or censoring speech, it does not require the government to take affirmative action to remove impediments to speech created by denials of access to government information.[112]

Finally, and most importantly, further expanding the First Amendment to encompass a right of access does little to actually ensure press access to government-held proceedings and information because the Supreme Court has repeatedly held that the First

107. U.S. CONST. art. I, § 5.

108. U.S. CONST. art. I, § 9.

109. U.S. CONST. art. II, § 3.

110. U.S. CONST. amend. VI (emphasis added).

111. *See supra* Part III.A.

112. BeVier, *supra* note 58, at 498; *see supra* Part III.A.

Amendment does not give the press any rights above those enjoyed by ordinary citizens.[113] By grounding the right of access in the First Amendment but limiting the exercise of that right, the Court assures the press little in the way of real access to information that the government seeks to withhold. By relying on a First Amendment right of access, the press's ability to gather information is limited because the Supreme Court has held that the press does not have a special institutional privilege to do whatever it wants. As a result, the First Amendment is an unsatisfactory basis for the right of access because it does little to ensure that the public has sufficient information to participate effectively in the democratic process. A better approach, one that could offer the press greater protection in gathering and disseminating information to the public, would be to recognize the right of access as a systemic right that is inherent in, and essential to, a fully functioning democracy.

A. The Systemic Nature of the Right of Access

Evidence of the systemic nature of the right of access can be found in the legislative history of the Constitution. Although it is unclear how much independent significance the framers of the First Amendment intended the press clause to have, separate from the speech clause, it is clear that the Framers considered the freedom of the press to be a crucial element of a democratic government.[114] According to Professor David Anderson, "freedom of the press was viewed not merely as a desirable civil liberty, but as a matter integral to the structure of the new government. . . . The demand for legal protection of the press was contemporaneous with the demand for independence and self-government."[115] Accordingly, since the right of access is essential to a fully functioning free press, and since a free press is essential to any system of self-government, it follows that the right of access is a systemic right that must be an integral part of the democratic government established by the Constitution.

Furthermore, the right of access can be analogized to other recognized systemic rights. For example, the Supreme Court has consistently identified the right to vote as a systemic right that is inherent in our constitutional structure. [116] In *Wesberry v. Sanders*, the Court warned that "[o]ther rights, even the most basic, are illusory

113. *See supra* Part II and accompanying notes.

114. Dyk, *supra* note 60, at 932.

115. Anderson, *supra* note 69, at 488.

116. The right to vote in state and federal elections is conferred by the Constitution. U.S. CONST. art. I, § 2; U.S. CONST. amends. 14, 15, 17, 19, 23, 24.

if the right to vote is undermined."[117] Furthermore, in *Illinois Board of Elections v. Socialist Workers Party* the Court stated that "voting is of the most fundamental significance under our constitutional structure." [118] As a systemic right, the right to vote is essential to the effective functioning of our democratic system of government, but this right cannot be exercised effectively unless citizens are supplied with enough information to make an informed choice. Justice Brandeis summarized the importance of information as follows:

> In the first place, in a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations. Great responsibility is accordingly placed upon the news media to report fully and accurately the proceedings of government, and official records and documents open to the public are the basic data of governmental operations. Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently 119

This quotation demonstrates that the Supreme Court implicitly recognizes that the right of access and the availability of information are a fundamental prerequisite to meaningful participation in the democratic process.

B. The Functional Argument for Recognizing the Right of Access as a Systemic Right

Perhaps more fundamentally, access and the availability of information is essential to the proper functioning of the government because it acts as an additional assurance that elected officials have access to information on which to base their decisions. True democratic self-government can only exist when elected leaders are responsive to the will of the people.[120] Yet, for the will of the people to be legitimate and for the people to function as a rational electorate they must be adequately informed about the activities of their government.[121] In addition to promoting effective participation in the democratic process, access also ensures government accountability, which is an integral part of any system of government.[122] When

117. 376 U.S. 1, 17 (1964); *see* Reynolds v. Sims, 377 U.S. 533, 555 (1964) ("The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.").

118. 440 U.S. 173, 184 (1979).

119. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 491-92 (1975).

120. David Mitchell Ivester, *The Constitutional Right to Know*, 4 HASTINGS CONST. L.Q. 109, 115 (1977).

121. *Id.*

122. *Id.* at 116 n.31.

people do not know what their government is doing, they cannot hold elected officials accountable for their actions.[123]

Likewise, the right of access is an essential threshold to true democracy because access, and the information it provides, is a prerequisite for informed speech. Without it citizens will not have sufficient knowledge to fully participate in the democratic process because they will be unable to accurately communicate their desires to the elected representatives that are charged with exercising the will of their constituents.[124] Access is also a prerequisite to the exercise of the free speech rights that are necessary for the proper functioning of the government.[125] Justice Stevens emphasized in *Houchins v. KQED, Inc.* that "'the protection of the Bill of Rights goes beyond specific guarantees to protect from . . . abridgement those equally fundamental personal rights necessary to make the express guarantees fully meaningful.'"[126] Accordingly, even though the right of access is not specifically mentioned in the Constitution, in many ways it is essential to the meaningful exercise of fundamental liberties such as voting and free speech.

C. The Structural Argument for Recognizing the Right of Access as a Systemic Right

In addition to a functional argument that the right of access is essential to the functioning of a democratic government, there is also a structural argument for recognizing the right of access as a systemic right. The premise underlying the structural argument is that the

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123. *Id.* at 115-16.

