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## The Common Law and First Amendment Qualified Right of Public Access to Foreign Intelligence Law

Laura K. Donohue


*Georgetown University Law Center*, [lkdonohue@law.georgetown.edu](mailto:lkdonohue@law.georgetown.edu)

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# The Common Law and First Amendment Qualified Right of Public Access to Foreign Intelligence Law

LAURA K. DONOHUE\*

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\* Scott K. Ginsburg Professor of Law and National Security, Georgetown Law; J.D., Stanford Law School; Ph.D., University of Cambridge. © 2023, Laura K. Donohue. The Foreign Intelligence Surveillance Court and Foreign Intelligence Surveillance Court of Review (collectively, FISC/R) publicly appointed the author as amicus curiae in two of the First Amendment right of access cases discussed in this Article: *In re Certification of Questions of Law to the Foreign Intelligence Surveillance Court of Review*, No. FISC.R 18-01, GID.CA.00006 (FISA Ct. Rev. Mar. 16, 2018) (per curiam) and *In re Opinions & Orders of This Court Addressing Bulk Collection of Data Under the Foreign Intelligence Surveillance Act*, No. Misc. 13-08, GID.C.00267 (FISA Ct. Feb. 11, 2020). This Article builds on arguments the author initially advanced for the FISC/R. It further benefited from thoughtful comments provided by David Schulz at the Yale Media Freedom and Information Access Clinic and Patrick Toomey at the American Civil Liberties Union, both of whom litigated the First Amendment public right of access to certain FISC/R opinions. I am also grateful to the Information Society Project at Yale Law School for the opportunity to present this research at the 2023 Access & Accountability Conference.

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This common law right [of public access] is not some arcane relic of ancient English law. To the contrary, the right is fundamental to a democratic state. . . . Like the First Amendment, . . . the right of inspection serves to produce “an informed and enlightened public opinion.” Like the public trial guarantee of the Sixth Amendment, the right serves to “safeguard against any attempt to employ our courts as instruments of persecution,” to promote the search for truth, and to assure “confidence in . . . judicial remedies.”<sup>1</sup>

INTRODUCTION

For millennia, public access to the law has been the hallmark of the rule of law. To be legally and morally binding, rules must be promulgated. Knowledge of the law serves as the lynchpin for democratic governance. As philosopher Jeremy Bentham explained,

Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account. Recordation, appeal, whatever other institutions might present themselves in the character of checks, would be

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1. *United States v. Mitchell*, 551 F.2d 1252, 1258 (D.C. Cir. 1976) (third omission in original) (footnotes omitted) (first quoting *Grosjean v. Am. Press Co.*, 297 U.S. 233, 247 (1936); and then quoting *In re Oliver*, 333 U.S. 257, 270 n.24 (1948)), *rev'd on other grounds sub nom. Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589 (1978).

found to operate rather as cloaks than checks; as cloaks in reality, as checks only in appearance.<sup>2</sup>

Nearly every modern jurisprudence theorist follows suit. John Rawls considered publicity of a society's legal tenets to be a formal constraint.<sup>3</sup> John Finnis stated that the justness of a law depends upon whether it has been made publicly available.<sup>4</sup> H.L.A. Hart's famous "rule of recognition" required that citizens and officials know what the law is and how it is being implemented.<sup>5</sup> Lon Fuller's eight principles, which define law, include, *inter alia*, the requirement that rules be widely promulgated to ensure that society knows their remit.<sup>6</sup> He emphasized the importance of consistency between the law as written and applied. For Fuller, a failure to meet the requirements "does not simply result in a bad system of law; it results in something that is not properly called a legal system at all."<sup>7</sup>

In common law countries, judicial opinions serve as one of the most important sources of law. They direct how constitutional, statutory, and regulatory authorities are read and implemented. They bind future courts through *stare decisis*, ensuring consistency and thereby bolstering the authority of the law. Where judicial review operates, rulings further serve as a final statement of what the law is. The rationale that drives adjudication forms part of the legal corpus, as it elucidates and gives meaning to final determinations. Information, arguments, and considerations encapsulated in judicial records form part of the penumbra of legal authority. The reasoning behind the final decision, and its grounding in information presented to the court, matters.

Common law and the First Amendment thus have long enshrined a right of public access to final opinions as well as, more broadly, to materials that comprise the judicial record. While they approach the matter in different ways, both offer solid grounds for individuals to obtain access to judicial muniments. Evidence, motions made along the way, the reasoning of the court in coming to its final determination on matters before it, and the decisions themselves are all matters of public import.

Promulgating such materials satisfies fundamental democratic tenets. It ensures that citizens know what the government is doing with the authorities it has been afforded. It deepens faith in the Judiciary: justice must not just be done, but be *seen* to be done.<sup>8</sup> The Supreme Court has long recognized the "nexus between openness, fairness, and the perception of fairness."<sup>9</sup> Courts need not be

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2. 1 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE, SPECIALLY APPLIED TO ENGLISH PRACTICE 524 (1827).

3. See JOHN RAWLS, A THEORY OF JUSTICE 130, 133 (1971).

4. See JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 270–73 (2d ed. 2011).

5. See H. L. A. HART, THE CONCEPT OF LAW 100–01 (2d ed. 1994).

6. See LON L. FULLER, THE MORALITY OF LAW 39, 51 (1964).

7. *Id.* at 39.

8. See, e.g., *Gannett Co. v. DePasquale*, 443 U.S. 368, 429 (1979) (Blackmun, J., concurring in part and dissenting in part); *Offutt v. United States*, 348 U.S. 11, 14 (1954).

9. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 570 (1980).

infallible; however, “it is difficult for [people] to accept what they are prohibited from observing.”<sup>10</sup> As the Third Circuit noted, “Public confidence [in the judiciary] cannot long be maintained where important judicial decisions are made behind closed doors and then announced in conclusive terms to the public, with the record supporting the court’s decision sealed from public view.”<sup>11</sup> Public access thereby achieves multiple goals: ensuring rule of law, educating the public, and building faith in the courts. John Wigmore put it well: “Not only is respect for the law increased and intelligent acquaintance acquired with the methods of government, but a strong confidence in judicial remedies is secured which could never be inspired by a system of secrecy.”<sup>12</sup>

These considerations are relevant to all Article III courts, which fulfill a critical and distinct role in protecting the rule of law.<sup>13</sup> Like their judicial sistren, the Foreign Intelligence Surveillance Court (FISC) and Foreign Intelligence Surveillance Court of Review (FISCR), both of which are specialized Article III courts, play a foundational role in the construction of law.<sup>14</sup> They adjudicate First, Fourth, and Fifth Amendment questions, the answers to which, daily, impact every U.S. citizen.<sup>15</sup> They engage in complex statutory analysis and construction.<sup>16</sup> They adjudicate grievances against the government.<sup>17</sup> And they monitor how the Executive Branch wields its power.<sup>18</sup> The FISC and FISCR (FISC/R) address the extent to which the government violates the law—which can have a profound

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10. *Id.* at 572.

11. *United States v. Cianfrani*, 573 F.2d 835, 851 (3d Cir. 1978).

12. 6 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW 438 (James H. Chadbourne ed., 1976); see *Richmond Newspapers, Inc.*, 448 U.S. at 572.

13. The federal Judiciary encompasses geographic courts, like district and circuit courts, as well as specialized courts, such as the Tax Court, Bankruptcy Courts, the U.S. Court of Federal Claims, and the FISC/R. For more discussion of the history of geographic and specialized Article III courts in the United States, see Laura K. Donohue & Jeremy McCabe, *Federal Courts: Article I, II, III, and IV Adjudication*, 71 CATH. U. L. REV. 543, 553–58, 586–90 (2022).

14. Established in 1978 by the Foreign Intelligence Surveillance Act, the two courts act as specialized Article III entities. See discussion *infra* Section V.A.1; 50 U.S.C. §§ 1801–1885c; see also Donohue & McCabe, *supra* note 13, at 554–58 (establishing the FISC/R as specialized Article III courts).

15. See, e.g., *In re Proc. Required by § 702(i) of the FISA Amends. Act of 2008*, No. Misc 08-01, GID.C.00028, slip op. at 5–6, 10 (FISA Ct. Aug. 27, 2008); [REDACTED], No. [REDACTED], GID.C.00112, slip op. at 3 (FISA Ct. 2014); *In re FBI for an Ord. Requiring the Prod. of Tangible Things from [REDACTED]*, No. BR 14-96, GID.C.00103, slip op. at 2–3 (FISA Ct. June 19, 2014); *In re Sealed Case*, 310 F.3d 717, 746 (FISA Ct. Rev. 2002). Throughout this article, GID identifiers are applied to documents publicly available through the Georgetown University Law Library’s Foreign Intelligence Law Collection. See Laura K. Donohue ed., *About the Collection*, DIGITALGEORGETOWN: FOREIGN INTEL. L. COLLECTION, <https://repository.library.georgetown.edu/handle/10822/1052698> [<https://perma.cc/4NXL-KHBL>] (last visited Oct. 25, 2023).

16. See, e.g., *In re Prod. of Tangible Things from [REDACTED]*, No. BR 08-13, GID.C.00033, slip op. at 1–5 (FISA Ct. Dec. 12, 2008).

17. See, e.g., USA PATRIOT Act Additional Reauthorizing Amendments Act of 2006, Pub. L. No. 109-178, sec. 3, 120 Stat. 278, 278–79 (amending subsection (f)(1) of section 501 of FISA to empower a person receiving a production order to challenge its legality by filing a petition with the FISC).

18. See [REDACTED], No. [REDACTED], GID.C.00050, slip op. at 7, 11 (FISA Ct. 2009).

impact on the rights of citizens.<sup>19</sup> The courts cite to their own opinions as precedent in support of points of law.<sup>20</sup> The Executive, too, avails itself of the precedential power of FISC/R opinions.<sup>21</sup> As a matter of horizontal parity, FISC/R opinions have purchase in nonspecialized Article III courts, just as decisions from the circuits influence FISC/R determinations. Hundreds of decisions and orders issued by the FISC/R, and hundreds more judgments by nonspecialized Article III courts ruling on matters related to the Foreign Intelligence Surveillance Act (FISA) and the FISC/R's jurisdiction, are in the public domain.<sup>22</sup>

Despite the importance of judicial records to rule of law (encapsulated in the common law and First Amendment right of access to judicial records), and the critical role played by the FISC/R in interpreting and applying the law, in April 2020 the FISC/R denied jurisdiction over a petition for a First Amendment qualified right of access to opinions issued by the FISC.<sup>23</sup> Congress, apparently, had deprived the FISC/R of the power to hear a First Amendment claim for access to its own opinions.<sup>24</sup> The FISC/R drew a sharp line between itself and geographic courts: “[T]here is no question,” the court wrote, “that the non-specialized federal

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19. See, e.g., *In re* FBI for an Ord. Requiring the Prod. of Tangible Things [REDACTED], No. BR 09-15, GID.C.00048, slip op. at 3, 5–6 (FISA Ct. Nov. 5, 2009) (stating that the NSA sent query results to an email list of 189 analysts, “only 53 of whom had received the required training”); [REDACTED], No. [REDACTED], 2011 WL 10945618, at \*5, \*28 (FISA Ct. Oct. 3, 2011) (noting that the NSA misled the court regarding its targeting and minimization procedures and finding that it violated FISA and the Fourth Amendment as applied to certain multi-communication transactions); [REDACTED], No. PR/TT [REDACTED], GID.C.00092, slip op. at 2–3, 17–18, 100–05, 107–08 (FISA Ct. [REDACTED]) (noting that the “NSA exceeded the scope of authorized acquisition continuously during the more than [REDACTED] years of acquisition” and that the Federal Bureau of Investigation (FBI), Central Intelligence Agency (CIA), and National Counterterrorism Center (NCTC) “accessed unminimized U.S. person information”).

20. See, e.g., *In re* Directives [REDACTED] Pursuant to § 105B of the Foreign Intel. Surveillance Act, 551 F.3d 1004, 1011 (FISA Ct. Rev. 2008); *In re* FBI for an Ord. Requiring the Prod. of Tangible Things from [REDACTED], GID.C.00103, slip op. at 3–4; [REDACTED], GID.C.00092, slip op. at 6, 74–75; *In re* FBI for an Ord. Requiring the Prod. of Tangible Things from [REDACTED], No. BR 13-109, GID.C.00083, slip op. at 2 (FISA Ct. Oct. 11, 2013).

21. *In* *ACLU v. Clapper*, for instance, the government argued in support of its position, “[S]ince May 2006, fourteen separate judges of the FISC have concluded on thirty-four occasions that the FBI satisfied this requirement, finding ‘reasonable grounds to believe’ that the telephony metadata . . . ‘are relevant to authorized investigations.’” Defendants’ Memorandum of Law in Opposition to Plaintiffs’ Motion for a Preliminary Injunction at 16, *ACLU v. Clapper*, 959 F. Supp. 2d 724 (S.D.N.Y. 2013) (No. 13 Civ. 3994). In a separate case, the government began its en banc brief by stating, “It is well-settled that there is no First Amendment public right of access to the proceedings, records, and rulings of this Court,” citing to four FISC opinions and orders in support. The United States’ Legal Brief to the En Banc Court in Response to the Court’s Order of March 22, 2017 at 1, *In re* Ops. & Ords. of this Ct. Addressing Bulk Collection of Data Under the Foreign Intel. Surveillance Act, No. Misc. 13-08 (FISA Ct. Apr. 17, 2017).

22. See *Donohue*, *supra* note 15 (documenting hundreds of FISA-related cases before geographic and specialized Article III courts).

23. *In re* Ops. & Ords. by the FISC Addressing Bulk Collection of Data Under the Foreign Intel. Surveillance Act, 957 F.3d 1344, 1347 (FISA Ct. Rev. 2020) (per curiam); see also *In re* Ops. & Ords. of the FISC Containing Novel or Significant Interpretations of L., No. Misc. 20-02, GID.CA.00015 (FISA Ct. Rev. Nov. 19, 2020) (holding that FISC/R lacked jurisdiction to consider a First Amendment right of public access claim).

24. See *In re* Ops. & Ords. by the FISC, 957 F.3d at 1349, 1351.

courts of appeals . . . are . . . empowered to consider claims arising under the First Amendment to the Constitution.”<sup>25</sup> However, for “specialized courts like the FISC or [FISCR],” the same could not be said.<sup>26</sup> The FISCR declined to exercise either the common law doctrine of ancillary jurisdiction or inherent authority over its own records.<sup>27</sup> There was no immediate “need to protect the integrity of [its] own judicial processes.”<sup>28</sup>

When the applicants responded with a petition for a writ of certiorari, the government went even further, taking the position that the Supreme Court “itself lacks jurisdiction . . . to review the decision below.”<sup>29</sup> Apparently, no First Amendment right of access claim could be made in *any* court in the United States for the FISC/R’s records. Moreover, in lieu of the Judiciary exercising control over its own records, the government suggested that the Supreme Court garner comfort from its claim that “[t]he Executive Branch is committed to providing the public as much transparency about the FISC’s work as is consistent with the Nation’s security. And there is also a readily available judicial process under the Freedom of Information Act.”<sup>30</sup>

Dissenting from the Court’s denial of certiorari, Justice Neil Gorsuch, joined by Justice Sonia Sotomayor, raised alarm about the government’s argument that “literally *no court* in this country has the power to decide whether citizens possess a First Amendment right of access to the work of our national security courts.”<sup>31</sup> Matters handled by the FISC “carry profound implications for Americans’ privacy and their rights to speak and associate freely,” Gorsuch wrote.<sup>32</sup> He considered their proceedings to be “of grave national importance.”<sup>33</sup> Perhaps “even more fundamentally,” he noted, the government challenged “the power of this Court to review the work of Article III judges in a subordinate court.”<sup>34</sup>

Gorsuch’s remarks underscored the separation of powers issues presented by the government’s argument that it could control access to judicial opinions, effectively cutting Article III out of the equation. A court’s exercise of authority over its own records is part and parcel of the inherent judicial power which every Article III court exercises. For centuries, the appropriate course of action for members of the public, or the media, seeking access to judicial muniments has been to approach the court that initially generated the records for relief. In addition, despite the government’s attestations, the Freedom of Information Act (FOIA), designed to provide the public with access to Executive Branch records,

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25. *Id.* at 1355.

26. *Id.*

27. *See id.* at 1356–57.

28. *Id.* at 1357.

29. Brief for the United States in Opposition at 11, *ACLU v. United States*, 142 S. Ct. 22 (2021) (No. 20-1499).

30. *Id.*

31. *ACLU*, 142 S. Ct. at 23 (Gorsuch, J., dissenting).

32. *Id.*

33. *Id.*

34. *Id.*

is not the proper instrument for obtaining *judicial* documents. At an even more foundational level, the government's argument sidestepped whether the Legislature even can, as a constitutional matter, insulate a court from a First Amendment right of public access—effectively using a statute to deny citizens their constitutional rights.

This Article tackles the profound concerns raised by the government's arguments in terms of rule of law and judicial authority. Part I begins with a historical treatment of the common law presumed right of access to judicial records, laying out the contours of the current test. Part II turns to the First Amendment qualified right of access, drawing out the test applied by the courts and providing examples of procedures and muniments thus covered, before examining, in Part III, interests jointly protected by the common law and First Amendment framings.

Part IV focuses on three parallel First Amendment right of access cases brought before the FISC/R in 2013 and the months that followed, in which litigants sought access to FISC opinions containing significant interpretations of law. As aforementioned, in 2020, the FISC/R denied itself (and the FISC) jurisdiction over any First Amendment claim, leading to the dismissal of all cases in which members of the public and the media were seeking access to the law. In the subsequent denial of certiorari, Gorsuch in his dissent expressed alarm at the government's position that the Supreme Court itself lacks jurisdiction to hear a First Amendment right of access motion to the records of an Article III court. As a constitutional matter, the Supreme Court exercises authority over all lower courts—which includes the FISC/R. Like all Article III entities, the FISC/R wield inherent powers, extending, *inter alia*, to control over their own records, a principle reflected in the nonstatutory (common law and First Amendment) right of access.

The government's effort to substitute its own (ostensible) commitment to transparency and the FOIA process for the common law and constitutional rights of access strains credulity. In the foreign intelligence law context, the government frequently refuses to release judicial records, ignores FOIA requests, and enters into litigation to prevent FISC/R records from reaching the light of day, capitulating only when nonspecialized courts, and the FISC/R themselves, challenge the government's assertions. The FOIA fallback option, moreover, creates a logical inconsistency: specialized foreign intelligence courts are more familiar with the national security aspects of their work than the geographic courts. This is precisely the point of having specialized entities make sensitive determinations. Judicial bodies with the necessary background and expertise ought to address questions related to the release of their own records. This is how the First Amendment right of access has traditionally operated: requests are made to the entity that first generated the record. It is part of their inherent power and central to the separation of powers.

Part V tackles the argument that the sensitive nature of matters before the FISC/R and their institutional design foreclose public access. It considers the claim that Congress designed the FISC/R to function in an environment of secrecy with jurisdiction only over narrow, statutorily defined matters. By not



explicitly extending jurisdiction over First Amendment claims, the argument runs, Congress foreclosed any such right to petition actions before the FISC/R. The Article calls attention to four grounds that undermine this line of reasoning. First, the FISC/R operate as Article III entities, making both the common law and First Amendment right of access available. Second, the constitutional nature of the right matters: not only does the Arising Under Clause and the vesting of the judicial power in the Supreme Court ensure its jurisdiction over constitutional questions, but Congress cannot divest the People of a constitutional right via a majoritarian vote. To the extent that the Legislature shapes lower courts' jurisdiction, it is in relation to statutory authorities enacted consistent with Article I, Section 8. Third, the FISC/R's narrow focus on the limited nature of matters before the FISC ignores the extent of what both courts do in the course of adjudication. Fourth, national security concerns are hardly unique to the FISC/R. For decades, geographic courts have handled similarly sensitive matters.<sup>35</sup> In these parallel courts, despite the sensitive nature of the subjects under consideration, geographic courts routinely find both a common law and First Amendment right of access.

The Article concludes in Part V by noting that while certain information may need to be withheld in relation to particularly sensitive intelligence, insofar as matters of law and the logic employed to reach the courts' conclusions are concerned, the public has a right to seek access to the associated judicial muniments.