124. However, there are some situations where press access could interfere with the effective functioning of the government. For example, in the case of the Washington, D.C. area sniper, law enforcement officials complained too much press coverage and press leaks compromised the investigation. *See* Gina Lubrano, *The Media and the D.C. Sniper Story*, SAN DIEGO UNION-TRIBUNE, Oct. 28, 2002, at B7 (analyzing the relationship between law enforcement and the media during the D.C. sniper episode).

125. In the same vein, it can be argued that the basic property rights are a necessary prerequisite to the constitutional guarantees against unreasonable government searches and seizures.

126. 438 U.S. 1, 32 n.22 (1978) (Stevens, J., dissenting) (quoting Lamont v. Postmaster General, 381 U.S. 301, 308 (1965) (Brennan, J., concurring)). The entire passage is as follows

> Admittedly, the right to receive or acquire information is not specifically mentioned in the Constitution. But "the protection of the Bill of Rights goes beyond specific guarantees to protect from . . . abridgement those equally fundamental personal rights necessary to make the express guarantees fully meaningful . . . . The dissemination of ideas can accomplish nothing if otherwise willing addresses are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers."

Id. Not only does this idea demonstrate the systemic value of access, it further supports the argument that the right of access is not included in the First Amendment.

right of access is implicit in the self-governing structure created by the Constitution, and "[t]he sovereign people, by virtue of their station as the fundamental source of all governmental power, have an inherent right to know what their government is doing."[127] The right of access is not explicitly mentioned in the Constitution, but is rather "implicit in the inalienable power of the people to make and unmake governments. It is a right that was not expressly forfeited when the people delegated powers to the government . . . [but is] one of those constitutionally protected unenumerated rights retained by the people."[128] As an unenumerated right, protection for the right of access cannot be rooted in the language of the First Amendment; instead it must flow from its recognition as a systemic right.

The basis for the structural argument for recognizing a systemic right of access can be found in Alexander Meiklejohn's political theory. According to Professor Meiklejohn, the central aim of the First Amendment is to protect the power of the people to collectively govern themselves.[129] He claimed that "[t]he principle of the freedom of speech springs from the necessities . . . of self-government,"[130] because a citizen must be well informed in order to make intelligent policy decisions.[131] Although Meiklejohn did not expressly address the right of access, his theories lend support to the idea that access to information is crucial to citizens being able to "exercise their sovereign will upon government."[132] According to Meiklejohn, "all the citizens shall, so far as possible, understand the issues which bear upon our common life. That is why no idea, no opinion, no doubt, no belief, no counterbelief, no relevant information shall be kept from them."[133] Under Meiklejohn's view, if access to

127. Ivester, *supra* note 120, at 116.

128. *Id.*at 116-17. This idea rests on the Ninth Amendment which says, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

129. *See* ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 27 (1965) ("The principle of the freedom of speech springs from the necessities of the program of self-government."), *quoted in* Anthony Lewis, *A Public Right to Know About Public Institutions: The First Amendment as Sword*, 1980 SUP. CT. REV. 1, 3 (1981).

130. MEIKLEJOHN, *supra* note 129, at 27, *quoted in* Lewis, *supra* note 129, at 3.

131. MEIKLEJOHN, *supra* note 129, at 75 ("The primary purpose of the First Amendment is, then, that all the citizens shall, so far as possible, understand the issues which bear upon our common life. That is why no idea, no opinion, no doubt, no belief, no counterbelief, no relevant information shall be kept from them."); *see infra* note 134 and accompanying text; *see also* Lewis, *supra* note 129, at 3 (noting that since the "sovereign citizen makes policy[,] . . . he must have an informed basis for his judgment." (citing MEIKLEJOHN, *supra* note 129, at 34-36)).

132. Cerruti, *supra* note 7, at 289 (establishing the relevance of Meiklejohn's scholarship to the right of access).

133. MEIKLEJOHN, *supra* note 129, at 75, *quoted in* Cerruti, *supra* note 7, at 289.

information were restricted, then voters would be deprived of the knowledge necessary to participate in our representative democracy.[134] Therefore, access to information must be protected to ensure that every citizen has "the fullest possible participation in the understanding of those problems with which the citizens of a self-governing society must deal."[135] According to Meiklejohn, "[s]elf-government can exist only insofar as the voters acquire the intelligence, integrity, sensitivity, and generous devotion to the general welfare that, in theory, casting a ballot is assumed to express . . . ."[136]Even though principally concerned with the First Amendment, Meiklejohn's theory supports the idea that the right of access is a systemic right because it recognizes that access, and the information it provides, are essential in order for citizens to exercise their sovereign rights.

In addition to the functional and structural arguments for recognizing a systemic right of access, further evidence that the right of access is a systemic right can be found in language in the Supreme Court's press access cases, and in the legislative history and judicial treatment of the Freedom of Information Act and other "right to know" statutes.

V. THE SUPREME COURT AND THE SYSTEMIC RIGHT OF ACCESS

Although the Supreme Court has grounded forty years of right of access jurisprudence in the First Amendment, certain language in the Court's opinions demonstrates that the Court acknowledges openness and the right of access as a systemic right that is inherent in our democratic system of government. Perhaps the first indication that the Supreme Court recognized the systemic nature of the right of access was in 1936 when Justice Southerland concluded that "informed public opinion is the most potent of all restraints upon misgovernment."[137] Several years later in *New York Times Co. v. United States* Justice Black said that "[t]he press was to serve the governed, not the governors. . . . The press was protected so that it could bare the secrets of government and inform the people."[138] In the

134. *See* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 26-27 (1948), *noted in* Hayes, *supra* note 42, at 1113 (making essentially this point).

135. MEIKLEJOHN, *supra* note 134, at 88, *quoted in* Hayes, *supra* note 42, at 1113.

136. Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255 (1962), *quoted in* Branzburg v. Hayes, 408 U.S. 665, 714 (1972) (Douglas, J., dissenting). In this respect, Meiklejohn's political theory is almost a sub-component of the functional rationale mentioned above.

137. Grosjean v. Am. Press, 297 U.S. 233, 250 (1936).

138. 403 U.S. 713, 717 (1971) (Black, J., concurring).

same opinion, Justice Douglas argued that "[s]ecrecy in government is fundamentally anti-democratic . . . . Open debate and discussion of public issues [is] vital to our national health."[139] A year later in *Branzburg* Justice Douglas further argued that "[t]he press has a preferred position in our constitutional scheme . . . to bring fulfillment to the public's right to know. The right to know is crucial to the governing powers of the people . . . . Knowledge is essential to informed decisions."[140] Justice Powell reiterated this position in *Saxbe v. Washington Post Co.*, saying that an "informed public depends on accurate and effective reporting by the news media. No individual can obtain for himself the information needed for the intelligent discharge of his political responsibilities. . . . [The press] is the means by which the people receive that free flow of information and ideas essential to intelligent self-government."[141] This idea was again reiterated by Justice Stevens when he argued that "[o]ur system of self-government assumes the existence of an informed citizenry. . . . Without some protection for the acquisition of information about the operation of public institutions . . . the process of self-governance contemplated by the Framers would be stripped of its substance."[142]

Justice Stewart had long been a champion of an autonomous press and an advocate for greater press freedoms. He argued that the press must be unrestrained in its ability to gather news saying, "[e]nlightened choice by an informed citizenry is the basic ideal upon which an open society is premised, and a free press is thus indispensable to a free society."[143] Therefore, "[a] corollary of the right to publish must be the right to gather news."[144] Justice Stewart thought that the press's ability to gather news was equally as important as its ability to disseminate that news to the public.[145]

In *Richmond Newspapers, Inc. v. Virginia*, the Court applied these rationales in the context of ensuring press access to criminal trials.[146] In the majority opinion, Justice Burger focused on the tradition of openness in our criminal justice system and, in doing so,

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139. *Id.* at 724 (Douglas, J., concurring).

140. 408 U.S. at 721 (Douglas, J., dissenting) (paraphrasing Alexander Meiklejohn in the last sentence of the quoted passage).

141. 417 U.S. 843, 863 (1974) (Powell, J., dissenting).

142. Houchins v. KQED, Inc., 438 U.S. 1, 31-32 (1978) (Stevens, J., dissenting).

143. *Branzburg*, 408 U.S. at 726 (Stewart, J., dissenting).

144. *Id.* at 727.

145. *Id.* at 728 ("News must not be unnecessarily cut off at its source, for without freedom to acquire information the right to publish will be impermissibly compromised. Accordingly, a right to gather news . . . must exist." (citing Zemel v. Rusk, 381 U.S. 1 (1965))).

146. *See* 448 U.S. 555 (1980); *see also* Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982).

noted the value of openness in general stating, "[o]ne of the demands of a democratic society is that the public should know what goes on in courts by being told by the press what happens there, to the end that the public may judge whether our system of criminal justice is fair and right."[147] Justice Brennan likewise emphasized that "open trials are bulwarks of our free and democratic government: public access to court proceedings is one of the numerous 'checks and balances' of our system, because 'contemporaneous review in the forum of public opinion is an effective restraint on the possible abuse of judicial power.'"[148] Justice Brennan more specifically addressed the right of access as part of the "assumption that valuable public debate—as well as other civic behavior—must be informed."[149] Based on this assumption some constitutional scholars argue that Justice Brennan supported an expansive affirmative right of access to information on matters of public concern "regardless of any connection to speech-based activity."[150] This argument serves as additional evidence of the Supreme Court's willingness to recognize the right of access as a systemic right rather than a First Amendment right.

VI. THE FREEDOM OF INFORMATION ACT AND OTHER "RIGHT TO KNOW" STATUTES

The Freedom of Information Act (FOIA)[151] is a statutory example of the functional and structural rationales for recognizing the right of access as a systemic right. Passed in 1966 in response to public distrust of the government because of the Vietnam War,[152] the FOIA is the primary vehicle for the members of the press, as well as ordinary citizens, to obtain information about government

147. *Richmond Newspapers*, 448 U.S. at 574 n.9 (quoting Maryland v. Balt. Radio Show, Inc. 338 U.S. 912, 920 (1950) (Frankfurter, J., dissenting from denial of certiorari)).

148. *Id.* at 592 (Brennan, J., concurring) (quoting *In re* Oliver, 33 U.S. 257, 270 (1948)); *see* Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 13 (1986); Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 508 (1984); *Globe*, 457 U.S. at 606.

149. *Richmond Newspapers*, 448 U.S. at 587 (Brennan, J., concurring).

150. Cerruti, *supra* note 7, at 276 (interpreting Justice Brennan's position to be that "[t]he public, . . . is affirmatively entitled to access to government-held information on matters of public debate, regardless of any connection to speech-based activity").

151. 5 U.S.C. § 552 (2000).