### I. COMMON LAW PRESUMED RIGHT OF PUBLIC ACCESS

Consistent with its common law heritage, the United States from the Founding has embraced a common law presumed right of public access to judicial records. Federal and state courts have consistently ensured that the public has had insight into the workings of the judiciary. It is not just final decisions that are made available: information influencing the court's final determination proves central to the right of access. The right can be overcome when heavily outweighed by competing demands that go to the core of judicial interests, such as situations in which fair trial, privacy, or due process stand endangered. But exceptions throughout U.S. history have been narrowly drawn, with those seeking to masquerade the

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35. Between 2001 and 2009, for example, the Government claimed the state secrets privilege in more than one hundred cases. Laura K. Donohue, *The Shadow of State Secrets*, 159 U. PA. L. REV. 77, 87 (2010). The issues before the court implicated everything from "[b]reach of contract, patent disputes, trade secrets, fraud, . . . [w]rongful death, personal injury, . . . negligence," and allegations of torture, to "environmental degradation, breach of espionage contracts, . . . defamation," criminal conduct, and constitutional claims. *Id.* at 87–89. Since that time, the geographic courts have disposed of approximately one hundred more state secrets cases, according to the State Secrets Archive maintained by the author. *See, e.g.,* *FBI v. Fazaga*, 142 S. Ct. 1051 (2022); *Wikimedia Found. v. Nat'l Sec. Agency*, 14 F.4th 276 (4th Cir. 2021); *In re Terrorist Attacks on Sept. 11, 2001*, 523 F. Supp. 3d 478 (S.D.N.Y. 2021). Others focus on prepublication review. *See, e.g.,* *Snepp v. United States*, 444 U.S. 507, 507–08, 510 (1980) (per curiam) (holding that a former CIA employee who published a book on CIA activities in South Vietnam without prepublication approval breached a fiduciary obligation).

information having the burden to demonstrate sufficiently compelling reasons to overcome the presumption of access.

A. ENGLISH COMMON LAW HERITAGE

The common law presumed right of public access to judicial muniments is “integral to our system of government.”<sup>36</sup> Since the time of Edward II, who ruled England 1307–1327, English judicial records have been public.<sup>37</sup> In 1372, Parliament expanded the common law right of access to include all court records and evidence, even if used against the king.<sup>38</sup> It was not just the final decision that mattered. Common law required, first, that “whensoever a man is enforced to yield a reason of his opinion or judgment, that then he set down all authorities; precedents, reasons, arguments and inferences whatsoever that may be probably applied to the case in question.”<sup>39</sup> Second, it demanded that such records and reports be available to any subject. Sir Edward Coke explained:

These records, for that they contain great and hidden treasure, are faithfully and safely kept (as they well deserve) in the King’s Treasury. And yet not so kept but that any subject may for his necessary use and benefit have access thereunto, which was the ancient law of England, and so is declared by an act of Parliament in 46 Edw. 3.<sup>40</sup>

Judicial records were thus both carefully preserved and made available to those with the need for access.

Paired with the public availability of the records was the guarantee that judicial proceedings themselves would remain open, giving English subjects the opportunity to watch and listen to how the law was interpreted and applied. Public hearings and the presence of lawyers ensured widespread, firsthand insight into the operation of the law.<sup>41</sup> It also served an educative function, giving subjects a deeper understanding of how the law operated. It contributed to a common understanding, as the dialogue extended across cases. The practice ensured reliability, contributing to legal legitimacy. And it helped to cement the law. It also allowed for public sentiment to provide a check on judges: should they deviate from the general understanding of fairness and justice, social and societal pressure could

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36. *United States v. Erie County*, 763 F.3d 235, 238–39 (2d Cir. 2014).

37. 1 WILLIAM BLACKSTONE, COMMENTARIES \*70–72.

38. *Compare* 46 Edw. 3 (1372) (Eng.), reprinted in THE STATUTES AT LARGE, FROM THE 15TH YEAR OF K. EDWARD III TO THE 13TH YEAR OF K. HENRY IV 2 Stat. 191, 196–97 (Danby Pickering ed., 1762), with 14 Edw. III, stat. 1, c. 14 (1340) (Eng.), reprinted in THE STATUTES AT LARGE, FROM MAGNA CARTA TO THE 14TH YEAR OF K. EDWARD III (Danby Pickering ed., 1762).

39. 2 EDWARD COKE, THE REPORTS OF SIR EDWARD COKE, at vi (Joseph Butterworth and Son & J. Cooke eds., 1826).

40. *Id.*

41. See BLACKSTONE, *supra* note 37, at \*71; WILLIAM HUDSON, A TREATISE OF THE COURT OF STAR CHAMBER 4–8 (Francis Hargrave ed., 2008) (1792).

be brought to bear. As a result, legal proceedings, like judicial records, were open. Even the much-derided Star Chamber “heard cases in public.”<sup>42</sup>

Considerations related to the rule of law undergirded the English approach, with the key component being that the law be known. For those unable to attend in person, and to ensure access to the law across geography and time, decisions reached by the court were put to paper, recorded, and available. Common law depended upon it, initially for “common erudition” and thereafter for authoritative case law.<sup>43</sup> Public knowledge further ensured consistency and reliability. *Genera customes* “guided and directed” the “proceedings and determinations in the king’s ordinary courts of justice.”<sup>44</sup> They depended “upon immemorial usage . . . for their support.”<sup>45</sup> Judges, after all, served as “the depositaries of the laws,” their decisions providing “the principal and most authoritative evidence” of the law.<sup>46</sup>

In the mid-eighteenth century, William Blackstone described how public access was given effect:

The judgment itself, and all the proceedings previous thereto, are carefully registered and preserved, under the name of records, in public repositories set apart for that particular purpose; and to them frequent recourse is had, when any critical question arises, in the determination of which former precedents may give light or assistance.<sup>47</sup>

Judicial decisions were “not only preserved as authentic records in the treasuries of the several courts, but [they] [we]re handed out to public view in the numerous volumes of reports.”<sup>48</sup> Broad knowledge provided context for future fact patterns and contexts in which legal questions arose. The reports included “histories of the several cases, with a short summary of the proceedings, which are preserved at large in the record; the arguments on both sides and the reasons the court gave for its judgment.”<sup>49</sup>

English law drew a line between formal matters of record and other judicial muniments.<sup>50</sup> The fact that a document was not part of the formal record, though,

42. 5 W. S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 156 (1927).

43. 6 JOHN BAKER, THE OXFORD HISTORY OF THE LAWS OF ENGLAND 488–89 (2003).

44. BLACKSTONE, *supra* note 37, at \*66.

45. *Id.* at \*68.

46. *Id.* at \*68.

47. *Id.* at \*68–69 (emphasis omitted).

48. *Id.* at \*70 (emphasis omitted).

49. *Id.*

50. *See, e.g.*, *Hewitt v. Pigott* [1831] 131 Eng. Rep. 155, 155, 7 Bing. 400, 401; *Browne v. Cumming* [1829] 109 Eng. Rep. 377, 378, 10 B. & C. 70, 72; *Turner v. Eyles* [1803] 127 Eng. Rep. 248, 252, 3 Bos. & Pul. 456, 464–65; *Wilson v. Rogers* [1745] 93 Eng. Rep. 1157, 1158, 2 Strange, 1242, 1242 (holding that plaintiff could inspect proceedings of the court in which he was sued insofar as the documents related to the immediate suit). In 1808, the Court of the King’s Bench determined that an individual with “title to a copyhold [wa]s entitled to inspect the court-rolls, and take copies of them” insofar as the information “relate[d] to the copyhold claimed,” regardless of whether a cause be underway. *The King v. Lucas*, [1808] 103 Eng. Rep. 765, 765, 10 East, 235, 235–36.

did not always insulate it from public view.<sup>51</sup> As Professor Simon Greenleaf later explained, “[I]n regard to the inspection of public documents, it has been admitted, from a very early period, that the inspection and exemplification of the records of the king’s courts is the common right of the subject.”<sup>52</sup>

The right of public access, according to Greenleaf, operated without restraint until the reign of Charles II, when actions for malicious prosecution increased in frequency.<sup>53</sup> Because such actions could not be supported without the judicial record, the judges issued an order to regulate the practice of obtaining any copy of an indictment for felony.<sup>54</sup> For all other matters, the common law right remained. The order proved controversial, with Lord Holt in *Groenvelt v. Burrell* challenging its authority.<sup>55</sup> In any event, it did not travel across the Atlantic. Greenleaf explained that

in the United States, no regulation of this kind is known to have been expressly made; and any limitation of the right to a copy of a judicial record or paper, when applied for by any person having an interest in it, would probably be deemed repugnant to the genius of American institutions.<sup>56</sup>

#### B. THE AMERICAN APPROACH

Reflecting their English heritage, U.S. courts, since the Founding, have recognized the common law public right of access to judicial records—itsself a subset of the broader right of individuals to examine public records. Although Congress, and in some cases state legislatures, adopted right of access statutes, the common law right both predated and paralleled these provisions, owing in large measure to the fact that it was a *judicially* created right. The key question, therefore, in determining whether a common law presumptive right of access attaches is whether a document is considered a “judicial record.”

##### 1. Historical Recognition and Parallel Statutory Provisions

As the Second Circuit recognized, “The common law right of public access to judicial documents is firmly rooted in our nation’s history.”<sup>57</sup> It forms part of the broader right of individuals to inspect public records.<sup>58</sup> And it extends beyond

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51. See *Fox v. Jones* [1828] 108 Eng. Rep. 897, 898, 7 B. & C. 732, 733–34; *Taylor v. Sheppard* [1835] 160 Eng. Rep. 110, 111, 1 Y. & C. Ex. 271, 271.

52. 1 SIMON GREENLEAF, *A TREATISE ON THE LAW OF EVIDENCE* § 471, at 623 (16th ed. 1899).

53. *Id.* at 624.

54. *Id.*

55. [1697] 91 Eng. Rep. 1065, 1065, 1 Ld. Raym. 252, 253.

56. GREENLEAF, *supra* note 52, at 624.

57. *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 119 (2d Cir. 2006).

58. See 66 AM. JUR. 2D *Records and Recording Laws* §17 (2023); see also *In re Caswell*, 29 A. 259, 259 (R.I. 1893) (“[E]very person is entitled to the inspection, either personally or by his agent, of public records (this term including legislative, executive, and judicial records, etc.), provided he has an interest therein which is such as would enable him to maintain or defend an action for which the document or record sought can furnish evidence or necessary information.”).

that which prevailed across the Atlantic.<sup>59</sup>

In the early nineteenth century, accordingly, the U.S. Supreme Court unanimously held that a court reporter could not hold a copyright to court materials, as they were already in the public domain.<sup>60</sup> No more so could a bookseller hold an exclusive copyright to the written opinions of state judges: “The whole work done by the judges constitutes the authentic exposition and interpretation of the law, which, binding every citizen, is free for publication to all, whether it is a declaration of unwritten law, or an interpretation of a constitution or a statute.”<sup>61</sup>

Circuit and district courts followed suit. In 1879, for instance, the Circuit Court in the Southern District of Ohio recognized the existence of “[t]he [common law] right to examine certain [judicial] records and papers.”<sup>62</sup> Just over a decade later, the Circuit Court in the District of Nebraska noted “the great importance to the public of having complete and accurate indexes to the records of judgments in these courts, and of affording to the public free and ready access to the same.”<sup>63</sup> Soon thereafter, the Washington, D.C. Court of Appeals explained in *Ex parte Drawbaugh* that

any attempt to maintain secrecy, as to the records of the court, would seem to be inconsistent with the common understanding of what belongs to a public court of record, to which all persons have the right of access, and to its records, according to long established usage and practice.<sup>64</sup>

It was not just certain litigants, judicial employees, or government officials who held such a right, but, as Supreme Court Justice John Paul Stevens later explained, “any member of the public.”<sup>65</sup> State courts similarly recognized the common law right. Some went even further. In 1886, for instance, the

59. *Compare* *Browne v. Cumming* [1829] 109 Eng. Rep. 377, 378, 10 B. & C. 70, 72 (stating that access to records extends to those “in which the subject may be interested as matters of evidence upon questions of private right”), *with* *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 597 (1978) (stating that U.S. common law “generally do[es] not condition enforcement of this right on a proprietary interest in the document or upon a need for it as evidence in a lawsuit”). At times, U.S. courts could be quite scathing about the distinction. *See, e.g.,* *Nowack v. Fuller*, 219 N.W. 749, 751 (Mich. 1928) (“This rule adopted by the English courts has no basis in reason or justice. It is absurd to hold that a man could inspect the public records, providing his purpose was to use the information in some litigation, and to deny him the right to inspect for some other purpose that might be equally beneficial to him. It does not protect all of his substantial rights and has not been received with general favor in this country.”).

60. *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 668 (1834).

61. *Banks v. Manchester*, 128 U.S. 244, 253 (1888).

62. *In re McLean*, 16 F. Cas. 237, 239 (C.C.S.D. Ohio 1879) (No. 8,877).

63. *In re Chambers*, 44 F. 786, 789 (C.C.D. Neb. 1891) (noting that the statute “puts it out of the power of either the clerk or the court to deny to a citizen the right, freely, and without charge, to inspect and examine the records mentioned” because “these are public records, made by the authority and direction of the United States whose property they are, and . . . are kept in a public office, by a public officer, for public purposes”); *see* 66 AM. JUR. 2D *Records and Recording Laws* §17 (2023) (acknowledging the public “right of access to and inspection of public records”).

64. 2 App. D.C. 404, 407–08 (D.C. Cir. 1894).

65. *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 614 n.1 (1978) (Stevens, J., dissenting) (emphasis omitted) (quoting *United States v. Mitchell*, 386 F. Supp. 639, 641 (D.D.C. 1975)) (“This privilege of the public to inspect and obtain copies of all court records, including exhibits while in the custody of the Clerk, is of long standing in this jurisdiction and reaches far back into our common law

Massachusetts Supreme Court held that members of the public had the public right of access to the state supreme court decisions following delivery of the judgment to the reporter, thus prohibiting the award of an exclusive right of their publication.<sup>66</sup>

In some cases, the common law right became augmented by federal statutory provisions, which paralleled but did not supplant the preexisting common law right. In 1848, for instance, Congress passed an act providing

[t]hat all books in the offices of the clerks of the Circuit and District Courts of the United States, containing the docket or minute of the judgments or decrees of said courts, shall, during office hours, be open to the inspection of any person desiring to examine the same, without any fee or charge therefor.<sup>67</sup>

The Legislature's actions reflected the common law requirements. In 1875, Congress further provided that

[a]ccounts and vouchers of clerks, marshals, and district attorneys shall be made in duplicate, to be marked respectively "original" and "duplicate". And it shall be the duty of the clerk to forward the original accounts and vouchers of the officers . . . , when approved, to the proper accounting officers of the Treasury, and to retain in his office the duplicates, where they shall be open to public inspection at all times.<sup>68</sup>

Similarly, in 1888, Congress required clerks to "prepare and keep in their respective offices complete and convenient indices and cross-indices of the judgment records of said courts," stating that "such indices and records shall at all times be open to the inspection and examination of the public."<sup>69</sup> As the Circuit Court in the District of Nebraska explained three years later, this statute took "cognizance of the great importance to the public of having complete and accurate indexes to the records of judgments in these courts, and of affording to the public free and ready access to the same."<sup>70</sup> The provision did not erase the common law right.

State statutes also paralleled the common law right, often incorporating and then going beyond it.<sup>71</sup> Nevertheless, in each case, they did not supplant the

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and traditions. Absent special circumstances, *any* member of the public has a right to inspect and *obtain copies* of such judicial records." (quoting *Mitchell*, 386 F. Supp. at 641)).

66. See *Nash v. Lathrop*, 6 N.E. 559, 560–61 (Mass. 1886).

67. Act of Aug. 12, 1848, ch. 166, 9 Stat. 284, 292.

68. Act of Feb. 22, 1875, ch. 95, 18 Stat. 333, 333.

69. Act of Aug. 1, 1888, ch. 729, § 2, 25 Stat. 357, 357–58; see Act of Feb. 26, 1853, ch. 80, 10 Stat. 161, 163 (fixing the clerk's fees "[f]or searching the records of the court for judgments, decrees, and other instruments").

70. *In re Chambers*, 44 F. 786, 789 (C.C.D. Neb. 1891).

71. See, e.g., *Bend Publ'g Co. v. Haner*, 244 P. 868, 869 (Or. 1926) (describing a state law providing for free inspection of all state and country records or files by all persons, expanding prior common law provision which limited inspection to examination for some lawful purpose, and not mere curiosity); *People ex rel. Gibson v. Peller*, 181 N.E.2d 376, 378 (Ill. App. Ct. 1962) (holding that the State Records Act does not abrogate the common law right to inspect and use public records).

common law right for the simple reason that they could not. As the New Hampshire Supreme Court explained, “An essential power of the judiciary is the power to control its own proceedings. The doctrine of separation of powers is violated when one branch of government usurps an essential power of another.”<sup>72</sup> The statute therefore had to be construed as providing for the judiciary to “retain[] ultimate authority over access to court records.”<sup>73</sup>

This approach persists in modern times. As one federal bankruptcy court explained, “When Congress enacted the Bankruptcy Code in 1978, it gave the long-standing federal common law of public access to judicial records a statutory boost.”<sup>74</sup> The statute in that case provided that any “paper filed in a case under this title and the dockets of a bankruptcy court are public records and open to examination by an entity at reasonable times without charge.”<sup>75</sup> Narrow exceptions were drawn to cover circumstances related to trade secrets or confidential research, defamation, or the public release of information which could provide a basis for identity theft.<sup>76</sup> The result was a law that established “a broad right of public access, subject only to limited exceptions set forth in the statute, to all papers filed in a bankruptcy case.”<sup>77</sup> More recently, in the 2017 case of *Metlife, Inc. v. Financial Stability Oversight Council*, the U.S. Court of Appeals for the District of Columbia determined that the Dodd-Frank Act did not supersede the common law right of public access to judicial records.<sup>78</sup>

The result is a jurisprudence marked by hundreds of cases in which federal and state courts have acknowledged the common law presumed right of public access to judicial records.<sup>79</sup> As the Supreme Court in *Nixon v. Warner Communications* wrote, “It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents.”<sup>80</sup>

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72. *Associated Press v. State*, 888 A.2d 1236, 1256 (N.H. 2005) (citation omitted).

73. *Id.*

74. *In re Peterson*, 597 B.R. 434, 437 (Bankr. D. Colo. 2019).

75. 11 U.S.C. § 107(a).

76. *Id.* § 107(b)–(c)(1).

77. *Gitto v. Worcester Telegram & Gazette Corp. (In re Gitto Glob. Corp.)*, 422 F.3d 1, 7 (1st Cir. 2005).

78. 865 F.3d 661, 669 (D.C. Cir. 2017).

79. See 76 C.J.S. *Records* § 82 (2023); M. C. Dransfield, Annotation, *Restricting Access to Judicial Records*, 175 A.L.R. 1260 (1948); see also, e.g., *In re Application for Access to Video Exhibits*, 575 F. Supp. 3d 101, 107 (D.D.C. 2021) (“There is a ‘strong presumption in favor of public access’ when a document is a judicial record.” (quoting *In re Leopold to Unseal Certain Elec. Surveillance Applications and Ords.*, 964 F.3d 1121, 1127 (D.C. Cir. 2020))); *United States v. Gotti*, 322 F. Supp. 2d 230, 239 (E.D.N.Y. 2004) (“There is a common law right of access to judicial documents.”); *In re Del. Cnty. Newspaper Publishers’ Ass’n*, 48 Pa. D. & C. 1, 4–5 (Ct. Com. Pl. 1943) (finding a common law right of access to documents filed with a court to aid in their decisionmaking).

80. *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 597 (1978); see *Nowack v. Fuller*, 219 N.W. 749, 750 (Mich. 1928).

## 2. What Constitutes a “Judicial Record”?

The common law right derives from judicial power over courts’ muniments.<sup>81</sup> As the Supreme Court explained in 1978, “Every court has supervisory power over its own records and files.”<sup>82</sup> It is part of their inherent power and central to the concept of separation of powers.<sup>83</sup> For centuries, this right has been recognized by federal and state courts. In 1908, for instance, one state court noted that

[t]he entries on the docket grow out of the employment of the court’s inherent power in that cause, and, unless some wholesome reason exists to require secrecy, to the end that the court’s function may not be defeated by publicity, no such dangerous qualification of the general policy of the open course of justice should, as administered through our courts, be sanctioned.<sup>84</sup>

Whether the common law right of public access therefore “applies to a particular document . . . [depends] on whether th[e] item is considered . . . a “judicial record.””<sup>85</sup> To answer this question, courts distinguish between “judicial records” and “other mere official records.”<sup>86</sup> The latter lie outside Article III bounds. Regardless of whether the Executive Branch chooses to shield its records from scrutiny, as it routinely does in regard to patents, for instance, such arguments have no purchase in the judicial realm. In 1894, the D.C. Court of Appeals elaborated:

The rules of the Patent Office have no application to the proceedings of this court . . . . They may be very necessary and proper for conducting the affairs of that office, . . . but it does not follow that similar rules should be adopted and enforced as applicable in an appellate court of record.<sup>87</sup>

81. See *In re Gitto/Glob. Corp.*, 321 B.R. 367, 375 (Bankr. D. Mass. 2005).

82. *Nixon*, 435 U.S. at 598; *accord* *United States v. Hubbard*, 650 F.2d 293, 315 (D.C. Cir. 1980).

83. See *[UNDER SEAL] v. [UNDER SEAL]*, 273 F. Supp. 3d 460, 467 (S.D.N.Y. 2017). Numerous scholars have written more generally about the inherent and supervisory powers of the judiciary. See generally, e.g., Amy Coney Barrett, *The Supervisory Power of the Supreme Court*, 106 COLUM. L. REV. 324 (2006) (examining the Supreme Court’s supervisory power over the circuit and district courts); Michael M. Martin, *Inherent Judicial Power: Flexibility Congress Did Not Write into the Federal Rules of Evidence*, 57 TEX. L. REV. 167 (1979) (considering the role of inherent judicial power in relation to the Federal Rules of Evidence).