152. *See* Robert L. Saloschin, *The Department of Justice and the Explosion of Freedom of Information Act Litigation*, 52 ADMIN. L. REV. 1401, 1401 (2000); *see also* Frank Askin, *Secret Justice and the Adversary System*, 18 HASTINGS CONST. L.Q. 745, 777 (1991) ("The anti-Vietnam War movement, the Watergate scandal, and tbe exposure of J. Edgar Hoover's misuse of the FBI as a political police force helped temporarily to inspire a new spirit of openness in the land that resulted in, among other things, the enactment of the Freedom of Information Act . . . .").

operations.[153] The FOIA gives all citizens the right to obtain federal agency records upon request regardless of their reasons for seeking the information.[154] Even though citizens can easily obtain most records, under the statute there are nine categories of information an agency may refuse to release.[155] For the most part, the exceptions are designed to protect classified government information for purposes of national security and to prevent disclosure of information that might impede the proper functioning of the government or invade personal privacy.[156] Aside from these exemptions, however, the FOIA creates a presumptive right of access since the government bears the burden of proof for withholding the requested information.[157]

The main purpose of the FOIA is to supply citizens with "the knowledge necessary to govern."[158] The legislative history of the FOIA shows that Congress intended to secure public access to government

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153. Karen L. Turner, *Convergence of the First Amendment and the Withholding of Information for the Security of the Nation: A Historical Perspective and the Effect of September 11th on Constitutional Freedoms*, 33 MCGEORGE L. REV. 593, 602 (2002). Prior to the passage of the FOIA, access to agency held government information was controlled by the Administrative Procedure Act ("APA"), which allowed inspection of pubic records by "persons properly and directly concerned" with the subject matter of the records, unless the records were kept secret "for good cause." Fred H. Cate et al., *The Right to Privacy and the Public's Right to Know: The "Central Purpose" of the Freedom of Information Act*, 46 ADMIN. L. REV. 41, 46 (1994) (quoting the Administrative Procedure Act of June 11, 1946, ch. 324, 60 Stat. 237, *repealed by* Freedom of Information Act of 1966, Pub. L. No. 89-554, 80 Stat. 383). Disclosure was minimal under the APA because the good cause standard became a method for federal agencies to deny even minimal access. *Id.*

154. H.R. REP. NO. 104-795, at 6 (1996) ("The FOIA establishes a presumptive right for the public to obtain identifiable, existing records of Federal departments and agencies . . . . Requestors do not have to show a need or reason for seeking information.").

155. Turner, *supra* note 153, at 602.

156. The records an agency may withhold include:

> Information that is classified for national defense or foreign policy purposes; Information that relates solely to an agency's internal personnel rules and practices; Information that has been clearly exempted under other laws.
>
> Confidential business information, such as trade secrets;
>
> Internal government deliberative communications about a decision before an
>
> announcement;
>
> Information about an individual that, if disclosed, would cause a clearly unwarranted invasion of personal privacy;
>
> Law enforcement records, particularly of ongoing investigations;
>
> Information concerning bank supervision;
>
> Geological and geophysical information, such as maps.

H.R. REP. NO. 104-795, at 6; *see* 5 U.S.C. §552(b)(1)-(b)(9).

157. H.R. REP. NO. 104-795, at 6 ("The burden of proof for withholding requested material rests with the department or agency that seeks to deny the request.").

158. Cate et al., *supra* note 153, at 42.

held information to facilitate the achievement of three goals.[159] First, allowing public access to federal agency records would preserve the "watchdog function of the public over the government" by ensuring that government officials continue to act in the public interest.[160] Second, the FOIA would ensure access to information regarding public policy decisions and allow citizens to independently evaluate those decisions.[161] Third, the FOIA would prevent the government from secretly creating or enforcing laws or administrative regulations.[162] Through the achievement of these three goals, the FOIA would foster openness and increase accountability by exposing the government to, in the words of the Supreme Court, the "sharp eye of public scrutiny."[163]

The passage of the FOIA shows that Congress understands the importance of openness and the systemic role that the right of access plays in a democratic system of government. For example, when President Johnson signed the FOIA into law on July 4, 1966, he said, "[t]his legislation springs from one of our most essential principles: A democracy works best when the people have all the information that the security of the Nation permits. No one should be able to pull curtains of secrecy around decisions which can be revealed without injury to the public interest."[164] Likewise, the Supreme Court has said that "[t]he generation that made the nation thought secrecy in government one of the instruments of Old World tyranny and committed itself to the principle that a democracy cannot function unless the people are permitted to know what their government is up to."[165] Accordingly, the Court has emphasized that "the Act was designed to create a broad right of access to 'official information'"[166]

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159. *Id.*

160. *Id.*

161. The rationale underlying the second goal of the FOIA is that since "[c]itizens enjoy the benefits or suffer the consequences of public policy, . . . they should be able to draw their own conclusions regarding the effectiveness of that policy" *Id.* (quoting Glenn Dickinson, Comment, *The Supreme Court's Narrow Reading of Public the Public Interest Served by the Freedom of Information Act*, 59 U. CIN. L. REV. 191, 197 (1990)); *see* S. REP NO. 89-813 (1965); H.R. REP. NO. 89-1497 (1966).

162. Cate et al., *supra* note 153, at 43.

163. United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 774 (1989), *quoted in* Cate et al., *supra* note 153, at 43.

164. H.R. REP. NO. 104-795, at 8 (1996) (quoting PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: LYNDON B. JOHNSON, (1966)).

165. EPA v. Mink, 410 U.S. 73, 105 (1973) (Douglas, J., dissenting) (quoting Henry Steele Commager, N.Y. REV., Oct. 5, 1972, at 7). Likewise, Justice Douglas has argued that "[s]ecrecy is government is fundamentally anti-democratic, perpetuating bureaucratic errors." N.Y. Times Co. v. United States, 403 U.S. 713, 724 (1971) (Douglas, J., concurring).

166. *Reporters Comm.*, 489 U.S. at 772 (quoting *Mink*, 410 U.S. at 80).

and that "[t]he basic policy of 'full agency disclosure unless information is exempted under clearly delineated statutory language,' indeed focuses on the citizens' right to be informed . . . ."[167] These statements by the Supreme Court regarding the purpose of the FOIA, in addition to the four goals of the FOIA identified by Congress, indicate that both institutions recognize the importance of the right of access to the proper functioning of a democracy and that the passage of FOIA was necessary to fully secure this right. Similarly, if the FOIA is a Congressional acknowledgment that the right of access is a systemic right that is integral to a fully functioning democracy, then the FOIA can also be seen as additional evidence that the First Amendment is not the source of the right of access. Since the language of the First Amendment does not explicitly guarantee the right of access, Congress, recognizing the public mistrust created when the government operates behind closed doors, took steps to ensure access to government information though passage of the Freedom of Information Act.[168]

Similarly, in addition to indicating that the Supreme Court recognizes the systemic nature of the of the right of access, the language in the Supreme Court's FOIA cases also lends support to the argument that the right of access is not included in the First Amendment guarantees of freedom of speech or the press. Chief Justice Burger articulated this idea when he quoted Justice Stewart's comment that "[t]here is no *constitutional* right to have access to particular government information . . . . The Constitution itself is [not] a Freedom of Information Act."[169] This language suggests that the Supreme Court may be backing away from its previous position that the right of access is grounded in the First Amendment.[170]

In addition to the FOIA, the Sunshine Act is another concrete statutory example of the functional and structural rationales for recognizing the right of access as a systemic right. The Government in the Sunshine Act requires that meetings of government agencies be open to the public.[171] The legislative history of the statute shows that ensuring press and public access to information regarding the activities of the federal government was Congress's primary concern

167. *Id.* at 773 (quoting S. REP. NO. 89-813, at 3 (1965), *quoted in* Air Force v. Rose, 425 U.S. 352, 360-61 (1976)).

168. *See* Saloschin, *supra* note 152, at 1401 (attributing the passage of the Freedom of Information Act in part to public distrust of government).

169. Houchins v. KQED, Inc., 438 U.S. 1, 14 (1978) (quoting Stewart, *supra* note 76, at 636 (emphasis added)).

170. *See* discussion *supra* Part II and accompanying footnotes.

171. 5 U.S.C. §552b(b) (2000).

in passing this legislation.[172] The impetus for the Act was the fear that government had become too "secretive and remote from the people," and that by forcing the government to open its doors, there would be an increase in public participation in the government, "greater accountability of public officials to the public, a concomitant increase in the degree to which government policy reflects the interests of the public at large, and a renewed public faith in government."[173] These goals support the idea that the right of access is a systemic right that is inherent in, and essential to, the functioning of a democratic government and that Congress itself recognizes the systemic value of the right of access and government openness.

VII. MODERN RESTRICTIONS ON THE RIGHT OF ACCESS

Just as there is no real textual basis for the right of access in the Constitution, the only constitutional reference to the government's ability to withhold information is found in the Article I language giving Congress the authority to withhold information from its public records it considers necessary to keep secret.[174] While there is no general government power to withhold information,[175] the FOIA explicitly permits restricting press and public access to information relating to matters of national security, and the Supreme Court has held that there are some situations in which the government could restrain the press's ability to publish in order to protect matters of national security.[176] Accordingly, even if the right of access is

172. Government in the Sunshine Act, Pub. L. No. 94-409, § 2, 90 Stat. 1241, 1241 (1976) ("It is hereby declared to be the policy of the United States that the public is entitled to the fullest practicable information regarding the decisionmaking processes of the Federal Government.").

173. Thomas H. Tucker, *"Sunshine" – The Dubious New God*, 32 ADMIN. L. REV. 537, 537 (1980) (citing S. REP. NO. 94-354, at 1, 4-9 (1975)).

174. U.S. CONST. art. I, § 5, cl. 3 ("Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy . . . ."); *see* Ivester, *supra* note 120, at 145 ("The only time secrecy is mentioned in the Constitution is with regard to the right of the houses of Congress to delete certain information from their published journals. Nowhere is a general power to withhold information expressly authorized."). Presumably, information Congress would want to keep secret would be information that could affect national security.

175. General power is thought to refer to broad powers of wide application, such as the power to regulate commerce. The power to Congress to withhold information is narrow in that it is limited to removal of information from Congressional journals. Ivester, *supra* note 120, at 145 n.163.

176. 5 U.S.C. §552b(1); *see* N.Y. Times Co. v. United States, 403 U.S. 713, 726 (1971) (Brennan, J., concurring) ("Our cases, it is true, have indicated that there is a single, extremely narrow class of cases in which the First Amendment's ban on prior judicial restraint may be overridden. Our cases have thus far indicated that such cases may arise only when the Nation 'is at war,' . . . ." (citing Schenck v. United States, 249 U.S. 47, 52 (1919))). Lower courts have also supported the government's ability to prevent the press from publishing information detrimental

recognized as a systemic, fundamental right, it can be limited when the security of the nation is at issue.