84. *Jackson v. Mobley*, 47 So. 590, 593 (Ala. 1908); see 45 AM. JUR. *Records and Recording Laws* § 21 (1943) (“Every court of record has a supervisory and protecting charge over its records and the papers belonging to its files.”); *A.P. v. M.E.E.*, 821 N.E.2d 1238, 1246 (Ill. App. Ct. 2004).

85. *Purcell v. Gilead Scis., Inc.*, 415 F. Supp. 3d 569, 574 (E.D. Pa. 2019) (quoting *In re Avandia Mktg., Sales Pracs. & Prods. Liab. Litig.*, 924 F.3d 662, 672 (3d Cir. 2019)); see *SV Int’l, Inc. v. Fu Jian Quanyu Indus. Co.*, 820 F. Supp. 2d 677, 679–80 n.1 (M.D.N.C. 2011); *Benedict v. Hankook Tire Co.*, 323 F. Supp. 3d 747, 755 (E.D. Va. 2018). Numerous state cases take the same approach. See, e.g., *Faulk v. Phila. Clerk of Cts.*, 116 A.3d 1183, 1187 n.5 (Pa. Commw. Ct. 2015).

86. *Ex parte Drawbaugh*, 2 App. D.C. 404, 407 (D.C. Cir. 1894).

87. *Id.* at 405.



For judicial records in particular, “by statute and unvarying usage, the custodian, upon payment of fees allowed by law, *is bound to furnish copies*.”<sup>88</sup>

Just because something has been filed with a court does not mean that it is subject to a public right of access.<sup>89</sup> Instead, courts look to the role that the record plays in the adjudicative process.<sup>90</sup> This goes directly to the function of the document in relation to the Judiciary’s core Article III capacity. Courts consider whether the material is “relevant to the performance of the judicial function and useful in the judicial process.”<sup>91</sup> They ask whether the documents are used as part of judicial proceedings—or, put another way, “the degree of judicial reliance on the document in question and the relevance of the document’s specific contents to the nature of the proceeding.”<sup>92</sup> “Documents created by or at the behest of counsel and presented to a court in order to sway a judicial decision are judicial documents that trigger the presumption of public access.”<sup>93</sup> Judges also consider “whether access to the [information] would materially assist the public in understanding the issues before the . . . court, and in evaluating the fairness and integrity of the court’s proceedings.”<sup>94</sup> Items which “play no role in the performance of Article III functions” do not qualify.<sup>95</sup> In contrast, “[i]n all cases . . . ‘materials filed in court [and] ‘intended to influence the court’” qualify as judicial records.”<sup>96</sup> So material not actually filed with a court (and therefore not part of the adjudicatory process) may not be included.<sup>97</sup> Courts consider whether the material is relevant to the manner in “which the government investigates and prosecutes its citizens.”<sup>98</sup> Of equal

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88. *Id.* at 407.

89. *United States v. Amodeo*, 44 F.3d 141, 145 (2d Cir. 1995) (“[T]he mere filing of a paper or document with the court is insufficient to render [it] a judicial document subject to the right of public access.”).

90. *Id.* (“[T]he item filed must be relevant to the performance of the judicial function and useful in the judicial process. . . .”); *SEC v. Am. Int’l Grp.*, 712 F.3d 1, 3 (D.C. Cir. 2013); *In re Leopold to Unseal Certain Elec. Surveillance Applications & Ords.*, 964 F.3d 1121, 1128 (D.C. Cir. 2020); *United States v. Doe*, 870 F.3d 991, 997 (9th Cir. 2017); *Cable News Network, Inc. v. FBI*, 984 F.3d 114, 118 (D.C. Cir. 2021).

91. *Amodeo*, 44 F.3d at 146; *see United States v. HSBC Bank USA, N.A.*, 863 F.3d 125, 133 (2d Cir. 2017).

92. *Newsday LLC v. County of Nassau*, 730 F.3d 156, 166–67 (2d Cir. 2013).

93. *Schiller v. City of New York*, No. 04 Civ. 7922, 2006 WL 2788256, at \*5 (S.D.N.Y. Sept. 27, 2006).

94. *Newsday*, 730 F.3d at 167.

95. *SEC v. TheStreet.com*, 273 F.3d 222, 232 (2d Cir. 2001) (quoting *United States v. Amodeo*, 71 F.3d 1044, 1050 (2d Cir. 1995)).

96. *In re Application for Access to Certain Sealed Video Exhibits*, 546 F. Supp. 3d 1, 4 (D.D.C. 2021) (second alteration in original) (quoting *United States v. Jackson*, No. 21-mj-115, 2021 WL 1026127, at \*4 (D.D.C. March 17, 2021)); *see Baxter Int’l, Inc. v. Abbott Lab’ys*, 297 F.3d 544, 545 (7th Cir. 2002) (noting that the possibility that records could “influence or underpin the judicial decision” makes them presumptively “open to public inspection”).

97. *See, e.g., Sanford v. Bos. Herald-Traveler Corp.*, 61 N.E.2d 5, 6 (Mass. 1945) (holding that a declaration prior to trial was not a public record under common law right of access); *Dahl v. Bain Cap. Partners, LLC*, 891 F. Supp. 2d 221, 224 (D. Mass. 2012) (holding that discovery material was not subject to common law right of access where it was “not filed . . . as exhibits . . . [or] considered by the Court in ruling on any Complaint-related motion”).

98. *United States v. Wecht*, 484 F.3d 194, 210 (3d Cir. 2007).

importance is the relationship of the material being sought to substantive rights.<sup>99</sup> Such considerations apply to civil and to criminal proceedings.<sup>100</sup>

Under the common law, finding that material constitutes a “judicial record” creates a presumptive right of public access.<sup>101</sup> Cases over the years have identified a wide range of material that so qualifies—even in areas traditionally thought of as highly secretive.

Consider, for instance, grand juries, whose “basic purpose . . . was to provide a fair method for instituting criminal proceedings against persons believed to have committed crimes.”<sup>102</sup> To ensure juror independence in considering the strength of the evidence prior to prosecution, their proceedings were “closed to the public, and records of such proceedings [were] kept from the public eye.”<sup>103</sup> At the Founding, “[t]he rule of grand jury secrecy was imported into [U.S.] federal common law,” becoming “an integral part of [the U.S.] criminal justice system.”<sup>104</sup> The practice accompanied adoption of the Fifth Amendment right to a grand jury, offering a further, constitutional grounding.<sup>105</sup> Such protection is not absolute: where considered essential for purposes of fairness and justice, common law allows for limited access.<sup>106</sup> The decision is left “largely within the discretion of the court whose grand jury is concerned.”<sup>107</sup>

99. See, e.g., *In re* U.S. for an Ord. Pursuant to 18 U.S.C. § 2703(D), 707 F.3d 283, 290 (4th Cir. 2013); *In re* Providence J. Co., 293 F.3d 1, 9–10 (1st Cir. 2002); *United States v. El-Sayegh*, 131 F.3d 158, 162 (D.C. Cir. 1997).

100. See, e.g., *United States v. Schlette*, 842 F.2d 1574, 1583 (9th Cir. 1988) (recognizing a common law right of access to presentencing reports in criminal case); *San Jose Mercury News, Inc. v. U.S. Dist. Ct.—N. Dist. (San Jose)*, 187 F.3d 1096, 1102–03 (9th Cir. 1999) (recognizing “the existence of a pre-judgment federal common law right of access to civil court documents”); *IDT Corp. v. eBay*, 709 F.3d 1220, 1222 (8th Cir. 2013) (noting that “the common-law right of access applies to judicial records in civil proceedings”).

101. See, e.g., *In re* Leopold to Unseal Certain Elec. Surveillance Applications & Ords., 964 F.3d 1121, 1129 (D.C. Cir. 2020); *United States v. Hubbard*, 650 F.2d 293, 317 (D.C. Cir. 1980); *Zurich Am. Ins. Co. v. Rite Aid Corp.*, 345 F. Supp. 2d 497, 503 (E.D. Pa. 2004); *Domtar AI Inc. v. J.D. Irving, Ltd.*, 43 F. Supp. 3d 635, 643 (E.D.N.C. 2014); *In re* Repts. Comm. for Freedom of the Press to Unseal Crim. Prosecution of Assange, 357 F. Supp. 3d 528, 533 (E.D. Va. 2019); *Benedict v. Hankook Tire Co.*, 323 F. Supp. 3d 747, 754 (E.D. Va. 2018); *ACLU v. Holder*, 652 F. Supp. 2d 654, 666 (E.D. Va. 2009); *Test Masters Educ. Servs., Inc. v. Robin Singh Educ. Servs., Inc.*, 799 F.3d 437, 454 (5th Cir. 2015); *Kile v. United States*, 915 F.3d 682, 688 (10th Cir. 2019); *Allied Tech. Grp., Inc. v. United States*, 94 Fed. Cl. 16, 23 n.1 (Fed. Cl. 2010). Circuit courts review district court determinations that material constitutes a judicial record de novo. *League of Women Voters of the U.S. v. Newby*, 963 F.3d 130, 135 (D.C. Cir. 2020).

102. *Costello v. United States*, 350 U.S. 359, 362 (1956).

103. See *Douglas Oil Co. of Cal. v. Petrol Stops Nw.*, 441 U.S. 211, 218 n.9 (1979) (citing Richard M. Calkins, *Grand Jury Secrecy*, 63 MICH. L. REV. 455, 457 (1965)) (noting that the practice has occurred “[s]ince the 17th century”).

104. *Id.*

105. See *Costello*, 350 U.S. at 362 (“There is every reason to believe that our constitutional grand jury was intended to operate substantially like its English progenitor.”); see also *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 802 (1989) (stating in dicta that “[u]ndoubtedly the common-law protections traditionally associated with the grand jury attach to the grand jury required by [the Fifth Amendment]—including the requisite secrecy of grand jury proceedings”). The Supreme Court has never ruled on the extent to which the Fifth Amendment requires secrecy.

Adopting this approach, the Seventh Circuit has granted a common law right of access to grand jury minutes and transcripts.<sup>108</sup> In *Carlson v. United States*, the court noted that denying such access would create an injury in fact and thus help to establish standing.<sup>109</sup> Merely by being a member of public, the plaintiff could “assert his ‘general right to inspect and copy . . . judicial records.’”<sup>110</sup> In 2014, the Ninth Circuit similarly considered a request to unseal transcripts related to a grand jury’s contempt proceedings.<sup>111</sup> The court looked to the fact that oral argument in an open forum had been held and that there was no clear “possibility that unsealing the appellate docket, the parties’ appellate briefs, and the motions filed in this appeal w[ould] harm a compelling government interest.”<sup>112</sup> The logic employed is instructive: the grand jury is part of the judicial process, so its minutes and transcripts are judicial records. The public therefore has a right to petition a court to obtain access.

Even the rules adopted to regulate grand juries recognize the unique powers of the court. Under the 1946 Federal Rules of Criminal Procedure, grand jurors, attorneys, interpreters, and stenographers were prohibited from disclosing the matter before the grand jury—*unless* directed by the court “preliminarily to or in connection with a judicial proceeding” or when permitted by the court.<sup>113</sup> The Advisory Committee explained in its note to the 1944 adoption that it intended the rule to “continue[] the traditional practice of secrecy on the part[] of members of the grand jury, *except when the court permits a disclosure.*”<sup>114</sup> Over time, the rule has been amended, extending the blanket of secrecy to operators of recording devices, transcribers, attorneys for the government, and individuals to whom

106. See *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 233–34 (1940) (noting that although “[g]rand jury testimony is ordinarily confidential[,] . . . disclosure is wholly proper” once “the grand jury’s functions are ended . . . where the ends of justice require it”); *Metzler v. United States*, 64 F.2d 203, 206 (9th Cir. 1933) (“Where the ends of justice can be furthered thereby and when the reasons for secrecy no longer exist, the policy of the law requires that the veil of secrecy be raised.”); *United States v. Farrington*, 5 F. 343, 346 (N.D.N.Y. 1881) (noting that “[i]t is only practicable” for courts to exercise “a salutary supervision over the proceedings of a grand jury . . . by removing the veil of secrecy whenever evidence of what has transpired before [the grand jury] becomes necessary to protect public or private rights”).

107. *In re Grand Jury Procs.*, 4 F. Supp. 283, 284 (E.D. Pa. 1933).

108. See *Carlson v. United States*, 837 F.3d 753, 757–60 (7th Cir. 2016).

109. *Id.* at 758.

110. *Id.* at 759 (omission in original) (quoting *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 597 (1978)).

111. *United States v. Index Newspapers LLC*, 766 F.3d 1072, 1078 (9th Cir. 2014).

112. *Id.* at 1097.

113. FED. R. CRIM. P. 6(e)(2)(B), (3)(E); see Rules Enabling Act of 1934, 28 U.S.C. §§ 2071–2077 (authorizing the Supreme Court to promulgate rules of procedure which carry the force and effect of law). There are also various statutory exceptions to the rules of secrecy. See, e.g., Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Pub. L. No. 107-56, § 203(a), 115 Stat. 272, 279 (2001) (codified at FED. R. CRIM. P. 6(e)(3)(C)) (amending Rule 6(e) to allow government attorneys to disclose any grand jury matter related to “foreign intelligence or counterintelligence . . . , or foreign intelligence information . . . to any Federal law enforcement, intelligence, protective, immigration, national defense, or national security official in order to assist the official receiving that information in the performance of [that official’s] duties”).

114. FED. R. CRIM. P. 6(e) advisory committee’s note to 1944 amendment (emphasis added).

disclosure is made consistent with certain law enforcement exceptions.<sup>115</sup> *Pari passu*, explicit exceptions expanded to allow the court within whose domain the grand jury was empaneled to authorize disclosure in several contexts, including:

- (i) preliminarily to or in connection with a judicial proceeding; (ii) at the request of a defendant who shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury; [and] (iii) at the request of the government, when sought by a foreign court or prosecutor for use in an official criminal investigation.<sup>116</sup>

All of these exceptions are for matters central to the administration of justice.

The rules regarding grand jury secrecy do not preclude the courts' inherent authority to release further information.<sup>117</sup> Three circuits and numerous district courts agree.<sup>118</sup> They offer a range of reasons, noting, *inter alia*, that courts have always had supervisory authority over grand juries, which includes the discretion to determine when to release the associated materials; that the Federal Rules of Criminal Procedure did not eliminate courts' supervisory authorities; and that the history of the Rules and Advisory Committees demonstrates that the purpose of Rule 6(e) was to be *reflective* of the common law norms adopted by the Judiciary.<sup>119</sup>

In making exceptions to the general rule of secrecy, courts consider a range of factors, such as who is seeking disclosure (and why), "what specific information is being sought," when the grand jury proceedings took place, "the extent to which the desired material . . . has [already] been . . . made public," who might be impacted by release of the information, and whether there is a need to continue to maintain secrecy.<sup>120</sup> In 2019, the Congressional Research Service recognized that among the courts, "the trend appears to be in favor of recognizing a court's extra-textual inherent authority to release grand jury materials."<sup>121</sup>

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115. FED. R. CRIM. P. 6(e)(2)(B).

116. FED. R. CRIM. P. 6(e)(3)(E).

117. See COMM. ON RULES OF PRAC. & PROC., MEETING OF JUNE 11-12, 2012: MINUTES 44 (2012), [https://www.uscourts.gov/sites/default/files/fr\\_import/ST06-2012-min.pdf](https://www.uscourts.gov/sites/default/files/fr_import/ST06-2012-min.pdf) [<https://perma.cc/8HMC-YPV6>].

118. See, e.g., *Carlson v. United States*, 837 F.3d 753, 755–56 (7th Cir. 2016); *In re Craig*, 131 F.3d 99, 103 (2d Cir. 1997); *In re Petition to Inspect & Copy Grand Jury Materials*, 735 F.2d 1261, 1268–69 (11th Cir. 1984); *In re Nichter*, 253 F. Supp. 3d 160, 165 (D.D.C. 2017); see also *In re Special Grand Jury 89–2*, 450 F.3d 1159, 1178 (10th Cir. 2006) (noting that "relief may be proper under the court's inherent authority" but declining to rule on the matter). *But see* *McKeever v. Barr*, 920 F.3d 842, 845 (D.C. Cir. 2019) (holding that the district court has no authority outside Federal Rule of Criminal Procedure 6(e) to disclose grand jury matter). The Eighth Circuit has taken contradictory positions over this question. Compare *United States v. McDougal*, 559 F.3d 837, 840 (8th Cir. 2009) ("[C]ourts will not order disclosure absent a recognized exception to Rule 6(e) . . ."), with *In re Grand Jury Subpoena Duces Tecum*, 797 F.2d 676, 680 (8th Cir. 1986) (acknowledging the inherent authority of the court to require disclosure limitations "in an appropriate case" even where Rule 6(e) does not provide for it).

119. *Carlson*, 837 F.3d at 762–63; *In re Petition to Inspect & Copy Grand Jury Materials*, 735 F.2d at 1268; *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 399 (1959).

120. *In re Craig*, 131 F.3d at 106.

Courts have similarly found that search warrant applications and affidavits, despite being drawn up by the Executive and presented to a judge in camera and ex parte, qualify as judicial records for purposes of the common law right of access in the course of an investigation<sup>122</sup> and following its termination.<sup>123</sup> The Fourth Circuit has squarely held that “a newspaper has a common law right of access to affidavits supporting search warrants”—even though a First Amendment right of access does not apply.<sup>124</sup> Covered, too, are electronic communication surveillance applications and orders obtained as part of a criminal investigation open to public inspection.<sup>125</sup> Such documents are part and parcel of the judicial process, not least because they become a basis on which the court reaches its final determination.

Books containing the docket or minute entries of the judgments and decrees of the court constitute judicial records for purposes of the common law presumptive right of access,<sup>126</sup> as do criminal complaints.<sup>127</sup> This includes any complaint that triggers legal consequences—even in a settlement context.<sup>128</sup> Accordingly, in 2017, the Southern District of New York determined that Time Inc. and the Reporters Committee for Freedom of the Press had a common law right of access to the Settlement Transcript in a case against (former) President Donald Trump.<sup>129</sup> “[B]ecause the district court was required to review and approve the settlement terms under Rule 23(e)” and the parties had failed to articulate

121. MICHAEL A. FOSTER, CONG. RSCH. SERV., R45456, FEDERAL GRAND JURY SECRECY: LEGAL PRINCIPLES AND IMPLICATIONS FOR CONGRESSIONAL OVERSIGHT 26 (2019), [https://perma.cc/A4R8-UWDP](https://sgp.fas.org/crs/secretary/R45456.pdf).

122. See *United States v. All Funds on Deposit at Wells Fargo Bank in S.F., Cal.*, in Acct. No. 7986104185, 643 F. Supp. 2d 577, 580, 583 (S.D.N.Y. 2009).

123. See *United States v. Bus. of Custer Battlefield Museum & Store*, 658 F.3d 1188, 1192–96 (9th Cir. 2011); *United States v. Kott*, 380 F. Supp. 2d 1122, 1124 (C.D. Cal. 2004). Even in cases where the presumption of access is overcome, courts still recognize that it applies. See *In re Granick*, 388 F. Supp. 3d 1107, 1119–21 (N.D. Cal. 2019); *In re WP Co.*, 201 F. Supp. 3d 109, 128 (D.D.C. 2016).

124. *In re Application & Affidavit for a Search Warrant*, 923 F.2d 324, 326 (4th Cir. 1991).

125. See *In re Leopold to Unseal Certain Elec. Surveillance Applications Ords.*, 964 F.3d 1121, 1128–29 (D.C. Cir. 2020) (holding that applications to surveil electronic communications in closed criminal investigations constitute judicial records subject to the common law presumption of access).

126. See *In re McLean*, 16 F. Cas. 237, 239 (C.C.S.D. Ohio 1879) (No. 8,877) (“The right to examine certain records and papers . . . exists as to the books containing the docket or minute entries of the judgments and decrees of the court.”).

127. See *United States v. Nojay*, No. 16-mj-600, slip op. at 5, 8, 13 (W.D.N.Y. Nov. 17, 2016) (recognizing “[c]ounsel for the government asserts that a criminal complaint ‘is the central judicial document in a criminal proceeding’ and thus by definition is a judicial document presumptively entitled to public inspection under either the common law or the First Amendment,” stating “[t]here is no question that a criminal complaint that confirms a judicial probable cause finding that an individual committed a federal criminal offense is a judicial document that is entitled to a weighty presumption of public access,” and concluding “the balance of competing interests does not favor preventing public access to the criminal complaint and the government’s motion to unseal the complaint must be granted”).

128. See *Bernstein v. Bernstein Litowitz Berger & Grossmann LLP*, 814 F.3d 132, 136 (2d Cir. 2016).

129. *Hardy v. Kaszycki & Sons*, No. 83-cv-6346, 2017 WL 6805707, at \*1, \*8 (S.D.N.Y. Nov. 21, 2017).

sufficient grounds for confidentiality, the common law presumption of access applied.<sup>130</sup>

Courts have routinely found briefs to be within the common law right on the grounds that such documents are designed “to influence a judicial decision.”<sup>131</sup> Upon being filed with the court, discovery documents similarly are considered judicial records.<sup>132</sup> A similar approach applies to documents marked as a court exhibit during a trial—in certain circumstances, personally identifiable information may narrowly be excised, as long as the document is more generally open to the public.<sup>133</sup> The judge need not rely on such materials for them to be subject to the common law right of access.<sup>134</sup> Nor must the exhibit ever go to a jury.<sup>135</sup> To the contrary, the mere fact of filing is sufficient.