This principle has come into play most recently in the wake of the September 11, 2001, terrorist attacks on New York City and Washington, D.C. One area of government in which the right of access has been jeopardized is the judicial system. The homeland security measures recently enacted by the Bush Administration have undermined the principle of open trials espoused in *Richmond Newspapers* in two ways.[177] First, Attorney General John Ashcroft issued an order to all immigration judges to close their courtrooms,[178] and second, President Bush issued an executive order establishing secret military tribunals.[179]

The order directing Immigration and Naturalization Service (INS) administrative judges and court administrators to close their courtrooms, otherwise known as the Creppy Memorandum because it was issued in the from of a memorandum from Chief Immigration Judge Michael Creppy, states that special procedures should be implemented for certain cases requiring the judges "to hold the hearings individually, to close the hearing to the public, and to avoid discussing the case or otherwise disclosing any information about the case to anyone outside the Immigration Court."[180] The Creppy Memorandum further specifies that "no visitors, no family, and *no press*" were allowed in the courtroom,[181] and that no record of any proceeding could be disclosed except to the deportee's attorney,

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to national security. *See* United States v. Marchetti, 466 F.2d 1309, 1311 (4th Cir. 1972) (enjoining disclosure by certain CIA secrets in accordance with a secrecy agreement); United States v. Progressive, Inc., 467 F. Supp. 990, 999-1000 (D. Wis. 1979) (enjoining publication of information regarding the workings of the hydrogen bomb).

177. Kathleen K. Olson, *Courtroom Access After 9/11: A Pathological Perspective*, 7 COMM. L. & POL'Y 461, 463 (2002). Olson quotes legal scholar Vincent Blasi, who coined the term "pathological perspective." *Id.* at 462. Blasi believed that "[i]n most periods, the central norms of a constitutional tradition are not challenged," but in times of national stress, "[t]he core commitments that derive from those norms are viewed by many as highly burdensome and controversial . . . . In times when those misgivings take hold, the central norms of the Constitutional regime are in jeopardy." Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 456-57 (1985).

178. Olson, *supra* note 177, at 463 (citing Memorandum from Michael J. Creppy, Chief Immigration Judge of the United States, to Immigration Judges and Court Administrators 1 (Sept. 21, 2001), [hereinafter Creppy Memorandum], http://news.findlaw.com/hdocs/docs/aclu/creppy092101memo.pdf).

179. *Id.* at 463-64 (citing Press Release, The White House, President Issues Military Order (Nov. 12, 2001), [hereinafter White House Press Release], http://www.whitehouse.gov/news/releases/2001/11/print/20011113-27.html).

180. Creppy Memorandum, *supra* note 178, at 1, *quoted in* Olson, *supra* note 177, at 465.

181. *Id.* at 2-3 (emphasis added), *quoted in* Olson, *supra* note 177, at 465.

"assuming the file does not contain classified information."[182] The memorandum directed Immigration judges to withhold additional information saying, "[t]his restriction on information includes confirming or denying whether such a case is on the docket or scheduled for a hearing."[183]

The press challenged the Creppy Memorandum in two lawsuits filed against Attorney General Ashcroft demanding access to the closed immigration proceedings.[184] The first case, *Detroit Free Press Association v. Ashcroft*, stemmed from the special interest case of Rabih Haddad, who was facing deportation for overstaying his travel visa and whom the government believed to be operating a charity that supplied money to terrorist groups.[185] When members of Haddad's family, the press, the public, and a United States Congressman sought to attend his deportation hearing, security guards denied them access to the courtroom and informed them that the hearing was closed to the press and the public.[186] Haddad and several newspapers filed suit claiming that the dictates of the Creppy Memorandum as applied in their case violated their right of access.[187]

The Sixth Circuit applied the *Richmond Newspapers*' two-part "experience and logic" test and held that the press and public have a right of access to attend deportation hearings.[188] In its opinion, tbe court warned, "[d]emocracies die behind closed doors. . . . When government begins closing doors, it selectively controls information rightfully belonging to the people. Selective information is misinformation."[189] The Sixth Circuit also gave several reasons why the right of access played a "significant positive role"[190] in deportation hearings. It first noted that "public access acts as a check on the actions of the Executive by assuring us that proceedings are conducted fairly and properly."[191] Second, the Sixth Circuit noted that "openness

182. *Id.* at 2, *quoted in* Detroit Free Press v. Ashcroft, 303 F.3d 681, 684 (6th Cir. 2002).

183. *Id.* at 2, *quoted in Detroit Free Press*, 303 F.3d at 684.

184. North Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198, 199 (3d Cir. 2002); *Detroit Free Press*, 303 F.3d at 683.

185. 303 F.3d at 684.

186. *Id.*

187. *Id.*

188. *Id.* at 700-05. While *Richmond Newspapers* established a right of access to criminal trials, the Supreme Court has yet to extend the right of access to civil trials. Furthermore, deportation hearings are not really trials at all, but administrative bearings conducted by the executive branch. However, the Sixth Circuit found that these hearings "exhibit substantial quasi-judicial characteristics." *Id.* at 694, *quoted in* Adam Liptak, *In Tense Times, a Court Insists on Open Doors*, N.Y. TIMES, Sept. 1, 2002, at D3.

189. *Detroit Free Press*, 303 F.3d at 683.

190. *Id.* at 703 (quoting Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 8-9 (1986)).