Material related to witness testimony also qualifies. State courts for more than a century have found such documents consistent with the common law public right of access. In the 1903 case of *Jenkins v. State*, for instance, the Texas Court of Criminal Appeals held that inquest records incorporating the testimony of a witness constituted a public document, which any accused of murder had a right to inspect.<sup>136</sup> Five years later, in *Jackson v. Mobley*, the Alabama Supreme Court granted mandamus to require the clerk of the circuit court to provide a criminal file incorporating subpoenas for two witnesses, explaining that “the defendant in the cause has the right to have the opportunity afforded by such a docket, when properly kept, to know upon whom as a witness the power of the court in that

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130. *Id.* at \*3.

131. *League of Women Voters of the U.S. v. Newby*, 963 F.3d 130, 136 (D.C. Cir. 2020).

132. *See Bond v. Utreras*, 585 F.3d 1061, 1073–78 (7th Cir. 2009); *see also Standard Inv. Chartered, Inc. v. Nat’l Ass’n of Sec. Dealers, Inc.*, 621 F. Supp. 2d 55, 63–69 (S.D.N.Y. 2007) (noting that “unfiled documents do not qualify as judicial”).

133. *See, e.g., United States v. Akhavan*, 532 F. Supp. 3d 181, 186–88 (S.D.N.Y. 2021) (determining that the common law and First Amendment right of access applied and allowing for redaction of “sensitive personally identifying information and bank records”); *In re Motions for Access of Garlock Sealing Techs. LLC*, 488 B.R. 281, 297–98 (D. Del. 2013) (determining that law firm statements entered into exhibit, despite containing personal identification information and not entered into the public electronic docket system, constituted “judicial records” to which a presumptive right of public access attached because they were filed with a clerk of court); *see also United States v. Mullins*, No. 22-cr-120, 2023 WL 3159418, at \*3 n.3 (S.D.N.Y. Apr. 26, 2023) (explaining the court in *Akhavan* “unseal[ed] criminal trial exhibits with narrowly tailored redactions for ‘sensitive personally identifying information,’ because ‘the interest . . . in preventing public access to [] sensitive personally identifying information . . . outweighed the especially strong common law presumption of access’” (second alteration and omissions in original) (quoting *Akhavan*, 532 F. Supp. 3d at 188)); *United States v. Sattar*, 471 F. Supp. 2d 380, 389 (S.D.N.Y. 2021) (“It is unnecessary to decide whether the First Amendment right of access applies to Mr. Dratel’s letter and Dr. Teich’s report because, even assuming that the right does apply, the interest in personal privacy for the matters redacted from the report provides a sufficiently compelling interest to overcome that right. The Court has carefully redacted the documents to assure that the redactions are narrowly tailored to redact only the matters as to which there is a sufficiently compelling interest in personal privacy.”).

134. *See Accent Delight Int’l Ltd. v. Sotheby’s*, 394 F. Supp. 3d 399, 416–17 (S.D.N.Y. 2019) (holding that exhibits submitted in action against New York auction house constituted judicial documents giving rise to a presumptive right of public access, even though the court did not rely on them in its determination).

135. *See Pelosi v. Spota*, 607 F. Supp. 2d 366, 375 (E.D.N.Y. 2009).

136. 75 S.W. 312, 312 (Tex. Crim. App. 1903).

cause has been exercised by the issue and execution of the court's process."<sup>137</sup> In federal cases, even government files regarding prospective witnesses have been found to be within the purview of the right.<sup>138</sup> As the Third Circuit explained, "[T]he process by which the government investigates and prosecutes its citizens is an important matter of public concern."<sup>139</sup>

The common law presumed right of access may extend to matters that occur outside a court where they are germane to the court's ruling. The Fourth Circuit, for instance, has applied a common law public right of access to documents filed in conjunction with a summary judgment motion.<sup>140</sup> It also has applied a common law right of access to all material filed in conjunction with nondiscovery pretrial motions.<sup>141</sup> It similarly has held that transcripts, "recorded in open court, transcribed and filed with the Clerk of the Court, and enforced in subsequent litigations, must be regarded as . . . judicial document[s] for purposes of determining the public's right of access."<sup>142</sup> Under Fifth Circuit jurisprudence, the same goes for minutes regarding the settlement conference held by the judge.<sup>143</sup> In the Ninth Circuit, sentencing materials, such as presentencing reports and letters, fall within the public right of access.<sup>144</sup> Various district courts include similar materials within the definition of judicial records, such as letters detailing medical treatment,<sup>145</sup> psychiatric reports,<sup>146</sup> and sentencing memoranda.<sup>147</sup> In the Eleventh Circuit, execution protocol similarly falls within the right of

137. 47 So. 590, 593 (Ala. 1908).

138. See *United States v. Wecht*, 484 F.3d 194, 204, 207–11 (3d Cir. 2007).

139. *Id.* at 210.

140. See *Rushford v. New Yorker Mag., Inc.*, 846 F.2d 249, 253 (4th Cir. 1988); see also *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 13 (1st Cir. 1986) (noting "some courts have recognized" that documents submitted as part of motions for summary judgment are subject to a public right of access).

141. See *Leucadia, Inc. v. Applied Extrusion Techs., Inc.*, 998 F.2d 157, 164 (3d Cir. 1993). The court looked to the common law tradition to distinguish between discovery and nondiscovery pretrial motion materials, holding that the right of access does not extend to the former. See *id.* at 165; see also *Anderson*, 805 F.2d at 11–12 (reaching the same conclusion regarding civil discovery documents).

142. *LEAP Sys., Inc. v. MoneyTrax, Inc.*, 638 F.3d 216, 220 (3d Cir. 2011); cf. *Bank of Am. Nat'l Tr. & Sav. Ass'n v. Hotel Rittenhouse Assocs.*, 800 F.2d 339, 345 (3d Cir. 1986) ("Once a settlement is filed in the district court, it becomes a judicial record, and subject to the access accorded such records.").

143. See *Bradley ex rel. AJW v. Ackal*, 954 F.3d 216, 227 (5th Cir. 2020). But see *Hardy v. Equitable Life Assurance Soc'y of the U.S.*, 697 F. App'x 723, 724–25 (2d Cir. 2017) (holding that the presumption of access to district court orders approving a settlement in a class action case was "of middling strength," as the orders did not themselves establish the contours of the litigants' substantive rights); *In re Sept. 11 Litig.*, 723 F. Supp. 2d 526, 533 (S.D.N.Y. 2010) (holding that confidential documents obtained through discovery and submitted as part of a settlement in an action to recover damages were preliminary materials because they did not impact the "adjudication of the motion for approv[ing]" the settlement and were not historically accessible by the public).

144. See, e.g., *United States v. Schlette*, 842 F.2d 1574, 1576, 1583–84 (9th Cir. 1988) (holding that a newspaper was allowed to see pre-sentencing reports for defendant accused of killing a former prosecutor, "subject to . . . appropriate redact[ions]"); see also *United States v. Kushner*, 349 F. Supp. 2d 892, 905–07 (D.N.J. 2005) ("[T]he strong presumption of access attaches to any letters excerpted or explicitly referenced in [the] defendant's [sentencing] memorandum.").

145. See *United States v. Kravetz*, 948 F. Supp. 2d 89, 92–93 (D. Mass. 2013).

146. See *United States v. Sattar*, 471 F. Supp. 2d 380, 383, 385 (S.D.N.Y. 2006).

147. See *United States v. Huntley*, 943 F. Supp. 2d 383, 385, 388 (E.D.N.Y. 2013).

access, even where it is not formally filed as part of an action alleging an Eighth Amendment violation.<sup>148</sup>

The common law right applies beyond written materials to include videotapes,<sup>149</sup> audio recordings,<sup>150</sup> and magnetic media.<sup>151</sup> In the late 1970s, for instance, the Federal Bureau of Investigation's (FBI) ABSCAM investigation videotaped several members of Congress, officials, and businessmen accepting bribes from a fictitious company in return for political favors.<sup>152</sup> Media observing the trial requested permission to copy the tapes presented to the jury, with the aim of broadcasting the material to the public.<sup>153</sup> The district court granted the application, stating, "[T]he tapes themselves are evidence [and] they are, under common law principles, available to the public and the press" absent "a strong showing of reasons why they should not be made available."<sup>154</sup> On appeal, the Second Circuit strongly agreed, writing, "The existence of the common law right to inspect and copy judicial records is beyond dispute."<sup>155</sup> The fact that a lawsuit has been resolved or a review of materials previously sealed would be expensive or burdensome proves insufficient to overcome the common law strong presumption in favor of disclosure.<sup>156</sup>

### 3. Limitations on the Presumed Right of Access

While a presumption attaches to anything that constitutes a "judicial record[]," the right, like most entitlements, is not absolute.<sup>157</sup> As the D.C. Circuit observed in 2021, "[C]ompeting interests may outweigh the strong presumption favoring

148. See *Comm'r, Ala. Dep't of Corr. v. Advance Loc. Media, LLC*, 918 F.3d 1161, 1168 (11th Cir. 2019).

149. See, e.g., *In re Nat'l Broad. Co.*, 653 F.2d 609, 613–14 (D.C. Cir. 1981); *In re Nat'l Broad. Co.*, 635 F.2d 945, 952 (2d Cir. 1980); see also *Perry v. Schwarzenegger*, 302 F. Supp. 3d 1047, 1055 (N.D. Cal. 2018) ("On the merits, I have no doubt that the common-law right of access applies to the video recordings as records of judicial proceedings to which a strong right of public access attaches."). Note that one court has determined that the common law right does not apply to footage merely referenced by the parties to the case. See *In re Application for Access to Certain Sealed Video Exhibits*, 546 F. Supp. 3d 1, 6 (D.D.C. 2021).

150. See, e.g., *United States v. Mitchell*, 551 F.2d 1252, 1258 & n.21 (D.C. Cir. 1976), *rev'd on other grounds sub nom. Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 599 n.11 (1978) (assuming without deciding that "the common-law right of access is applicable"). *But see Guarriello v. Benson*, 217 A.2d 22, 27 (N.J. Super. Ct. App. Div. 1966).

151. See, e.g., *Menge v. City of Manchester*, 311 A.2d 116, 116, 118 (N.H. 1973) ("computerized tape of . . . field record cards"); *Ortiz v. Jaramillo*, 483 P.2d 500, 502 (N.M. 1971) (magnetic tapes).

152. *In re Nat'l Broad. Co.*, 635 F.2d at 947.

153. *Id.* at 948.

154. *Id.* at 949 (second alteration in original).

155. *Id.*

156. See *Davita Healthcare Partners, Inc. v. United States*, 131 Fed. Cl. 42, 44 (Fed. Cl. 2017).

157. *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598 (1978) ("[T]he right . . . is not absolute."); see *In re Leopold to Unseal Certain Elec. Surveillance Applications & Ords.*, 964 F.3d 1121, 1128 (D.C. Cir. 2020) ("[N]ot all documents filed with courts are judicial records." (quoting *SEC v. Am. Int'l Grp.*, 712 F.3d 1, 3 (D.C. Cir. 2013))). Similar statements have been made across time by innumerable circuit and district courts. See, e.g., *In re Motions of Dow Jones & Co.*, 142 F.3d 496, 504 (D.C. Cir. 1998); *MetLife, Inc. v. Fin. Stability Oversight Council*, 865 F.3d 661, 663 (D.C. Cir. 2017); *Am. Int'l Grp.*, 712 F.3d at 3; *In re Reps. Comm. for Freedom of the Press*, 773 F.2d 1325, 1333 (D.C. Cir. 1985); *In re Nat'l Broad. Co.*, 653 F.2d 609, 613 (D.C. Cir. 1981); *United States v. Hubbard*, 650 F.2d 293, 316 (D.C. Cir. 1980); *In re McLean*, 16 F. Cas. 237, 239 (C.C.S.D. Ohio 1879) (No. 8,877); *In re ACandS, Inc.*, 462



disclosure.<sup>158</sup> Such exceptions, however, stem from matters that go to the core of the judicial function: circumstances in which justice requires that certain material be withheld or where the court needs to act to prevent the Judiciary from being used for improper purposes.<sup>159</sup> Judicial integrity matters.<sup>160</sup> The bar is high and often involves highly unusual circumstances.<sup>161</sup> In every context, the countervailing interests must “*heavily* outweigh the public interests in [having] access” to the material.<sup>162</sup> It cannot be a close call.

As a general matter, there are three categories where exceptions have been made. The first has to do with the administration of justice. Where certain information is likely to disrupt grand jury proceedings in a serious criminal case, for instance, records may be withheld.<sup>163</sup> Similarly, in the event that revelation might harm ongoing investigations, the public interest in accessing information may be outweighed.<sup>164</sup> If appropriately narrowly tailored, information that could place law enforcement officials, defendants, or their families in jeopardy also may be sealed.<sup>165</sup> Courts further take account of whether the information sought might be otherwise available. In regard to twenty-two hours of taped conversations with President Richard Nixon relating to the break-in at the Democratic National Committee headquarters, for example, the Supreme Court denied Warner Communications common law access to the tapes on the grounds that they had already been aired during the trial and that the Presidential Recordings Act created

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B.R. 88, 98 (Bankr. D. Del. 2011); *In re Pratt*, 511 F.3d 483, 485 (5th Cir. 2007); *Jaufre ex rel. Jaufre v. Taylor*, 351 F. Supp. 2d 514, 516 (E.D. La. 2005); *Test Masters Educ. Servs., Inc. v. Robin Singh Educ. Servs., Inc.*, 799 F.3d 437, 454 (5th Cir. 2015); *Seidl v. Am. Century Cos.*, 799 F.3d 983, 994 (8th Cir. 2015); *In re Neal*, 461 F.3d 1048, 1053 (8th Cir. 2006); *Steele v. City of Burlington*, 334 F. Supp. 3d 972, 976 (S.D. Iowa 2018); *Suture Express, Inc. v. Owens & Minor Distrib., Inc.*, 851 F.3d 1029, 1046 (10th Cir. 2017); *Colony Ins. Co. v. Burke*, 698 F.3d 1222, 1241 (10th Cir. 2012); *Parson v. Farley*, 352 F. Supp. 3d 1141, 1154 (N.D. Okla. 2018). This approach is shared by state courts. *See, e.g.*, *A.P. v. M.E.E.*, 821 N.E.2d 1238, 1246 (Ill. App. Ct. 2004); *People v. Zimmerman*, 120 N.E.3d 918, 927 (Ill. 2018).

158. *Cable News Network, Inc. v. FBI*, 984 F.3d 114, 118 (D.C. Cir. 2021).

159. *See [UNDER SEAL] v. [UNDER SEAL]*, 273 F. Supp. 3d 460, 466–67 (S.D.N.Y. 2017); *In re Gitto/Glob. Corp.*, 321 B.R. 367, 375 (Bankr. D. Mass. 2005).

160. *See, e.g.*, *Perry v. Schwarzenegger*, 302 F. Supp. 3d 1047, 1056 (N.D. Cal. 2018).

161. *See, e.g.*, *Co. Doe v. Pub. Citizen*, 749 F.3d 246, 265–66 (4th Cir. 2014) (noting that the common law right of public access can only be abrogated in unusual circumstances); *In re Reps. Comm. for Freedom of the Press to Unseal Crim. Prosecution of Assange*, 357 F. Supp. 3d 528, 534 (E.D. Va. 2019) (stating that the common law right of access to judicial records and proceedings can be “abrogated only in unusual circumstances” (quoting *Stone v. Univ. of Md. Med. Sys. Corp.*, 855 F.2d 178, 180 (4th Cir. 1988))). For state cases, see *Sanford v. Bos. Herald-Traveler Corp.*, 61 N.E.2d 5, 6 (Mass. 1945) (holding that a court can impound its files in a case and deny public inspection when justice requires it) and *Schmedding v. May*, 48 N.W. 201, 203 (Mich. 1891) (holding that papers and records in a case do not always have to be made public).

162. *E.g.*, *Co. Doe*, 749 F.3d at 265–66 (emphasis added) (quoting *Rushford v. N.Y. Mag.*, 846 F.2d 249, 253 (4th Cir. 1988)).

163. *See, e.g.*, *United States v. Steinger*, 626 F. Supp. 2d 1231, 1235 (S.D. Fla. 2009).

164. *See, e.g.*, *Forbes Media LLC v. United States*, 548 F. Supp. 3d 872, 874, 879–80 (N.D. Cal. 2021) (finding that the common law right of access to judicial records doesn’t apply to All Writs Act documents related to tracking of an individual subject to an arrest warrant on the grounds that the documents were part of an ongoing criminal investigation).

165. *See In re Reps. Comm. for Freedom of the Press*, 128 F. Supp. 3d 238, 241 (D.D.C. 2015).

an “alternative means of public access.”<sup>166</sup> The latter trumped the company’s interest in commodifying public access.

The second category relates to competing rights, such as fair trial or freedom of the press.<sup>167</sup> Where inflammatory and irrelevant material may sway a juror pool, for instance, it can be sealed until after the jury is empaneled to ensure that the defendant’s right to a fair trial is not abridged.<sup>168</sup> Privacy also matters.<sup>169</sup> In 2020, the Second Circuit determined that the privacy interests of a witness in a case alleging the sexual assault of a juvenile were sufficient to overrule the strong presumption of a common law right of public access to a deposition.<sup>170</sup> Courts tend to adopt special consideration for minors in particular.<sup>171</sup> Privacy interests also may extend to proprietary commercial data.<sup>172</sup> In such circumstances, courts take into account the strength of the privacy claim, whether both parties are moving for sealing, and whether there has been prior public access.<sup>173</sup> Mere embarrassment or bad press is insufficient grounds for protecting trade secrets. In *Joy v. North*, for example, a bank attempted to place a report generated by its special litigation committee under seal on the grounds that it contained sensitive internal business operations information which, if public, could adversely impact both the bank and the local community.<sup>174</sup> The Second Circuit viewed the objection as falling “woefully short of the kind of showing which raises even an arguable issue as to whether it may be kept under seal.”<sup>175</sup> As the Sixth Circuit later explained, “Simply showing that the information would harm the company’s reputation is not sufficient to overcome the strong common law presumption in favor of public access to court proceedings and records.”<sup>176</sup> Looking at *Joy*, the Sixth Circuit underscored the power of the common law right of public noting that

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166. *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 594, 597–600, 604–08 (1978).

167. *See, e.g.*, *Belo Broad. Corp. v. Clark*, 654 F.2d 423, 431–32 (5th Cir. 1981).

168. *See Courier-J., Inc. v. McDonald-Burkman*, 298 S.W.3d 846, 850–51 (Ky. 2009).

169. *See, e.g.*, *Moore v. CVS Rx Servs., Inc.*, 660 F. App’x 149, 153 n.4 (3d Cir. 2016) (per curiam) (holding that, in an Americans with Disabilities Act case, employer’s filing that revealed employee’s medical information was sufficiently private to overcome public right of access); *United States v. Harris*, 890 F.3d 480, 492 (4th Cir. 2018) (holding that redaction of names of defendant’s wife and child and their photographs was sufficient to protect their privacy while observing public interest in access to judicial process).

170. *See Mirlis v. Greer*, 952 F.3d 51, 67 (2d Cir. 2020).

171. *See, e.g.*, *In re Fort Totten Metrorail Cases*, 960 F. Supp. 2d 2, 12 (D.D.C. 2013).

172. *See, e.g.*, *GoSMiLE, Inc. v. Dr. Jonathan Levine, D.M.D. P.C.*, 769 F. Supp. 2d 630, 649–50 (S.D.N.Y. 2011) (holding that, in trademark case, proprietary material related to marketing, product development, and budgeting could be placed under seal).

173. *See, e.g.*, *United States v. Harris*, 204 F. Supp. 3d 10, 17–18 (D.D.C. 2016) (finding all three considerations together were sufficient to overcome common law right of access).

174. 692 F.2d 880, 894 (2d Cir. 1982).