191. *Id.* at 703-04 (citing Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 569 (1980)).

ensures that government does its job properly; that it does not make mistakes."[192] Third, open deportations "serve a 'therapeutic' purpose as outlets for 'community concern, hostility, and emotions.'"[193] Fourth, "openness enhances the perception of integrity and fairness."[194] And finally, "public access helps ensure that 'the individual citizen can effectively participate in and contribute to our republican system of self-government.'"[195]

Although the Sixth Circuit discussed the benefits of the right of access in the context of deportation hearings, these benefits have a broader application to the functioning of the government as a whole. This opinion is a recent example of the movement of courts toward recognizing the right of access as a systemic right that is inherent in a democratic government. Also, this opinion is a recent example of courts' invocation of that systemic right to secure access to government information that would otherwise be excluded under the traditional First Amendment access doctrine.

In addition to the Sixth Circuit case challenging the constitutionality of the Creppy Memorandum and seeking access to special interest deportation hearings, the Third Circuit addressed the same issue in *North Jersey Media Group, Inc. v. Ashcroft*.[196] Like the Sixth Circuit, the Third Circuit applied the *Richmond Newspapers*' experience and logic test.[197] However, this court concluded that the tradition of openness of deportation proceedings did not meet that standard.[198] Furthermore, even though the Third Circuit agreed with the Sixth Circuit that allowing the press and the public access to deportation hearings would serve important functions, the court nonetheless held that openness did not play a significant positive role in the proceeding.[199] In reaching this conclusion, the Third Circuit examined "the flip side—the extent to which openness impairs the public good" and focused on evidence that opening the special interest deportation hearings would create serious national security concerns.[200]

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192. *Id.* at 704.

193. *Id.* (quoting *Richmond Newspapers*, 448 U.S. at 571).

194. *Id.*

195. *Id.* (quoting Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 604 (1982)).

196. 308 F.3d 198 (3d Cir. 2002).

197. *Id.* at 201.

198 *Id.*

199. *Id.* at 220.

200. *Id.* at 217-19. The Third Circuit outlined the potential dangers of open hearings:

> [P]ublic hearings would . . . reveal sources and methods of investigation . . . [which allow] "a terrorist organization to build a picture of the investigation. . . .

Finally, although the Third Circuit held there was no right of access to attend special interest deportation hearings, it emphasized the narrowness of its holding, stating,

> [w]e do not decide that there is no right to attend administrative proceedings, or even that there is no right to attend any immigration proceeding. Our judgment is confined to the extremely narrow class of deportation cases that are determined by the Attorney General to present significant national security concerns."[201]

The *North Jersey Media Group* case illustrates the principle that the right of access is not absolute and national security concerns can override the press's and public's right to know what their government is "up to"; however, since there is now a split of authority between the Third and Sixth Circuits, the Supreme Court may well be called upon to establish more precisely the limits of the right of access.

In addition to the Creppy Memorandum, President Bush issued an order authorizing secret military tribunals. These tribunals were established to try non-United States citizens suspected of being members of terrorist organizations, specifically Al-Qaeda, or of having "engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefore."[202] The order further stated that "[g]iven the danger to the safety of the United States and the nature of international terrorism, . . . it is not practicable to apply the principles of law . . . generally recognized in the trial of criminal cases in the United States district courts."[203] Although several groups such as the American Bar Association and the American Civil Liberties Union raised concerns that fundamental liberties would be impaired through the tribunals, President Bush defended the order on national security grounds.[204]

> . . . [I]nformation about how any given individual entered the country . . . would allow the terrorist organization to see patterns of entry, what works and what doesn't . . . .
> . . . [I]nformation about what evidence the United States has against members of a particular cell collectively will inform the terrorist organization as to what cells to use and which not to use for further plots and attacks . . . ."
>
> . . . [I]f a terrorist organization discovers that a particular member is detained, or that information about a plot is known, it may accelerate the timing of a planned attack, thus reducing the amount of time the government has to detect and prevent it . . . .
>
> . . . [And finally,] a public hearing involving evidence about terrorist links could allow terrorist organizations to interfere with the pending proceedings by creating false or misleading evidence.

Id. at 218 (quoting in part the declaration of Dale Watson, the FBI's Executive Assistant Director for Counterterrorism and Counterintelligence).

201. *Id.* at 220.

202. White House Press Release, *supra* note 179, *quoted in* Olson, *supra* note 177, at 467.

203. *Id.*, *quoted in* Olson, *supra* note 177, at 467.

204. Olson, *supra* note 177, at 467-68; *see* White House Press Release, *supra* note 179 ("I have determined that an extraordinary emergency exists for national defense purposes, . . . and that issuance of this order is necessary to meet the emergency.").

In addition to the above-mentioned limitations, following the September 11, 2001 attacks the press's ability to gather news was further restricted. For example, for almost three months following the attack, the press was prohibited from entering the site of the World Trade Center.[205] In fact, there were reported instances of police confiscating cameras and film, in addition to threatening reporters with citations, or actually citing them, for entering the restricted area.[206] During this time, reporters were also forbidden to report from Afghanistan, according to the Department of Defense, because of the need for secrecy in the military operations taking place there.[207] In addition, government agencies blocked access to maps and satellite images of Afghanistan as well as to information regarding national water supplies, energy facilities, nuclear plants, and chemical plants because it was considered a threat to national security.[208] Furthermore, following September 11, 2001 there was an increase in the number of denials under the FOIA because of a decision by Attorney General Ashcroft to rescind a government-wide directive that mandated the limited use of FOIA exemptions.[209] Attorney General Ashcroft promised that the Department of Justice would defend any government agency's denial of a FOIA request.[210] Ashcroft went on to establish a new policy allowing agencies to withhold information as long as they have a "sound legal basis" for doing so.[211]

Surprisingly, several of the restrictions placed on the press after September 11, 2001, were not imposed by a government order, but were instead voluntarily adopted by the press.[212] For example, at the request of the White House, executives from the three major networks, in addition to Fox News and CNN, agreed not to air "unedited, videotaped statements from Osama Bin Laden and his followers . . . [and also] agreed to remove from the taped statements

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205. Turner, *supra* note 153, at 608.

206. *Id.* at 607 (citing Reporters Committee for Freedom of the Press, Sporadic Press Restrictions Seen in the Aftermath of Terrorist Attacks (Sept. 19, 2001). Arguably, however, these restrictions were imposed so that extensive press coverage did not hamper the recovery efforts, as well as for the safety of the reporters themselves.

207. *See id.* at 607-08.

208. *Id.* at 609. Agencies also removed information from their websites. For example, the National Nuclear Security Administration removed the Department of Energy's Office of Defense Programs page from its website. *Id.*

209. *Id.* at 610.

210. *Id.* (quoting Reporters Committee for Freedom of the Press, Ashcroft Promises for FOI Act Denials (Oct. 18, 2001).

211. Ted Bridis, *Bush Backs Changes in Hacking Disclosure*, WASH. POST, Oct. 19, 2001, at A27; *see* Turner, *supra* note 153, at 610 (quoting Reporters Committee for Freedom of the Press, Ashcroft Promises for FOI Act Denials (Oct. 18, 2001).

212. *See* Turner, *supra* note 153, at 608.

'language the government consider[ed] inflammatory.'"[213] In effect, these restrictions made it very difficult for the press to gather news on the "War on Terror" and as a result made it nearly impossible for citizens to know about the decisions their government was making.[214]

The government seeks to justify the restrictions on press activity enacted after September 11, 2001 under the traditional First Amendment jurisprudence that allows restrictions on the availability of information in order to protect national security. Even though some restrictions are necessary if essential to prevent "direct, immediate, and irreparable damage to our Nation or its people,"[215] the restrictions enacted by the Bush administration in the name of national security are often grossly overreaching and must be more narrowly tailored to preserve the systemic value of the right of access. The values of government openness and accountability that are secured through a systemic right of access are the type of fundamentally democratic ideals that the War on Terror is being fought to protect; and therefore the modern restrictions on the free flow of information to the public are logically inconsistent with the systemic right of access that emphasizes the necessity of access in preserving a functioning democracy.

VIII. CONCLUSION

In sum, although the Supreme Court has grounded forty years of right-of-access jurisprudence in the First Amendment, it is an unsatisfactory basis for the right of access because the right of access goes beyond the scope of traditional First Amendment values and because the First Amendment does not provide access to the amount of information necessary to ensure the proper functioning of our democratic government. In addition, not only is there no explicit textual reference to the right of access in the First Amendment, the guarantees of freedom of speech and of press were only intended to protect against government interference through censorship or prior restraint, not to grant the press any affirmative rights. Furthermore, basing the right of access in the First Amendment does little to actually ensure press access to government held proceedings and information because the Supreme Court has held that the First

213. *Id.* (quoting The Reporters Committee for Freedom of the Press, *White House Urges TV Networks to Stop Airing Bin Laden Tapes*, Oct. 11, 2001, http://www.rcfp.org/news/2001/1011majorb.html).

214. *See id.* at 613.

215. N.Y. Times Co. v. United States, 403 U.S. 713, 730 (1971) (Stewart, J., concurring).

Amendment does not give the press any rights above those enjoyed by ordinary citizens.[216]

A better approach, and one that could provide greater protection for the ability of the press to gather and disseminate information to the public, would be to recognize the right of access as a systemic right that is inherent in, and essential to, our democratic government. Access is a systemic right that is essential to the proper functioning of the government because access, and the information it provides, ensures that the people can effectively exercise their right to vote by making informed decisions, that the people have the knowledge necessary to inform the elected representatives charged with exercising the will of their constituents, and that those elected officials remain accountable to the people.

Support for a systemic right of access can be found in several sources. Supreme Court opinions demonstrate that the Court recognizes openness and the right of access as a systemic right that is inherent in our democratic system of government. Additional evidence that the right of access is a systemic right can be found in the passage of "right to know" statutes such as the Freedom of Information Act and the Government in the Sunshine Act, which are the primary vehicles for the members of the press, as well as ordinary citizens, to obtain information about government operations. Furthermore, the legislative history and judicial treatment of these statutes shows that the government understands the importance of openness and the systemic role that the right of access plays in the proper functioning of the government. These statutes also demonstrate that Congress realizes the right of access is not included in the First Amendment guarantees of freedom of speech or the press; and, therefore, Congress chose to ensure access legislatively though these "right to know" statutes.

Finally, the recent restrictions on the right of access implemented by the federal government following the September 11, 2001 terrorist attacks suggest that even if the right of access is recognized as a systemic right, it can be limited when the security of the nation is at stake. Judicial language in recent cases considering the validity of some of these restrictions shows that courts may be moving toward explicitly recognizing the right of access as a systemic right that is inherent in, and essential to, a democratic government.[217] For example, the Sixth Circuit's admonition in *Detroit Free Press*

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216. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 802 (1978) (Burger, J., concurring) ("I can see no difference between the right of those who seek to disseminate ideas by way of a newspaper and those who give lectures or speeches . . . .").

217. *See* Detroit Free Press v. Ashcroft, 303 F.3d 681, 683 (6th Cir. 2002).

Association that "[d]emocracies die behind closed doors"[218] suggests that limitations on the right of access should be narrowly tailored to preserve the democratic ideals on which this Nation was founded.

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218. *Id.*

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