175. *Id.*

176. *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1179–80 (6th Cir. 1983) (noting that a desire “to shield prejudicial information contained in judicial records from competitors and the public . . . cannot be accommodated by courts without seriously undermining the tradition of an open judicial system”).

access, it could only be overcome where “legitimate trade secrets” were on the line.<sup>177</sup>

Like privacy, due process concerns may play a role.<sup>178</sup> Such considerations, though, are far from trump cards and are often denied in the face of the strong presumption in favor of access. Privacy interests related to home address, contact information, employment history, and marital status have been found insufficient to suspend the right.<sup>179</sup> *Pari passu*, a defendant’s privacy interest in medical records may not outweigh the common law right of the public to examine sentencing memoranda where the defendant chose to introduce medical information as part of the sentencing process.<sup>180</sup> Nor may the Fifth Amendment privilege against self-incrimination be sufficient to overcome the common law right of access to financial affidavits.<sup>181</sup>

The third category of exceptions arises from judicial efforts to prevent malicious harm that could follow from public access to private matters. The underlying argument is that the court does not want to allow itself to be used to facilitate bad behavior. It appears to be most common in state divorce cases. As the Second Circuit explained, “Courts have long declined to allow public access simply to cater ‘to a morbid craving for that which is sensational and impure.’”<sup>182</sup> Courts may deny copies of portions of the record to nonparties “where the purpose is to gratify private spite or promote public scandal.”<sup>183</sup> Defamation suits provide a parallel context. In a 2018 case out of the Southern District of New York (S.D.N.Y.), for instance, documents that alleged certain sexual acts involving parties and nonparties (some of whom were public figures) remained out of the public eye on the grounds that the court did not rely on them to resolve motions or render its decision.<sup>184</sup> Similar issues have arisen in regard to witness protection programs to ensure that individuals are able to retain their anonymity.<sup>185</sup>

As with the rights category, the bar in regard to disrepute remains high, with limits to the exception applied. Thus, in another case out of S.D.N.Y., information in a complaint in a bankruptcy case was not sufficiently scandalous: although the trustee had employed “flowery” language, the allegations fell short of being grossly offensive and, in any event, the complaint had not been submitted with an improper purpose in mind.<sup>186</sup>

177. *Id.* at 1180.

178. *See, e.g., In re WP Co.*, 201 F. Supp. 3d 109, 128 (D.D.C. 2016) (finding privacy and due process considerations sufficient to overcome common law right).

179. *Lytle v. JPMorgan Chase*, 810 F. Supp. 2d 616, 630–32 (S.D.N.Y. 2011).

180. *United States v. Dare*, 568 F. Supp. 2d 242, 244 (N.D.N.Y. 2008).

181. *United States v. Avenatti*, 550 F. Supp. 3d 36, 55 (S.D.N.Y. 2021).

182. *United States v. Amodeo*, 71 F.3d 1044, 1051 (2d Cir. 1995) (quoting *In re Caswell*, 29 A. 259, 259 (R.I. 1893)).

183. M.C. Dransfield, Annotation, *Restricting Access to Judicial Records*, 175 A.L.R. 1260 § 4 (1948) (citing *In re Caswell*, 29 A. at 259).

184. *Giuffre v. Maxwell*, 325 F. Supp. 3d 428, 442 (S.D.N.Y. 2018).

185. *See United States v. Hickey*, 767 F.2d 705, 709 (10th Cir. 1985) (“If the common law right of access were absolute, . . . the efficacy of the witness protection program would be substantially at risk.”).

186. *In re Anthracite Cap., Inc.*, 492 B.R. 162, 177 (Bankr. S.D.N.Y. 2013).

#### 4. The Common Law Test

Circuit courts consider various factors to determine whether a judicial muniment is subject to the presumed right of access. Elements taken into account vary by each court's jurisprudence. As a general matter, once a record or document satisfies the standard, courts consider whether possible exceptions apply which would negate the presumption.

One of the most well-developed approaches stems from the D.C. Circuit,<sup>187</sup> which has crafted a six-factor test incorporating the following considerations:

(1) the need for public access to the documents at issue; (2) the extent of previous public access to the documents; (3) the fact that someone has objected to disclosure, and the identity of that person; (4) the strength of any property and privacy interests asserted; (5) the possibility of prejudice to those opposing disclosure; and (6) the purposes for which the documents were introduced during the judicial proceedings.<sup>188</sup>

As the D.C. District Court has acknowledged, “documents that are preliminary, advisory, or, for one reason or another, do not eventuate in any official action or decision being taken” do not qualify as a public record to which a common law right of access attaches.<sup>189</sup> By way of comparison, to determine the weight of the presumption, the Second Circuit in *Lugosch v. Pyramid Co. of Onondaga* looked to (1) “the role of the material at issue in the exercise of Article III judicial power” and (2) “the resultant value of such information to those monitoring the federal courts.”<sup>190</sup>

In all cases, it is not enough for the claim of an exception to merely outweigh the presumed right of access. Instead, it must be particularly significant and heavily outweigh other considerations.<sup>191</sup> The burden is on those wishing to exempt the material to meet this high threshold.<sup>192</sup> Even where exceptions are made, courts narrowly tailor them to the competing interest at issue, protecting the greatest public access possible.<sup>193</sup>

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187. See *United States v. Hubbard*, 650 F.2d 293, 296, 317–22 (D.C. Cir. 1980) (laying out the relevant factors and applying them to the immediate case to determine whether 50,000 documents removed from the Church of Scientology should be sealed).

188. *In re Leopold to Unseal Certain Elec. Surveillance Applications & Ords.*, 964 F.3d 1121, 1131 (D.C. Cir. 2020) (quoting *MetLife, Inc. v. Fin. Stability Oversight Council*, 865 F.3d 661, 665 (D.C. Cir. 2017)).

189. *Wash. Legal Found. v. U.S. Sent’g Comm’n*, 89 F.3d 897, 905 (D.C. Cir. 1996).

190. 435 F.3d 110, 119 (2d Cir. 2006) (quoting *United States v. Amodeo*, 71 F.3d 1044, 1049 (2d Cir. 1995)).

191. See, e.g., *Minter v. Wells Fargo Bank, N.A.*, 258 F.R.D. 118, 121 (D. Md. 2009) (finding no demonstration sufficient to heavily outweigh common law public interest).

192. See, e.g., *Sky Angel U.S., LLC v. Discovery Commc’ns, LLC*, 28 F. Supp. 3d 465, 488 (D. Md. 2014); *Benedict v. Hankook Tire Co.*, 323 F. Supp. 3d 747, 754 (E.D. Va. 2018).

193. See, e.g., *In re Digit. Music Antitrust Litig.*, 321 F.R.D. 64, 81 n.1 (S.D.N.Y. 2017) (allowing competitive pricing data and strategies to be redacted from evidentiary submission despite constituting a judicial record for common law right of access purposes).

Given the broad common law right of access to judicial records, standing is met whenever a member of the public has been deprived of access to a court record. Thus, in every circuit court, all members of the public have standing to bring the claim. It is not just certain individuals, who may (or may not) have an interest in the proceeding, who are allowed access to a judicial remedy. Accordingly, in a case involving efforts by individuals who had been the subject of a two-year special grand jury investigation, the Ninth Circuit held that while the secrecy of the grand jury proceedings had to be protected, to the extent that the records fell outside the proceedings, the subjects of the proceeding, merely as members of the public, had a right to the records in question.<sup>194</sup> It did not matter whether they were connected with the investigation or not.

## II. FIRST AMENDMENT QUALIFIED RIGHT OF PUBLIC ACCESS

The First Amendment prohibits the government from “abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”<sup>195</sup> The Supreme Court recognized in 1978 that the clause plays a critical “role in affording the public access to discussion, debate, and the dissemination of information and ideas.”<sup>196</sup> It includes and “goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw.”<sup>197</sup> It protects public access to government information. For judicial records, the presumed right of “access is rooted in the public’s [F]irst [A]mendment right to know about the administration of justice.”<sup>198</sup> While the right to petition plays a particularly important role, courts also acknowledge the close nexus to free speech and the other associative rights as grounds for a qualified right of access.

### A. THE RIGHT TO PETITION

Despite the contemporary desuetude of the right to petition, the Framers considered it independent of, and of greater importance than, freedom of speech, press, and assembly.<sup>199</sup> In the American colonial context, the right empowered British subjects to seek redress for wrongs and “could force the government’s attention on the claims of the governed when no other mechanism could.”<sup>200</sup> It allowed individuals to go directly to the Crown to challenge lesser tribunals and

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194. See *In re* Special Grand Jury (for Anchorage), 674 F.2d 778, 781–82, 784 (9th Cir. 1982).

195. U.S. CONST. amend. I.

196. *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 783 (1978).

197. *Id.*

198. *In re* Orion Pictures Corp., 21 F.3d 24, 26 (2d Cir. 1994).

199. See JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS 4 (1986); Julie M. Spanbauer, *The First Amendment Right to Petition Government for a Redress of Grievances: Cut from a Different Cloth*, 21 HASTINGS CONST. L.Q. 15, 17, 34–39 (1993); Norman B. Smith, “*Shall Make No Law Abridging . . .*”: An Analysis of the Neglected, But Nearly Absolute, Right of Petition, 54 U. CIN. L. REV. 1153, 1165–67 (1986).

200. Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition*, 66 FORDHAM L. REV. 2153, 2157 (1998).

authorities.<sup>201</sup> Colonists, as they traversed the Atlantic, carried the right with them. The King's failure to respond to petitions provided grounds for rebellion, as we read in the Declaration of Independence: "In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury."<sup>202</sup> Under the Lockean right to rebellion, such petitions were a necessary precondition to breaking with the prior regime.<sup>203</sup> It was necessary to ensure that such a right existed to allow for an appeal to be made prior to entering a state of war.

When it came to the founding, Anti-Federalists roundly attacked the Constitution specifically for failing to protect the right to petition.<sup>204</sup> James Madison thus agreed to incorporate it into the Bill of Rights. He initially proposed that it only apply to Congress<sup>205</sup>—a suggestion reflective of the supreme power which Parliament previously held in England.<sup>206</sup> During consideration of the Bill of Rights, however, Congress expanded it to apply to all three branches. The separation of powers and the creation of an entirely separate Judicial Branch of government required that the right to petition extend beyond the Legislature to the "government"—language that the Select Committee adopted.<sup>207</sup> It thus attached as much to the Executive as to the Judiciary.

The emphasis on the right to petition stemmed from its vital role in democratic governance: it protects continual, active political engagement. It prevents citizens from being limited to only weighing in when it comes time to vote. Instead, interaction occurs as a continuous conversation, allowing the People constant input into the process. It allows citizens to direct their concerns to a particular body of persons (i.e., government officials). This prevents officials from insulating themselves from the population—or only allowing certain constituents or supporters to gain access to them. It encapsulates a demand that the officials respond to requests. Once a petition is made, the government must answer that petition. It provides another way of holding the powers that be to account. The right bypasses

201. *Id.* at 2163.

202. THE DECLARATION OF INDEPENDENCE para. 30 (U.S. 1776).

203. See generally JOHN LOCKE, SECOND TREATISE OF GOVERNMENT (C. B. Macpherson ed., Hackett Publ'g Co., Inc. 1980) (1690).

204. See, e.g., *Centinel II*, PHILA. FREEMAN'S J. (Oct. 24, 1787), reprinted in 13 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 457, 466–67 (John P. Kaminski et al. eds., 1981); Richard Henry Lee's Amendments, 27 September, reprinted in 13 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra*, at 238, 239.

205. 1 ANNALS OF CONG. 451 (Joseph Gales ed., 1834) ("The people shall not be restrained from peaceably assembling and consulting for their common good; nor from applying to the Legislature by petitions, or remonstrances, for redress of their grievances.")

206. See BLACKSTONE, *supra* note 37, at \*146–89.

207. "The freedom of speech, and of the press, and the right of the people peaceably to assemble, and consult for their common good, and to apply to the government for redress of grievances, shall not be infringed." House of Representatives Journal, August, 1789, reprinted in 5 BERNARD SCHWARTZ, THE ROOTS OF THE BILL OF RIGHTS 1122, 1122 (1980); see also House of Representatives Debates, August, 1789, reprinted in SCHWARTZ, *supra*, at 1125, 1126 (adopting the text); Senate Journal, August—September, 1789, reprinted in SCHWARTZ, *supra*, at 1147, 1148–49 (altering "apply" to "petition").

the representative levers of government, ensuring that citizens have direct access and the opportunity to be heard. It allows for interim societal shifts to be reflected in representative government.<sup>208</sup> It prevents the governors (that is, elected representatives as well as those appointed to serve in official capacities) from being the sole guardian of the collective public will.<sup>209</sup> The People themselves hold that power. Finally, it gives citizens the ability to do something about their concerns. It thus helps to mitigate tension, providing citizens with the opportunity to air grievances and concerns—potentially mitigating anger or frustration before it takes the form of civil unrest.

The right of access, accordingly, has long been recognized by the Supreme Court as “part of the right of petition protected by the First Amendment.”<sup>210</sup> It “extends to all departments of the Government.”<sup>211</sup> Citizens cannot petition and seek redress if they cannot access the law. The case is even stronger in relation to government malfeasance, where remedies for unlawful conduct create a “constitutional antidote to . . . sovereign immunity.”<sup>212</sup>

The right to petition bears a close nexus to other First Amendment entitlements. As Chief Justice Burger explained in *Richmond Newspapers*, “In guaranteeing freedoms such as those of speech and press, the First Amendment can be read as protecting the right of everyone to attend trials so as to give meaning to those explicit guarantees.”<sup>213</sup> While that case dealt with attendance in open court, Burger drew the point more broadly, pointing out that the freedoms guaranteed in the First Amendment “share a common core purpose of assuring freedom of communication on matters relating to the functioning of government.”<sup>214</sup> Justice Stevens, concurring, “agree[d] that the First Amendment protects the public and the press from abridgment of their rights of access to information about the operation of their government, including the Judicial Branch.”<sup>215</sup> Justice Brennan, concurring in the judgment (and joined by Justice Marshall), wrote that

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208. See *Thomas v. Collins*, 323 U.S. 516, 545–46 (1945) (Jackson, J., concurring).

209. See *id.* at 545.

210. *Cal. Motor Transp. Co. v. Trucking Unltd.*, 404 U.S. 508, 513 (1972); see *Bradley v. Pittsburgh Bd. of Educ.*, 913 F.2d 1064, 1076 (3d Cir. 1990). See generally Carol Rice Andrews, *A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right*, 60 OHIO ST. L.J. 557 (1999) (finding historical, textual, and policy support for reading the First Amendment to include a right of access to the courts).

211. *Cal. Motor*, 404 U.S. at 510.

212. James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government*, 91 NW. U. L. REV. 899, 899 (1997).

213. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980) (plurality opinion). Justice Stewart, concurring in the judgment, lodged the First Amendment right of access in the right to free speech and press. *Id.* at 599 n.2 (Stewart, J., concurring in judgment) (“The First Amendment provisions relevant to this case are those protecting free speech and a free press. The right to speak implies a freedom to listen. The right to publish implies a freedom to gather information.” (citation omitted)).

214. *Id.* at 575 (plurality opinion); see *Globe Newspaper Co. v. Superior Ct.*, 457 U.S. 596, 604–05 (1982); *Mills v. Alabama*, 384 U.S. 214, 218 (1966); *Thornhill v. Alabama*, 310 U.S. 88, 95–96 (1940).

215. *Richmond Newspapers, Inc.*, 448 U.S. at 584 (Stevens, J., concurring).

the First Amendment embodies more than a commitment to free expression . . . , it has a *structural* role to play in securing and fostering our republican system of self-government. . . . Implicit in this structural role is not only “the principle that debate on public issues should be uninhibited, robust, and wide-open,” but also the antecedent assumption that valuable public debate—as well as other civic behavior—must be informed.<sup>216</sup>

The First Amendment protects the “conditions of meaningful communication”<sup>217</sup> by prohibiting the government “from limiting the stock of information from which members of the public may draw.”<sup>218</sup>

Justice Brennan, in his concurrence, provided two helpful principles for ascertaining when a right applied: “First, the case for a right of access has special force when drawn from an enduring and vital tradition of public entree to particular proceedings or information.”<sup>219</sup> The reason this principle has teeth reflects in some measure the fact that “the Constitution carries the gloss of history.”<sup>220</sup> Finding “a tradition of accessibility [would] impl[y] the favorable judgment of experience.”<sup>221</sup> Second, he proposed that “the value of access . . . be measured in specifics”—that is, “the importance of public access to the . . . process itself.”<sup>222</sup>

#### B. DENIAL OF ACCESS ESTABLISHES AN INJURY IN FACT

The first and most important point to make in the context of applying the First Amendment qualified right of access is that where access to judicial records is being sought, all members of the public denied access to such records fulfill the injury-in-fact requirement for standing.

In *Lujan v. Defenders of Wildlife*, the Supreme Court famously summarized its three-pronged approach to standing.<sup>223</sup> “First, the plaintiff must have suffered an ‘injury in fact’—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) ‘actual or imminent, not ‘conjectural’ or ‘hypothetical.’”<sup>224</sup> To be “particularized,” the injury has to impact the litigant “in a personal and individual way.”<sup>225</sup> The Court continued, “Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be ‘fairly . . . trace[able] to the challenged action of the defendant, and not . . .

216. *Id.* at 587 (Brennan, J., concurring in judgment) (citation omitted) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

217. *Id.* at 588; see *Kleindienst v. Mandel*, 408 U.S. 753, 762–63 (1972).

218. *Richmond Newspapers, Inc.*, 448 U.S. at 576 (plurality opinion) (quoting *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 783 (1978)).

219. *Id.* at 589 (Brennan, J., concurring in judgment).

220. *Id.*

221. *Id.*

222. *Id.*

223. 504 U.S. 555, 560–61 (1992).

224. *Id.* at 560 (footnote and citations omitted) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)).

225. *Id.* at 560 n.1.



th[e] result [of] the independent action of some third party not before the court.”<sup>226</sup> The Court added, “Third, it must be ‘likely,’ as opposed to merely ‘speculative,’ that the injury will be ‘redressed by a favorable decision.”<sup>227</sup> For an interest to be legally protected and thus constitute an injury in fact, it must be one that is “legally and judicially cognizable.”<sup>228</sup>

Almost every court to consider whether an individual who has been denied access to judicial records or court proceedings meets the standing requirement for a First Amendment right of access claim has answered in the affirmative. The injury is concrete in that the individual does not have the information being sought, and it is particularized in that it is access to *a specific record or proceeding* that is being denied. Courts also largely agree that the presumed right of access is a legally cognizable interest—regardless of whether subsequent examination finds that an exception applies.

In one of the leading cases on the First Amendment right of access, *Press-Enterprise Co. v. Superior Court (Press-Enterprise II)*, the petitioner sought a transcript of a forty-one-day preliminary hearing that grew out of a criminal prosecution.<sup>229</sup> Because the document had been released in the interim, the Supreme Court first focused on whether the issue had become moot.<sup>230</sup> At no point in its Article III, Section 2 analysis, however, did it even question whether the media had established an injury in fact.<sup>231</sup> The Court’s approach followed its earlier rulings relating to access to judicial proceedings.<sup>232</sup> In *Press-Enterprise I*, for instance, which considered a public right of access to a transcript of the voir dire, there was no question that the public at large had standing to bring the claim.<sup>233</sup> The Court noted “the right of everyone in the community to attend” and to obtain a transcript of such proceedings.<sup>234</sup>

Similarly, in *Nixon v. Warner Communications, Inc.*, as aforementioned, petitioners sought access to twenty-two hours of tape recordings that had been played to the jury and to the public in a courtroom.<sup>235</sup> The district court had later

226. *Id.* at 560 (alterations and omissions in original) (quoting *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 41–42 (1976)).

227. *Id.* at 561 (quoting *Simon*, 426 U.S. at 38, 43); see *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982) (“Art. III requires the party who invokes the court’s authority to ‘show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant’ and that the injury ‘fairly can be traced to the challenged action’ and ‘is likely to be redressed by a favorable decision.’” (citation omitted) (first quoting *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979); and then quoting *Simon*, 426 U.S. at 38, 41)).

228. *Raines v. Byrd*, 521 U.S. 811, 819 (1997).

229. 478 U.S. 1, 3–5 (1986).

230. *Id.* at 6.

231. See *id.*

232. See, e.g., *Press-Enterprise Co. v. Superior Ct. (Press-Enterprise I)*, 464 U.S. 501 (1984); *Globe Newspaper Co. v. Superior Ct.*, 457 U.S. 596 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (plurality opinion); *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979).

233. 464 U.S. at 504–05, 508.

234. *Id.* at 505, 508, 513.

235. 435 U.S. 589, 594 (1978).

provided transcripts of the recordings to jurors, reporters, and members of the public.<sup>236</sup> The Supreme Court did not inquire into the media's standing to bring the First Amendment claim. To the contrary, referring back to common law, the Court highlighted that "[t]he interest necessary to support the issuance of a writ compelling access has been found . . . in the citizen's desire to keep a watchful eye on the workings of public agencies and in a newspaper publisher's intention to publish information concerning the operation of government."<sup>237</sup> There was no question: Warner Communications represented "the public interest."<sup>238</sup>

For decades, every circuit court of appeals to consider the First Amendment right of access to judicial documents has either explicitly held or assumed that the party seeking the judicial records has met the injury-in-fact requirement.<sup>239</sup> In 1977, for example, several news organizations excluded from a pretrial suppression hearing sought the record of that hearing.<sup>240</sup> The Third Circuit, "obliged to consider whether the intervenors [had] standing," concluded that they did:

Intervenors' allegations that the district court denied them access to the pretrial hearing, and continues to deny them access to the record of that proceeding, state the constitutionally required "'injury in fact,' that is, a sufficiently concrete interest in the outcome of their suit to make it a case or controversy subject to a federal court's Art. III jurisdiction."<sup>241</sup>

Beyond this, the "zone of interest[]" protected by the First Amendment was that "of the public's and the press's first . . . amendment rights both to have access to court proceedings and to receive and gather information about government activities."<sup>242</sup> This made the intervenors the "proper proponents of the particular

236. *Id.*

237. *Id.* at 597–98 (citations omitted).

238. *See id.* at 602.

239. *See, e.g.,* Pansy v. Borough of Stroudsburg, 23 F.3d 772, 777 (3d Cir. 1994) (noting that "[w]e have routinely found, as have other courts, that third parties have standing to challenge protective orders and confidentiality orders in an effort to obtain access to information or judicial proceedings. . . . 'So long as the "injury in fact" alleged by each intervenor is "a distinct and palpable injury to himself," standing should not be denied "even if it is an injury shared by a large class of other possible litigants,"" and finding that the denial of access to the settlement agreement satisfied newspaper's injury in fact requirement (footnote omitted) (quoting *United States v. Cianfrani*, 573 F.2d 835, 845 (3d Cir. 1978)); *In re Wash. Post Co.*, 807 F.2d 383, 388 n.4 (4th Cir. 1986) ("The *Post* meets the standing requirement because it has suffered 'an injury . . . "that is likely to be redressed by a favorable decision.'" (omission in original) (quoting *Cent. S.C. Chapter, Soc'y of Pro. Journalists v. Martin*, 556 F.2d 706, 707–08 (4th Cir. 1977)); *Courthouse News Serv. v. Planet*, 750 F.3d 776, 788 (9th Cir. 2014) ("[T]here is no question that CNS itself has alleged a cognizable injury caused by the Ventura County Superior Court's denial of timely access to newly filed complaints."); *United States v. Edwards*, 823 F.2d 111 (5th Cir. 1987) (finding no question of standing in determining which judicial records meet the public right of access requirement); *In re Search Warrant for Secretarial Area Outside Off. of Gunn*, 855 F.2d 569, 572–73 (8th Cir. 1988) (granting access to material filed in support of search warrant applications without addressing movant's standing).

240. *Cianfrani*, 573 F.2d at 843.

241. *Id.* at 845–46 (quoting *Singleton v. Wulff*, 428 U.S. 106, 112 (1976)).

242. *Id.* at 845.

legal rights on which they base their suit.”<sup>243</sup> The injury in fact, moreover, did not just “belong to a broad portion of the public at large”; to the contrary, it was a distinct and palpable injury *to every member of the public*.<sup>244</sup> The fact that the claim was being brought by a single entity in relation to a broader right did not matter: the party before the court itself also held the public right.<sup>245</sup>

In 2016, the Seventh Circuit found standing met, even as it distinguished between whether the court could exercise jurisdiction and whether the litigants would likely prevail.<sup>246</sup> The case, like many before the FISC/R, incorporated elements of national security. During World War II, a grand jury had investigated the *Chicago Tribune* for publishing a story about the United States having cracked Japanese cyphers.<sup>247</sup> Various scholarly, journalistic, and historical organizations sought access to the grand jury materials, which had been sealed in 1942. Although nearly seventy-five years had elapsed, the government still objected to plaintiffs’ efforts to obtain the muniments on the grounds that the Federal Rules of Criminal Procedure had “eliminate[d] the district court’s common-law supervisory authority over . . . grand jury” records.<sup>248</sup> The court disagreed. Merely “[a]s a member of the public, Carlson ha[d] standing to assert his claim to the grand-jury transcripts, because they are public records to which the public may seek access, even if that effort is ultimately unsuccessful.”<sup>249</sup>

Denial of access creates an automatic injury in fact sufficient to find standing even for nonparties. A favorable opinion on appeal would ameliorate third-party injuries by providing them access to the records being sought.<sup>250</sup> Providing access to the information sought is precisely the harm that the court is empowered to address.

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243. *Id.* (quoting *Singleton*, 428 U.S. at 112).

244. *See id.* at 845–46.

245. Similarly, in 1983, the Eleventh Circuit ruled on a case involving the publisher of two Alabama newspapers that sought judicial records linked to a class action suit regarding prison overcrowding. *Newman v. Graddick*, 696 F.2d 796, 798 (11th Cir. 1983). The court noted that it had repeatedly “upheld the press’s standing to seek access in suits to which it is not a party.” *Id.* at 800. The court explained, “Although the rights asserted by The Advertiser Company are also enjoyed by the general public, the newspaper publisher has suffered a ‘distinct and palpable’ injury since its reporters have requested and been denied access.” *Id.* More recently, in 2014, the Fourth Circuit considered a case in which consumer protection groups intervened to protest sealing. *Co. Doe v. Pub. Citizen*, 749 F.3d 246, 253 (4th Cir. 2014). To meet the nonparty appellate standing requirements, “the appellant [had to] have some cognizable interest” impacted by the district court’s determination. *Id.* at 259. The court “conclude[d] that the presumptive right of access to judicial documents and materials under the First Amendment and common law” provided the groups with the requisite interest in the litigation. *Id.* at 261. Moreover, “[t]o deprive Consumer Groups of the right to appeal the district court’s adverse ruling on their objections would leave no possible avenue for them to vindicate their asserted First Amendment and common-law rights of access.” *Id.* Appeal was their only option.

246. *See Carlson v. United States*, 837 F.3d 753, 757–58 (7th Cir. 2016).

247. *Id.* at 755.

248. *Id.* at 755–57.

249. *Id.* at 757–58.

250. *See Co. Doe*, 749 F.3d at 262–65.

## C. MUNIMENTS CONSIDERED WITHIN THE FIRST AMENDMENT RIGHT OF ACCESS

The First Amendment incorporates a right of access to criminal trials.<sup>251</sup> In *Press-Enterprise I*, the Supreme Court recognized that the right also extends to some pre-trial proceedings.<sup>252</sup> In *Press-Enterprise II*, the Supreme Court went on to articulate a two-part test for the First Amendment right to public access: “First, because a ‘tradition of accessibility implies the favorable judgment of experience,’ we have considered whether the place and process have historically been open to the press and general public.”<sup>253</sup> “Second, in this setting the Court has traditionally considered whether public access plays a significant positive role in the functioning of the particular process in question.”<sup>254</sup> The Court continued, “If the particular proceeding in question passes these tests of experience and logic, a qualified First Amendment right of public access attaches.”<sup>255</sup>

The two-part inquiry has come to be referred to as the “experience and logic” test. It is employed to evaluate physical access to judicial proceedings, as well as to documents, videotapes, and other judicial muniments. Although both elements must be met for the right of access to attach, the first prong takes precedence. As the Ninth Circuit observed, “Where access has traditionally been granted to the public without serious adverse consequences, logic necessarily follows.”<sup>256</sup> Thus, “[i]t is only where access has traditionally not been granted that we look to logic. If logic favors disclosure in such circumstances, it is necessarily dispositive.”<sup>257</sup>

In the criminal context, courts consider pretrial hearings to fall within the right of access.<sup>258</sup> As the Second Circuit explained, “It makes little sense to recognize a right of public access to criminal courts and then limit that right to the trial phase of a criminal proceeding, something that occurs in only a small fraction of criminal cases.”<sup>259</sup> The court continued, “There is a significant benefit to be gained from public observation of many aspects of a criminal proceeding, including pretrial suppression hearings that may have a decisive effect upon the outcome of a prosecution.”<sup>260</sup> The First Amendment right attaches to suppression of evidence and bail proceedings, as well as witness testimony, voir dire, and sentencing.<sup>261</sup>

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251. *See, e.g.*, *Globe Newspaper Co. v. Superior Ct.*, 457 U.S. 596, 603 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 581 (1980) (plurality opinion); *In re Knight Publ'g Co.*, 743 F.2d 231, 233 (4th Cir. 1984).

252. 464 U.S. 501, 505 (1984).

253. 478 U.S. 1, 8 (1986) (citation omitted) (quoting *Globe Newspaper Co.*, 457 U.S. at 605).

254. *Id.*

255. *Id.* at 9.

256. *In re Copley Press, Inc.*, 518 F.3d 1022, 1026 & n.2 (9th Cir. 2008).

257. *Id.* at 1026 n.2.

258. *See, e.g.*, *In re Herald Co.*, 734 F.2d 93, 98–99 (2d Cir. 1984); *United States v. Criden*, 675 F.2d 550, 557 (3d Cir. 1982); *United States v. Brooklier*, 685 F.2d 1162, 1167–71 (9th Cir. 1982).

259. *In re Herald Co.*, 734 F.2d at 98.

260. *Id.*

261. *See, e.g.*, *Press-Enterprise I*, 464 U.S. 501, 505, 508 (1984) (holding that the First Amendment right of access was applicable to voir dire examination); *Globe Newspaper Co. v. Superior Ct.*, 457 U.S.

Although the Supreme Court has not directly ruled on a First Amendment right of access to civil proceedings, there is wide agreement among the circuits that it also applies in that realm.<sup>262</sup> The Third,<sup>263</sup> Sixth,<sup>264</sup> Seventh,<sup>265</sup> Eighth,<sup>266</sup> and Eleventh<sup>267</sup> Circuits have all ruled on this point. The Eighth Circuit has also determined a First Amendment right of public access to contempt proceedings, which are partly criminal and partly civil in nature.<sup>268</sup> The public, for reasons discussed in Part III, below, must be given the opportunity to witness the administration of justice.

As part of that process, materials on which the proceedings hinge are equally important. Where “judicial documents a[re] derived from or [are] a necessary corollary of the capacity to attend the relevant proceedings,” the presumption of access applies.<sup>269</sup> The right to attend criminal proceedings thus extends to the right to access the docket sheets.<sup>270</sup> Such records reveal whether the court has reached a final judgment and whether the case has been dismissed or is still underway. They show what documents have been filed with the court—from briefs to motions to intervene, remand, or change venue. And they indicate when a particular matter is to be heard. They also offer a broader view of the judicial system writ large. As the Second Circuit explained, “By inspecting materials like docket sheets, the public can discern the prevalence of certain types of cases, the nature of the parties to particular kinds of actions, information about the settlement rates in different areas of law, and the types of materials that are likely to be sealed.”<sup>271</sup>

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596, 602–06 (1982) (applying *Richmond Newspapers* to pretrial hearings involving the testimony of rape victims); *United States v. Chagra*, 701 F.2d 354, 362–64 (5th Cir. 1983) (recognizing the right to attend bail hearings despite those hearings not having been historically open to the public); *In re Herald Co.*, 734 F.2d at 99 (recognizing a First Amendment right of access to pretrial suppression hearings); *Brooklier*, 685 F.2d at 1170–71 (same); *Criden*, 675 F.2d at 557 (recognizing a First Amendment right of access to “pretrial suppression, due process, and entrapment hearings”); *United States v. Ahsani*, 76 F.4th 441, 447 (5th Cir. 2023) (“We have applied the experience-and-logic test to sentencing hearings and concluded that the First Amendment right of access attaches to them.”).

262. *Courthouse News Serv. v. Planet*, 947 F.3d 581, 590 (9th Cir. 2020) (“The Supreme Court has yet to explicitly rule on whether the First Amendment right of access to information reaches civil judicial proceedings and records, but the federal courts of appeals widely agree that it does.”).

263. *See Publiker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1061 (3d Cir. 1984); *In re Avandia Mktg., Sales Pracs. & Prods. Liab. Litig.*, 924 F.3d 662, 673 (3d Cir. 2019).

264. *See Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1178, 1180 (6th Cir. 1983).

265. *See In re Cont’l Ill. Sec. Litig.*, 732 F.2d 1302, 1308 (7th Cir. 1984).

266. *See In re Iowa Freedom of Info. Council*, 724 F.2d 658, 661 (8th Cir. 1983).

267. *See Wilson v. Am. Motors Corp.*, 759 F.2d 1568, 1569 (11th Cir. 1985) (per curiam).

268. *In re Iowa Freedom of Info. Council*, 724 F.2d at 661 (“[W]e conclude that the protection of the First Amendment extends to proceedings for contempt, a hybrid containing both civil and criminal characteristics.”).

269. *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 92–93 (2d Cir. 2004).

270. *See, e.g., United States v. Ochoa-Vasquez*, 428 F.3d 1015, 1029 (11th Cir. 2005); *Hartford Courant Co.*, 380 F.3d at 93, 96.

271. *Hartford Courant Co.*, 380 F.3d at 95–96; *see Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 499 n.4 (1st Cir. 1989) (noting that docket sheets “sometimes [include] a brief entry describing the event which occurred or action taken [and] the disposition of the charges”).

The First Amendment qualified right of access attaches not just to the record of matters before the court, but to specific rulings and documents material to the administration of justice and central to the Judiciary's core Article III function.<sup>272</sup> Courts largely agree that this category includes warrant materials following the close of an investigation and after the filing of an indictment.<sup>273</sup> Following the 2001 anthrax mailings which resulted in five deaths, accordingly, the U.S. District Court for the District of Columbia applied the First Amendment qualified right of access to the warrant materials.<sup>274</sup> The Eighth Circuit even recognizes the right to warrant materials filed during the pendency of an investigation on the grounds that such documents are "important to the public's understanding of the function and operation of the judicial process and the criminal justice system and may operate as a curb on prosecutorial or judicial misconduct."<sup>275</sup> Courts have extended a similar right of access to papers filed in support of summary judgment motions.<sup>276</sup> Once accepted by a court, a plea agreement substitutes for a trial, similarly placing such materials within the scope of the First Amendment.<sup>277</sup> Various other documents, such as settlement agreements and motions to approve them, similarly qualify.<sup>278</sup>

The First Amendment presumed right of access is not absolute. It can be overcome where there is "an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that

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272. See generally *infra* Part III.

273. See, e.g., *United States v. Loughner*, 769 F. Supp. 2d 1188, 1195 (D. Ariz. 2011); *In re N.Y. Times Co. for Access to Certain Sealed Ct. Recs.*, 585 F. Supp. 2d 83, 88–90 (D.D.C. 2008). But see *United States v. Cohen*, 366 F. Supp. 3d 612, 628 (S.D.N.Y. 2019) ("[N]either experience nor logic support a First Amendment right of access to search warrant materials.").

274. *In re N.Y. Times Co.*, 585 F. Supp. 2d at 86–87.

275. *In re Search Warrant for Secretarial Area Outside Off. of Gunn*, 855 F.2d 569, 573 (8th Cir. 1988).

276. See *Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982); *Duke Energy Carolinas, LLC v. NTE Carolinas II, LLC*, No. 19-CV-00515, 2022 WL 1127107, at \*1 (W.D.N.C. Apr. 14, 2022) ("The Fourth Circuit applies the First Amendment right of access to documents submitted in support of summary judgment motions in civil cases."); *Rushford v. New Yorker Mag., Inc.*, 846 F.2d 249, 252 (4th Cir. 1988) (finding the First Amendment right of access applies to summary judgment materials, and noting "summary judgment adjudicates substantive rights and serves as a substitute for a trial"); *Painter v. Doe*, No. 15-CV-369, 2016 WL 3766466, at \*3 (W.D.N.C. July 13, 2016) ("When a judicial document or record sought to be sealed is filed in connection with a dispositive motion, the public's right of access to the document in question arises under the First Amendment.").

277. See *Wash. Post v. Robinson*, 935 F.2d 282, 288 (D.C. Cir. 1991) (finding that a plea agreement culminating in a guilty plea satisfies the First Amendment test—that is, "such access has historically been available, and serves an important function of monitoring prosecutorial or judicial misconduct"). But see *United States v. El-Sayegh*, 131 F.3d 158, 159, 161 (D.C. Cir. 1997) (finding no First Amendment right of access to a plea offer submitted as an exhibit to a motion to seal and not as a final agreement accepted by the court).

278. See, e.g., *In re Sept. 11 Litig.*, 723 F. Supp. 2d 526, 531 (S.D.N.Y. 2010) (holding that the First Amendment and common law presumption of access applies to information in a motion to approve a settlement); *Hardy v. Kaszycki & Sons*, No. 83-cv-6346, 2017 WL 6805707, at \*6 (S.D.N.Y. Nov. 21, 2017) (holding that the First Amendment qualified right of access applies to settlement documents in suit against then-President Donald Trump and noting that the court would reach the same result regarding the common law presumption of access).

interest.<sup>279</sup> For the most part, exceptions stem from enumerated constitutional rights. The issue is one of competing entitlements.

Trial judges, for instance, have an affirmative constitutional duty to ensure that public access to pretrial proceedings does not undermine the defendant's Sixth Amendment rights.<sup>280</sup> The Tenth Circuit thus allows for proceedings to be closed where allowing the public to attend would carry the "substantial probability" of undermining the defendant's right to a fair trial.<sup>281</sup> To make this determination, the court also must determine that reasonable alternatives to closing the courtroom to protect the defendant's interests are not available.<sup>282</sup> The Fifth Circuit requires that three prongs be met: that the accused's "right to a fair trial will likely be prejudiced," that "alternatives . . . cannot adequately protect [the Sixth Amendment] right," and that "closure will probably be effective in protecting against" violation of the right.<sup>283</sup>

Similarly, as in the case of the common law right of access, the court may look to the right to privacy to restrict the presumptive First Amendment right of access. This is part of the rationale of drawing a line between ongoing investigations and situations in which no indictment has been handed down and after-the-fact considerations: "where . . . search warrant[s] [or] other surveillance applications . . . d[o] not result in an indictment or criminal prosecution, the public disclosure of those materials w[ill] implicate . . . privacy, reputational and due process interests of the targets of [such] investigations who were never charged."<sup>284</sup> Protective orders may be issued by the court to limit the disclosure of sensitive information, such as in regard to financial records of third parties,<sup>285</sup> libelous statements,<sup>286</sup> and particulars in a divorce.<sup>287</sup>

As a concomitant of privacy rights, the release of trade secrets and other confidential proprietary information could unfairly damage a manufacturer's

279. *Press-Enterprise I*, 464 U.S. 501, 510 (1984).

280. *Cf. Sheppard v. Maxwell*, 384 U.S. 333, 358, 363 (1966) ("Since the state trial judge did not fulfill his duty to protect Sheppard from the inherently prejudicial publicity which saturated the community and to control the disruptive influences in the courtroom, we must reverse the denial of the habeas petition."). The Supreme Court has explicitly reserved this question. *See Gannett Co. v. DePasquale*, 443 U.S. 368, 382–83, 391–92 (1979). Concurrences in that case took different positions on whether a First Amendment right attaches. *Compare id.* at 397 (Powell, J., concurring) ("Because of the importance of the public's having accurate information concerning the operation of its criminal justice system, I would hold explicitly that petitioner's reporter had an interest protected by the First and Fourteenth Amendments in being present at the pretrial suppression hearing."), *with id.* at 404 (Rehnquist, J., concurring) ("Despite the Court's seeming reservation of the question whether the First Amendment guarantees the public a right of access to pretrial proceedings, it is clear that this Court repeatedly has held that there is no First Amendment right of access in the public or the press to judicial or other governmental proceedings.").

281. *See, e.g., United States v. McVeigh*, 119 F.3d 806, 809, 815 (10th Cir. 1997).

282. *See id.* at 815.

283. *United States v. Chagra*, 701 F.2d 354, 365 (5th Cir. 1983).

284. *In re Granick*, 388 F. Supp. 3d 1107, 1125 (N.D. Cal. 2019).

285. *See In re Knoxville News-Sentinel Co.*, 723 F.2d 470 (6th Cir. 1983).

286. *See Park v. Detroit Free Press Co.*, 40 N.W. 731 (Mich. 1888).

287. *See In re Caswell*, 29 A. 259 (R.I. 1893).

reputation or create unnecessary alarm.<sup>288</sup> Simultaneously, the failure to protect trade secrets may result in a violation of property rights. As the D.C. Circuit explained, an entity's "proprietary interest in a document, in combination with the privacy interests implicated by the facts and circumstances of the seizure, may give rise to a protectable interest in preventing indiscriminate public access to the records of which the document has become a part."<sup>289</sup> The Eighth Circuit concurs: "Trade secrets are a peculiar kind of property. Their only value consists in their being kept private. If they are disclosed or revealed, they are destroyed."<sup>290</sup> There are, nevertheless, exceptions to the exception. In *Seattle Times Co. v. Rhinehart*, the Supreme Court held that where a corresponding "protective order is entered on a showing of good cause . . . , is limited to the context of pretrial civil discovery, and does not restrict the dissemination of the information if gained from other sources, it does not offend the First Amendment."<sup>291</sup>

For the Third Circuit, the bar that must be cleared for information to be withheld is high: in the civil context, "[a]lthough the parties may agree to shield information contained in discovery materials, they may not do so once those materials become part of the court record."<sup>292</sup> As the court has explained, "the public and the press have a First Amendment right of access to civil trials."<sup>293</sup> Even should the parties consent to sealing confidential documents, "the Court must conduct a document-by-document review and make specific findings of fact to justify sealing judicial documents or proceedings."<sup>294</sup> In the Tenth Circuit, the decision as to whether full public right of access attaches "is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case."<sup>295</sup> Even so, the presumption may only be overcome "if countervailing interests heavily outweigh the public interests in access."<sup>296</sup>

Protective orders differ from motions to seal or to limit inspection of portions of a judicial record. Under Federal Rule of Civil Procedure 5.2, certain sensitive

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288. See *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 35 (1984); *Megapulse, Inc. v. Lewis*, 672 F.2d 959, 961 (D.C. Cir. 1982).

289. *United States v. Hubbard*, 650 F.2d 293, 307 n.53 (D.C. Cir. 1980); see *Co. Doe v. Pub. Citizen*, 749 F.3d 246, 269 (4th Cir. 2014) (noting that corporations may have "a strong interest" in keeping trade-secret information from the public domain, which may serve as justification for partially sealing court records).

290. *In re Iowa Freedom of Info. Council*, 724 F.2d 658, 659, 662, 664 (8th Cir. 1983) (holding that the portion of a transcript of an individual's testimony that contained trade secrets could remain sealed "in order to protect property rights in these secrets," noting that "trade secrets partake of the nature of property, the value of which is completely destroyed by disclosure").

291. 467 U.S. at 37.

292. *Midwest Athletics & Sports All. LLC v. Ricoh USA, Inc.*, 395 F. Supp. 3d 461, 463 (E.D. Pa. 2019).

293. *In re Avandia Mktg., Sales Pracs. & Prods. Liab. Litig.*, 924 F.3d 662, 673 (3d Cir. 2019).

294. *Roubert v. Amazon*, 609 F. Supp. 3d 354, 359 (E.D. Pa. 2022).

295. *United States v. Hickey*, 767 F.2d 705, 708 (10th Cir. 1985) (quoting *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 599 (1978)).

296. *Mann v. Boatright*, 477 F.3d 1140, 1149 (10th Cir. 2007) (quoting *Rushford v. New Yorker Mag., Inc.*, 846 F.2d 249, 253 (4th Cir. 1988)).



information (for example, social security numbers, bank accounts, and children's names) should be redacted in public documents.<sup>297</sup> An unredacted copy of the same information may then be filed under seal.<sup>298</sup> There are other circumstances where an individual can request that their judicial records be closed to the public, such as in the context of juvenile records, cases involving juveniles, or cases in which witness protection measures are implemented—all situations involving the right to privacy. National security may also serve as an exception for public access. State secrets cases provide one of the clearest examples.<sup>299</sup> Efforts by the media to obtain information from criminal proceedings also present these issues. In such circumstances, national security may serve as a competing reason to overcome the presumption of access. In *M.K.B. v. Warden*, for instance, Mohamed Kamel Bellahouel, an Algerian waiter living in Florida, filed a habeas petition challenging his imprisonment post-9/11.<sup>300</sup> Twenty-three media and public interest entities attempted to intervene to get the records unsealed,<sup>301</sup> which in 2004 the Supreme Court denied.<sup>302</sup>

Across these categories, the First Amendment presumed right of access does not supplant the common law right. They are two separate inquiries.<sup>303</sup> They differ in important ways. The common law right involves a balancing of interests. The First Amendment, in theory, does not. Once the probability of harm to a compelling interest is shown, with no alternative way to protect it, the First Amendment presumed right of access can be overcome. In contrast, the common law could, in principle, allow the access right to overcome harm to a compelling interest in an appropriate case, where the need for access is extreme. And it would be hard to envision a more significant need for access than for the public to know *what the law is*.

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297. FED. R. CIV. P. 5.2(a).

298. FED. R. CIV. P. 5.2(d).

299. See generally Laura K. Donohue, *Surveillance, State Secrets, and the Future of Constitutional Rights*, 2022 SUP. CT. REV. 351 (discussing the history and evolution of state secrets privilege).

300. See [REDACTED] Petition for Writ of Certiorari, *M.K.B. v. Warden*, 540 U.S. 1213 (2003) (mem.) (No. 03-6747), 2003 WL 23139103, at \*9; Dan Christensen, *Secrecy Within: Algerian Native's Federal Appeal in Miami Has Court Altering Records, Closing Hearing in Name of Security*, DAILY BUS. REV., Mar. 12, 2003, at A1; Bill Mears, *Court Declines Appeal on 9/11 Secrecy*, CNN.COM: L. CTR. (Feb. 23, 2004, 5:27 PM), <http://www.cnn.com/2004/LAW/02/23/scotus.terror.secrecy/index.html> [<https://perma.cc/HEC6-3CC7>]; Linda Greenhouse, *News Groups Seek to Open Secret Case*, N.Y. TIMES (Jan. 5, 2004), <https://www.nytimes.com/2004/01/05/us/news-groups-seek-to-open-secret-case.html>.

301. Greenhouse, *supra* note 300.

302. *M.K.B.*, 540 U.S. at 1213.

303. The D.C. Circuit observes a further relationship between the rights: the existence of “a common law tradition of right of access is an appropriate consideration to take into account when examining the scope of the First Amendment.” *In re N.Y. Times Co. for Access to Certain Sealed Ct. Recs.*, 585 F. Supp. 2d 83, 89 (D.D.C. 2008). The Second Circuit follows a similar approach. See *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 92 (2d Cir. 2004) (noting that the presence of a “common law right of access . . . support[s] . . . finding a history of openness” under the “experience” prong of the First Amendment right of access analysis).

### III. THE IMPORTANCE OF THE RIGHTS OF ACCESS

The common law and First Amendment rights of access serve vital functions, foremost amongst which is the rule of law. Also critical is their role in solidifying judicial power: absent a sword or the power of the purse, all courts *have* is the ability to consider different arguments and determine which prevails, thus both interpreting the law and binding citizens. Ensuring public access to what is said and done by the courts thus guards the functional division of power among the branches of government. It bolsters the political legitimacy of the Judiciary and feeds democracy, ensuring the democratic frame of governance. Finally, it plays a key role in protecting individual rights.

Access to the law is one of the foundational tenets of western democratic states.<sup>304</sup> Without it, a ruling could not be said to constitute law. Therefore, for the law to be valid, judicial rulings and their supporting records must be promulgated.<sup>305</sup> Access to judicial records works hand in hand with the concept of an open courtroom: the public must be able to see the courts operating, just as those unable to attend in person must be able to glean the same information from the record.<sup>306</sup> Rule of law concerns may stem from the Founding, but they continue to be as relevant in the present day.<sup>307</sup> As the D.C. Circuit recently explained, “The common-law right of public access to judicial records ‘is a fundamental element of the rule of law, important to maintaining the integrity and legitimacy of an independent Judicial Branch.’”<sup>308</sup>

Another important consideration relates to the role of the record itself, which serves as the font of judicial power. Hamilton’s “least dangerous” branch lacks either a purse or a sword.<sup>309</sup> Instead, all courts *have* at some level is their decisionmaking ability, which is transmitted through the record. As the Supreme Court observed in 1889, “The well-settled maxim that a court of record can act only through its orders made of record, when applied to judicial proceedings, means that where the court must itself act, and act directly, that action must always be evidenced by the record.”<sup>310</sup>

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304. *See, e.g.*, *United States v. Mitchell*, 551 F.2d 1252, 1258 (D.C. Cir. 1976) (describing access to judicial records as “fundamental to a democratic state”), *rev’d on other grounds sub nom. Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589 (1978).

305. *See, e.g.*, *Ex parte Gay*, 20 La. Ann. 176, 176–77 (1868).

306. *See, e.g.*, *Scott v. Stutheit*, 121 P. 151, 154 (Colo. App. 1912) (“The law is well settled . . . that . . . a judgment or decree, to be valid, must be rendered in open court during term time. . . . This is the general rule in this country, and has been adopted by the appellate courts in most, if not all, of the states of the Union.”); *In re Petersen*, 597 B.R. 434, 437 (Bankr. D. Colo. 2019).

307. *See, e.g.*, *United States v. Akhavan*, 532 F. Supp. 3d 181, 186–89 (S.D.N.Y. 2021) (highlighting the importance of the common law and First Amendment public right of access to judicial records and how they were accommodated within the context of Covid-19).

308. *In re Leopold to Unseal Certain Elec. Surveillance Applications & Ords.*, 964 F.3d 1121, 1127 (D.C. Cir. 2020) (quoting *MetLife, Inc. v. Fin. Stability Oversight Council*, 865 F.3d 661, 663 (D.C. Cir. 2017)).

309. THE FEDERALIST NO. 78 (Alexander Hamilton).

310. *Bullitt County v. Washer*, 130 U.S. 142, 149 (1889).

The right of public access also plays a constitutional role in upholding the separation of powers. While the government may prefer that the public not be cognizant of certain actions that it undertakes, the ancient legal precept *nemo iudex in causa sua* applies: Article II cannot be the sole determinant of the conditions under which the public is given access to its own deeds. The Judiciary thus provides an important backstop to the temptation to keep certain matters from being aired.

The right to public access also strengthens judicial legitimacy. It helps “to produce an informed and enlightened public opinion[,] . . . to promote the search for truth, and to assure confidence in judicial remedies.”<sup>311</sup> As the S.D.N.Y. explained, “A presumption of public access is essential for judicial documents because ‘the monitoring of the judicial function is not possible without access to documents that are used in the performance of Article III functions.’”<sup>312</sup> “The presumption of access is based on the need for federal courts . . . to have a measure of accountability and for the public to have confidence in the administration of justice.”<sup>313</sup> Public access builds confidence about the fairness of the system—whether it be criminal or civil in nature. Courts do not get to pick and choose which information is made public, potentially skewing the public’s view and understanding of the Judiciary, the other branches, or even private citizens. Instead, access is based more broadly on being able to see how the courts rule on matters across the board. This approach has attendant benefits, which are grounded in “the public’s right to monitor the functioning of our courts, thereby insuring quality, honesty and respect for our legal system.”<sup>314</sup> The same is true of the public perception of law enforcement institutions and processes more generally.<sup>315</sup>

Another interest protected by the right of public access to judicial documents revolves around democratic representation: it provides the public with information critical for voting. The courts’ interpretations are authoritative statements of what the Legislature’s laws mean and how they can be applied. Voters need to have access to those statements of law so they can petition their representatives to change the law when necessary or vote their current representatives out of office if they fail to enact changes being demanded by the electorate.

The common law and First Amendment rights of access further ensure that rights are protected. Specifically, as the “repositories of the rights of persons and

311. *In re Leopold*, 964 F.3d at 1127 (quoting *United States v. Hubbard*, 650 F.2d 923, 315 n.79 (D.C. Cir. 1980)); see *Crystal Grower’s Corp. v. Dobbins*, 616 F.2d 458, 461 (10th Cir. 1980) (noting that citizens have a “general interest in understanding disputes that are presented to a public forum for resolution. [It] is [in] the public’s interest . . . that the courts are fairly run and judges are honest.”).

312. *[UNDER SEAL] v. [UNDER SEAL]*, 273 F. Supp. 3d 460, 466 (S.D.N.Y. 2017) (quoting *Standard Inv. Chartered, Inc. v. Fin. Indust. Regul. Auth.*, 347 F. App’x 615, 616 (2d Cir. 2009)).

313. *United States v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995); see *In re Orion Pictures Corp.*, 21 F.3d 24, 26 (2d Cir. 1994) (“This preference for public access is rooted in the public’s first amendment right to know about the administration of justice. It helps safeguard ‘the integrity, quality, and respect in our judicial system.’” (quoting *In re Analytical Sys., Inc.*, 83 B.R. 833, 835 (Bankr. N.D. Ga. 1987))).

314. *In re Cont’l Ill. Sec. Litig.*, 732 F.2d 1302, 1308 (7th Cir. 1984).

315. See *Satele v. Superior Ct.*, 444 P.3d 700, 705 (Cal. 2019).

of property, and in many cases the only evidence of either,” courts bear the responsibility of making such documents widely available.<sup>316</sup> Federal and state courts have long recognized this vital role that the right of public access plays.<sup>317</sup> It extends beyond the entitlements protected in the Bill of Rights.

In patent law, for instance, the right of access plays a critical role in ensuring that courts do not reconsider questions that other suits have fully investigated.<sup>318</sup> Once a patent holder establishes her legal status, she holds a right against all others making similar claims to those previously adjudicated. Such a right could not be enforced without broad public access to the prior decision. This function, like the protection of other rights, has been long recognized by the courts. In an appeal from the Patent Office to the D.C. Circuit, for instance, the court noted in 1894 that such files were subject to public inspection in a manner commensurate with those at issue in other cases.<sup>319</sup> This function continues to present day.<sup>320</sup> In 2013, an effort to seal an order that directed a defendant to disgorge profits in a patent infringement case failed on account of “the public’s interest in full access” under the common law.<sup>321</sup> The same year, the Eleventh Circuit granted public access to a document containing revenue and profit projections for patented topical testosterone gel, as well as a document containing recommendations for how to settle the patent infringement suit between the patent owner and its competitors.<sup>322</sup>

Each of these elements—the role of public access to judicial documents in upholding rule of law, protecting the ability of the Judiciary to perform its core function, ensuring separation of powers, strengthening judicial legitimacy, ensuring democratic representation, and protecting rights—applies to all Article III entities, including courts, like the FISC/R, which are specialized in nature.

#### IV. FILINGS BEFORE THE FISC/R SEEKING ACCESS TO JUDICIAL RECORDS

Like other Article III courts, the FISC/R has entertained First Amendment right of access petitions brought by the media, civil rights organizations, and members of the public. The suits emphasize the importance of obtaining judicial opinions which relate to critical matters of law. They mark a relatively recent phenomenon,

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316. *In re McLean*, 16 F. Cas. 237, 238 (C.C.S.D. Ohio 1879).

317. *See, e.g., In re Caswell*, 29 A. 259, 259 (R.I. 1893) (“At common law, every person is entitled to the inspection, either personally or by his agent, of public records (this term including legislative, executive, and judicial records, etc.), provided he has an interest therein which is such as would enable him to maintain or defend an action for which the document or record sought can furnish evidence or necessary information. It is not essential, however, ‘that the interest be private, capable of sustaining a suit or defense on his own personal behalf, but it will be sufficient that he act in such suit as the representative of the common or public right.’” (quoting 20 THE AMERICAN AND ENGLISH ENCYCLOPAEDIA OF LAW 522, 523 (John Houston Merrill ed., 1892))).

318. *See Sloan Filter Co. v. El Paso Reduction Co.*, 117 F. 504, 506 (C.C.D. Colo. 1902).

319. *Ex parte Drawbaugh*, 2 App. D.C. 404, 406 (D.C. Cir. 1894).

320. *See, e.g., Aviva Sports, Inc. v. Fingerhut Direct Mktg., Inc.*, 960 F. Supp. 2d 1011, 1012, 1014 (D. Minn. 2013) (finding a common law public right of access to judicial records in patent infringement case sufficient to overcome defendant’s effort to keep sales and profit information sealed).

321. *Id.*

322. *FTC v. AbbVie Prods. LLC*, 713 F.3d 54, 58, 71 (11th Cir. 2013).

which has paralleled the increasing public awareness of how constitutional and statutory provisions have been secretly interpreted in ways that have an enormous impact on citizens' rights. Two initial efforts to obtain FISC/R opinions predate the more recent string of motions that ended with the denial of certiorari.

#### A. TWO PRELIMINARY CASES

In the aftermath of 9/11, the Bush Administration began collecting Internet and telephony metadata and content without first obtaining judicial approval—either from the FISC/R or ordinary geographic courts, as statutorily and, in some cases, constitutionally required.<sup>323</sup> The effort to shoehorn the President's Surveillance Program, code-named STELLARWIND, into the Foreign Intelligence Surveillance Act (FISA) framework starting in 2004 brought the FISC/R into play.<sup>324</sup> Although the various elements of the program remained classified and hidden from public view for years, information eventually leaked.<sup>325</sup> When it did, its breadth and depth stunned legislators and citizens, who considered many of the associated collection techniques to be a violation of both statutory and constitutional provisions. Attention quickly turned to the role of the FISC/R and how the collection of Internet and telephony metadata and content had withstood legal scrutiny.

The first right of access petition to the FISC was filed in August 2007.<sup>326</sup> That motion, filed by the American Civil Liberties Union (ACLU), followed on the heels of FISC Judge Malcolm Howard's decision on January 10, 2007, to allow parts of the President's Surveillance Program to transfer to Title I of FISA—as well as FISC Judge Roger Vinson's rejection of the same just four months later.<sup>327</sup> Vinson objected to the broad reading of “facility” being advanced by the government (to include switches and gateways), as well as the Department of Justice's (DOJ) contention that National Security Agency (NSA) analysts and not the court (as required by statute) ought to be allowed to make probable cause determinations about which communications traversing such sites should be

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323. See generally Laura K. Donohue, *Section 702 and the Collection of International Telephone and Internet Content*, 38 HARV. J.L. & PUB. POL'Y 117 (2015) (discussing the Bush Administration's data collection practices).

324. See 1 OFFS. OF INSPECTORS GEN. OF THE DEP'T OF DEF., DOJ, CIA, NAT'L SEC. AGENCY & OFF. OF THE DIR. OF NAT'L INTEL., REPORT ON THE PRESIDENT'S SURVEILLANCE PROGRAM 1 n.1 (2009), <https://repository.library.georgetown.edu/bitstream/handle/10822/1085403/2009%20Joint%20IG%20Report%20on%20the%20PSP%20Vol.%20L.pdf?sequence=1&isAllowed=y> (“The cover term NSA uses to protect the President's Surveillance Program is STELLARWIND.”). For further discussion of STELLARWIND and the incorporation of elements of the program into FISA, see generally *id.* and Laura K. Donohue, *Bulk Metadata Collection: Statutory and Constitutional Considerations*, 37 HARV. J.L. & PUB. POL'Y 757 (2014).

325. See, e.g., James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES (Dec. 16, 2005), <https://www.nytimes.com/2005/12/16/politics/bush-lets-us-spy-on-callers-without-courts.html>; Shane Harris, *How Does the NSA Spy?*, NAT'L J. (Jan. 21, 2006, 7:00 AM), <https://www.nationaljournal.com/s/422417/issues-amp-ideas-how-does-nsa-spy/> [<https://perma.cc/A46K-TH8F>]; Leslie Cauley, *NSA Has Massive Database of Americans' Phone Calls*, USA TODAY (May 11, 2006), <https://www.usatoday.com/story/money/2022/09/13/nsa-secretly-collecting-americans-phone-call-records/7940563001/?gnt-cfi=1>.

326. See *In re Release of Ct. Recs.*, 526 F. Supp. 2d 484, 485 (FISA Ct. 2007).

327. *Id.*

targeted.<sup>328</sup> Vinson determined that such a reading “would be inconsistent with the statutory requirement and the congressional intent that the *Court* make such findings *prior* to issuing the order.”<sup>329</sup> At that point, however, the underlying opinions were not public. Instead, government officials had made public statements alluding to them to justify the introduction of new powers into Congress to prevent the government from “going dark”—suggesting that it had previously been collecting certain material. Relying on these statements, the ACLU requested that the court unseal the January orders; any subsequent orders extending, modifying, or vacating them; and any associated government briefs.<sup>330</sup> At that point, just three FISC/R opinions had ever been released.<sup>331</sup> In December 2007, Judge John Bates issued a fourth one, disagreeing with the government’s argument that the court lacked jurisdiction over its own records.<sup>332</sup> Nevertheless, Bates determined that FISA, and the security procedures dictated by Congress, preempted “any right of common law access that otherwise might arguably exist.”<sup>333</sup> Nor did the First Amendment provide a public right of access.<sup>334</sup> The statute precluded independent judicial review of Executive Branch classification decisions. The Court explicitly declined to exercise any “residual discretion” that might exist to release portions of the records being sought.<sup>335</sup>

The following year, a second right of access case arose. The ACLU sought information about, and leave to participate in, the judicial proceedings associated with newly enacted Section 702.<sup>336</sup> It requested “that it be notified of the caption and briefing schedule for [the] proceedings”; that “the Court require the Government to file public versions of its legal briefs, with only those redactions necessary to protect information that is properly classified”; and “that any legal

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328. Compare *In re* [REDACTED], No. [REDACTED], GID.C.00009, slip op. at 7 n.5 (FISA Ct. Jan. 10, 2007) (Howard, J.) (“Although the NSA surveillance will be designed to acquire only international communications where one communicant is outside the United States, the Court understands that the communications infrastructure and the manner in which it routes communications do not permit complete assurance that this will be the case.”), with *In re* [REDACTED], No. [REDACTED], GID.C.00012, slip op. at 2, 16 (FISA Ct. Apr. 3, 2007) (Vinson, J.) (noting that “[t]he application seeks, in effect, to delegate to NSA the Court’s responsibility to make [probable cause] findings” that each of the facilities being targeted “was being used or about to be used by” a foreign power or an agent thereof). For probable cause determinations, see 50 U.S.C. § 1805(a)(2).

329. *In re* [REDACTED], GID.C.00012, slip op. at 16.

330. *In re Release of Ct. Recs.*, 526 F. Supp. 2d at 485 n.2.

331. See *In re* U.S. for an Ord. Authorizing Physical Search of Nonresidential Premises & Pers. Prop., No. [REDACTED], GID.C.00001 (FISA Ct. June 11, 1981), reprinted in S. REP. NO. 97-280 at 16–19 (1981); *In re* All Matters Submitted to the FISC, 218 F. Supp. 2d 611 (FISA Ct. 2002), abrogated by *In re Sealed Case*, 310 F.3d 717 (FISA Ct. Rev. 2002) (per curiam); *In re Sealed Case*, 310 F.3d 717. As of 2007, only one FISC/R case was in the public domain. See *id.* at 719.

332. *In re Release of Ct. Recs.*, 526 F. Supp. 2d at 487; see also *In re* Motion for Consent to Disclosure of Ct. Recs., No. Misc. 13-01, GID.C.00082, slip op. at 2 (FISA Ct. June 12, 2013) (citing favorably to Bates’s opinion).

333. *In re Release of Ct. Recs.*, 526 F. Supp. 2d at 490–91.

334. *Id.* at 491–97.

335. *Id.* at 497.

336. *In re* Proc. Required by § 702(i) of the FISA Amends. Act of 2008, No. Misc. 08-01, GID.C.00028, slip op. at 1 (FISA Ct. Aug. 27, 2008).

opinions issued by the Court at the conclusion of such proceedings be made available to the public, with only those redactions necessary to protect information that is properly classified.”<sup>337</sup> In addition, the ACLU sought leave to file its own “legal brief addressing the constitutionality of the [statute]” on its face “and to participate in oral argument.”<sup>338</sup>

FISC Judge Mary A. McLaughlin, ruling against the ACLU, saw no reason to depart from Judge Bates’s reasoning. Like the documents at issue in the prior motion, the ones in the instant case were also “maintained under the comprehensive statutory scheme” which protected the court’s records “from routine public disclosure.”<sup>339</sup> Neither a common law nor a First Amendment right of access attached.<sup>340</sup> McLaughlin went on to apply the experience and logic tests adopted in *Press-Enterprise II* and concluded, in relation to the former, that “neither the ‘place’ nor the ‘process’ ha[d] ‘historically been open to the press and general public.’”<sup>341</sup> Government briefings, the court’s proceedings, and FISC orders had all historically been closed.<sup>342</sup>

For Section 702, there was no history of anything—the procedures had only recently been put into place by Congress.<sup>343</sup> Under *Press-Enterprise II*, the experience test served as a necessary component of finding a First Amendment right of access.<sup>344</sup> Nevertheless, McLaughlin went on to note that the motion also failed the logic test: in her calculation, public access to the requested materials would not “play a significant positive role in the functioning of the FISA process.”<sup>345</sup> Even assuming that the court had the authority to inquire into whether the material submitted by the government had been properly classified, “[a]bsent the Government’s wholesale abuse of classification authority, which there [was] no reason to presume . . . , any disclosure resulting from such a review can be expected to be limited and incremental in nature.”<sup>346</sup> If the ACLU could, at best, only gain partial access to the document, the logic test could not be met: redactions could result in confusing or obscuring, instead of illuminating, the documents in question. On top of this, the release of any material could result in public dissemination of information that should have remained hidden from public view. Such benefits as could be foreseen were outweighed by the national

337. *Id.* at 4.

338. *Id.*

339. *Id.* at 5 (quoting *In re Release of Ct. Recs.*, 526 F. Supp. 2d at 491).

340. *Id.* at 5–6.

341. *Id.* at 6 (quoting *Press-Enterprise II*, 478 U.S. 1, 8 (1986)).

342. *Id.*

343. See FISA Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436; *In re Procs. Required by § 702(i) of the FISA Amends. Act of 2008*, GID.C.00028, slip op. at 6 (“Moreover, the specific process at issue here, proceedings under Section 702(i) of the FAA, is brand-new, and therefore cannot be said to have such a tradition.”).

344. See *In re Procs. Required by § 702(i) of the FISA Amends. Act of 2008*, GID.C.00028, slip op. at 6; *Press-Enterprise II*, 478 U.S. at 9 (noting that, “[i]f the particular proceeding in question passes” the experience test, “a qualified First Amendment right of public access attaches”).

345. *In re Procs. Required by § 702(i) of the FISA Amends. Act of 2008*, GID.C.00028, slip op. at 6.

346. *Id.* at 7.

security risks that would accompany release of the materials.<sup>347</sup> Having dispatched the First Amendment question, the court declined to exercise any inherent powers it might have to grant the ACLU relief.<sup>348</sup>

As for the proceedings themselves, McLaughlin noted that FISA did not provide for any party but the government to come before it in relation to Section 702. In an argument redolent of *expressio unius est exclusio alterius*, the court noted that, in the context of tangible things, Congress had explicitly provided for parties other than the government to contest orders. “The lack of analogous provisions for proceedings under Section 702(i) strongly suggests that Congress did not contemplate the Court’s review of the certification and procedures to be anything other than an *ex parte* proceeding.”<sup>349</sup> The court’s role, moreover, in regard to Section 702, was severely circumscribed: it was limited to ascertaining whether the certification met the statutory requirements for targeting and minimization—in regard to which, all of the underlying materials were classified. Without access to such information, the ACLU would be unable to “provide meaningful input to the Court” on whether the government complied with either the 2008 FISA Amendments Act or the Fourth Amendment.<sup>350</sup> Finally, the court declined to exercise any inherent authority it might have to allow the ACLU to appear.<sup>351</sup>

Foreclosed by the Bates and McLaughlin rulings, for five years no media organization, civil society entity, or member of the public submitted a filing to the FISC either to obtain records or to gain access to FISC/R proceedings. But in 2013, Edward Snowden made headlines when he began releasing FISC opinions and orders to demonstrate the extent of the surveillance underway.<sup>352</sup> The government’s response, reports issued by the Privacy and Civil Liberties Oversight Board (PCLOB), the report of the President’s Review Board, and successful FOIA litigation unveiled more information about prior FISC/R decisions.<sup>353</sup>

Once again, the scope of the surveillance programs underway took the public—and Congress—by surprise. A sudden onslaught of suits, and efforts to gain access to FISC/R opinions, followed.<sup>354</sup> Three motions before the FISC/R in particular gained ground. Their history is complicated and intertwined. They ultimately

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347. *Id.*

348. *Id.*

349. *Id.* at 9.

350. *Id.* at 10.

351. *See id.*

352. *See* Glenn Greenwald, Ewen MacAskill & Laura Poitras, *Edward Snowden: The Whistleblower Behind the NSA Surveillance Revelations*, GUARDIAN (June 11, 2013, 9:00 AM), <https://www.theguardian.com/world/2013/jun/09/edward-snowden-nsa-whistleblower-surveillance> [<https://perma.cc/J8QP-65ZG>]; Glenn Greenwald, *NSA Collecting Phone Records of Millions of Verizon Customers Daily*, GUARDIAN (June 6, 2013), <https://www.theguardian.com/world/2013/jun/06/nsa-phone-records-verizon-court-order> [<https://perma.cc/KPT6-GZQW>].

353. *See generally* Donohue, *supra* note 299.

354. *See, e.g., In re* Ords. of This Ct. Interpreting § 215 of the Patriot Act, No. Misc. 13-02, GID.C.00085 (FISA Ct. Sept. 13, 2013); *Klayman v. Nat’l Sec. Agency*, 280 F. Supp. 3d 39 (D.D.C. 2017); *Smith v. Obama*, 24 F. Supp. 3d 1005 (D. Idaho 2014); *Elec. Priv. Info. Ctr. v. DOJ*, 15 F. Supp. 3d 32 (D.D.C. 2014); *Elec. Frontier Found. v. U.S. DOJ*, 376 F. Supp. 3d 1023 (N.D. Cal. 2019).



resulted in the Supreme Court denying certiorari in a petition to review the FISCR's determination that no member of the public can ever assert a First Amendment right of access to FISC/R opinions—despite the prevalence of FISC/R muniments now in the public domain and legislative changes requiring that such documents be made publicly available to the greatest extent possible.<sup>355</sup>

#### B. THREE MOTIONS TO THE FISC: ORIGINS

On June 6, 2013, the *Guardian* captured international attention, reporting that the NSA, on an “ongoing, daily basis,” was collecting the telephone records of millions of Verizon customers, providing the U.S. government with insight into domestic communications as well as calls between the United States and abroad.<sup>356</sup> The information and subsequent articles released by the *Guardian* and the *Washington Post* surprised the general public and experts alike—not least because the initial order and associated documents leaked by the media appeared to be a facial violation of prohibitions on foreign intelligence collection in FISA.<sup>357</sup>

The statute required that the government have “reasonable grounds to believe that the tangible things sought are relevant to an authorized investigation (other than a threat assessment).”<sup>358</sup> The broad collection of *all* customer records for nearly a decade read “reasonable grounds” and “relevant” out of the statute: if all telephony records were reasonable, no telephony records could be considered “unreasonable.” If all telephony records were reasonable, so too could one argue that all financial records, educational records, medical records, and the like could be considered “reasonable”—rendering nothing “unreasonable.” In similar fashion, if everything was “relevant,” nothing was “irrelevant.” The program, moreover, lacked the particularization traditionally required of FISA, which reflected the use of the article “an,” referring to a particular (past tense, already established) investigation.<sup>359</sup> Further, the statute was being used to ascertain potential threats, serving in the capacity of a threat assessment, which was expressly forbidden by the language of the provision.<sup>360</sup> Additionally, the statute required that the information be otherwise obtainable via subpoena duces tecum—which all

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355. See *Uniting and Strengthening America by Fulfilling Rights and Ensuring Effective Discipline over Monitoring Act of 2015 (USA FREEDOM Act)*, Pub. L. No. 114-23, sec. 402, § 602, 129 Stat. 268, 281.

356. Greenwald, *supra* note 352; see *ACLU v. FBI*, 59 F. Supp. 3d 584, 587 (S.D.N.Y. 2014) (citing *In re FBI for an Ord. Requiring the Prod. of Tangible Things from Verizon Bus., Network Servs., Inc. ex rel. MCI Commc'n Servs., Inc.*, No. BR 13-80, slip op. at 24 (FISA Ct. Apr. 25, 2013)).

357. See generally Kennedy Elliott & Terri Rugar, *Six Months of Revelations on NSA*, WASH. POST (Dec. 23, 2013), <https://www.washingtonpost.com/wp-srv/special/national/nsa-timeline/> (describing the “systematic and high tech collection and retention of personal data on virtually every single citizen”).

358. 50 U.S.C. § 1861(b)(2)(B) (2019) (current version at 50 U.S.C. § 1862(b)(2)(B)).

359. See *id.*

360. See *id.*

Americans' telephony metadata clearly was not.<sup>361</sup> Finally, significant Fourth Amendment concerns were presented, not least in regard to the issuance of what appeared, for all intents and purposes, to be a general warrant.<sup>362</sup>

Immediate fallout ensued, impacting all three branches. Within the Executive Branch, the PCLOB picked up steam and issued its first report, condemning the collection program.<sup>363</sup> To assuage public anger, President Barack Obama appointed a special Review Board, which made forty-six recommendations to strengthen the government's commitment to privacy and individual rights while also protecting national security and advancing U.S. foreign policy.<sup>364</sup> By the end of the year, the Administration had issued Presidential Policy Directive 28, laying out certain standards for protecting both citizens' and noncitizens' privacy.<sup>365</sup>

Forty-two bills flooded Congress, which in the prior year (at which time three FISA provisions had been up for sunset) had only considered three initiatives. In the end, both houses agreed to the USA FREEDOM Act, which, *inter alia*, prohibited bulk collection under two different sections in FISA (relating to business records as well as pen register/trap and trace devices) or through the five national security letter statutory provisions.<sup>366</sup> The law provided special procedures for limited call detail records acquisition<sup>367</sup> and required the FISC to appoint at least five amici to assist the court when confronted by "a novel or significant interpretation of the law."<sup>368</sup>

Concerned that the Executive Branch had not followed the law, Congress directed the court to appoint individuals with an "expertise in privacy and civil liberties, intelligence collection, communications technology, or any other area that may lend legal or technical expertise" to assist them in their deliberations

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361. 50 U.S.C. § 1861(c)(2)(D) (2019) (current version at 50 U.S.C. § 1862(c)). For further analysis of the statutory and constitutional issues presented by the telephony collection program, see Donohue, *supra* note 324, at 836–97.

362. See Donohue, *supra* note 324, at 864–65, 875.

363. PRIV. & C.L. OVERSIGHT BD., REPORT ON THE TELEPHONE RECORDS PROGRAM CONDUCTED UNDER SECTION 215 OF THE USA PATRIOT ACT AND ON THE OPERATIONS OF THE FOREIGN INTELLIGENCE SURVEILLANCE COURT 57 (2014), [https://documents.pclob.gov/prod/Documents/OversightReport/ec542143-1079-424a-84b3-acc354698560/215-Report\\_on\\_the\\_Telephone\\_Records\\_Program.pdf](https://documents.pclob.gov/prod/Documents/OversightReport/ec542143-1079-424a-84b3-acc354698560/215-Report_on_the_Telephone_Records_Program.pdf) [<https://perma.cc/Q43D-E5LQ>] ("[T]he Board concludes that Section 215 does not provide an adequate legal basis to support this program. Because the program is not statutorily authorized, it must be ended.")

364. See *generally* PRESIDENT'S REV. GRP. ON INTEL. & COMM'NS TECHS., LIBERTY AND SECURITY IN A CHANGING WORLD: REPORT AND RECOMMENDATIONS OF THE PRESIDENT'S REVIEW GROUP ON INTELLIGENCE AND COMMUNICATIONS TECHNOLOGIES (2013), [https://obamawhitehouse.archives.gov/sites/default/files/docs/2013-12-12\\_rg\\_final\\_report.pdf](https://obamawhitehouse.archives.gov/sites/default/files/docs/2013-12-12_rg_final_report.pdf) [<https://perma.cc/S38Y-PMVZ>].

365. *Presidential Policy Directive – Signals Intelligence Activities*, WHITE HOUSE (Jan. 17, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/01/17/presidential-policy-directive-signals-intelligence-activities> [<https://perma.cc/KQ6X-8AEE>].

366. Uniting and Strengthening America by Fulfilling Rights and Ensuring Effective Discipline over Monitoring Act of 2015 (USA FREEDOM Act), Pub. L. No. 114-23, 129 Stat. 268. In particular, see Titles I (business records), II (pen register and trap and trace), and V (national security letters). Sections 601 and 602 also included new reporting requirements to keep Congress informed about how the government was using its authorities under Section 702 of FISA.

367. Sec. 101, § 501(b)(2).

368. Sec. 401, § 103.

and to counter arguments put forward by the Government.<sup>369</sup> To protect against further extraordinary interpretations of statutory provisions, Congress required that “the Director of National Intelligence, in consultation with the Attorney General, . . . conduct a declassification review of [every FISC/R] decision, order, or opinion” containing “a significant . . . interpretation” of FISA “and, consistent with that review, make [them] publicly available to the greatest extent practicable.”<sup>370</sup>

Article III courts too felt the burden of the government’s overreach. Numerous cases in nonspecialized courts challenged Section 215.<sup>371</sup> One of the earliest actions resulted in a D.C. District Court enjoining the government from further collecting plaintiffs’ call records—which was stayed pending appeal.<sup>372</sup> It was followed by the Second Circuit’s determination in May 2015 that Section 215 did not authorize the bulk collection of metadata.<sup>373</sup> Criminal defendants began challenging the collection of evidence in prior cases.<sup>374</sup> Dozens of FOIA suits sought more information about how the government was secretly interpreting the law.<sup>375</sup>

Like its nonspecialized Article III sistren, the FISC felt the burden. The court became the target of public outrage. In the twelve months that followed the initial leak, the FISC logged 160 public filings.<sup>376</sup> There had only been five such filings in the entire history of the court, all of which had been submitted in the two months prior to the leaks and related to an Electronic Frontier Foundation (EFF) FOIA lawsuit filed in the District Court for the District of Columbia.<sup>377</sup> (EFF had moved the FISC to consent to disclosure of its records, which the DOJ was arguing were solely in FISC’s control and therefore could not be obtained via FOIA in a non-FISC setting.<sup>378</sup>)

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369. *Id.*

370. Sec. 402(a), § 602.

371. *See, e.g.*, Complaint at 2, *Klayman v. Obama (Klayman I)*, No. 13-cv-00851 (D.D.C. June 6, 2013); Complaint at 5–6, *Klayman v. Obama (Klayman II)*, No. 13-cv-00881 (D.D.C. June 12, 2013); Complaint at 1, *ACLU v. Clapper*, 959 F. Supp. 2d 724 (S.D.N.Y. 2013) (No. 13 Civ. 3994).

372. *See Klayman I*, 957 F. Supp. 2d 1, 43–44 (D.D.C. 2013), *vacated*, 800 F.3d 559 (D.C. Cir. 2015) (per curiam).

373. *ACLU v. Clapper*, 785 F.3d 787, 826 (2d Cir. 2015).

374. *See, e.g.*, *United States v. Moalin*, No. 10cr4246, 2013 WL 6079518, at \*1 (S.D. Cal. Nov. 18, 2013).

375. *See, e.g.*, *Elec. Priv. Info. Ctr. v. DOJ*, 15 F. Supp. 3d 32, 35 (D.D.C. 2014); *Elec. Frontier Found. v. U.S. DOJ*, 376 F. Supp. 3d 1023, 1026 (N.D. Cal. 2019).

376. *See Public Filings – U.S. Foreign Intelligence Surveillance Court*, U.S. FOREIGN INTEL. SURVEILLANCE CT., <https://www.fisc.uscourts.gov/public-filings> [<https://perma.cc/4B87-HAZX>] (last visited Nov. 6, 2023).

377. *See Elec. Frontier Found. v. DOJ*, 57 F. Supp. 3d 54 (D.D.C. 2014). Note that this number does not include the earlier ACLU filings from 2007 and 2008 described above. It similarly excludes an amicus brief filed to the FISCR in 2002 during consideration of *In re Sealed Case*, 310 F.3d 717 (FISA Ct. Rev. 2002).

378. Motion of the Electronic Frontier Foundation for Consent to Disclosure of Court Records or, in the Alternative, a Determination of the Effect of the Court’s Rules on Statutory Access Rights at 2, 5, *In re Motion for Consent to Disclosure of Ct. Recs. or, in the Alt., a Determination of the Effect of the Ct.’s Rules on Statutory Access Rts.*, No. 13-01 (FISA Ct. May 21, 2013).

Until the *Guardian* article, FOIA requests to the nonspecialized Article III courts were primarily for Executive Branch records related to Section 215 of the USA PATRIOT Act, which had been encapsulated in FISA’s business records provisions.<sup>379</sup> The release of the order, however, raised rule of law concerns. It appeared that the FISC had been complicit in an extraordinary reading of the text, supporting the collection of massive amounts of information on law-abiding citizens—for years. Secret legal interpretations had eroded Americans’ right to privacy in their communications and associations, with First and Fourth Amendment implications. Attention immediately shifted to the FISC.

The three cases that followed have an interwoven history in which the Supreme Court ultimately declined to hear the serious common law and First Amendment arguments. The next few Sections of this Article discuss each case, with the relationship among them summarized in Figure 1, below.

**Figure 1: Parallel Cases Before the FISC**

No. Misc. 13-02	No. Misc. 13-08	No. Misc. 16-01
June 6, 2013: <i>Guardian</i> article	July 31, 2013: <i>Washington Post</i> article	June 2, 2015: USA FREEDOM Act
<ul style="list-style-type: none"> <li>06/12/13: ACLU, MFIA file motion requesting FISC publish its opinions on the meaning, scope, constitutionality of § 215.</li> <li>09/13/13: FISC (Saylor) directs Government to ID opinions not in SDNY FOIA suit, propose timetable for declassification.</li> <li>10/24/2013: Government states one opinion should be withheld in full.</li> <li>11/20/13: Court orders details as to why.</li> <li>12/20/13: Government concedes some portions.</li> <li>01/23/14: Government meets with FISC Legal Advisors, concedes further portions.</li> <li>BR 13-25 released (to date, most fulsome First Amendment analysis available).</li> </ul>	<ul style="list-style-type: none"> <li>11/7/13: ACLU, MFIA file second motion re: legal underpinning of bulk collection more generally.</li> <li>Government releases two opinions, identifies two more.</li> <li>Two FISC Judges request Rule 62 publication; all four opinions end up in public domain w/redactions.</li> <li>ACLU says insufficient.</li> <li>01/25/17: FISC (Collyer) dismisses for lack of <i>ix</i>, First Amendment doesn't afford qualified right of access, movants lack standing. Conflicts w/Saylor, goes <i>en banc</i>.</li> <li>11/9/17: FISC <i>en banc</i> (6-5) finds standing, certifies to FISCR (18-01).</li> <li>03/16/18: FISCR agrees w/<i>en banc</i>.</li> <li>02/11/20: FISC (Collyer) has ancillary subject matter <i>ix</i>; no First Amendment right of access to FISC opinions.</li> <li>04/24/20: FISCR dismisses for lack of <i>ix</i>.</li> </ul>	<ul style="list-style-type: none"> <li>10/19/16: ACLU files third motion for FISC ops w/“novel or significant interpretations of law” between 09/11/01 and USAFA.</li> <li><i>Concerns</i>: search of email; use of NITs; direction to ECSPs to weaken/circumvent encryption or produce source code; use of stingrays; warrantless surveillance of U.S. persons under 702.</li> <li>09/15/20: FISC (Boasberg) dismisses 16-01, saying <i>ix</i> inconsistent with FISCR decision.</li> <li>09/15/20: FISC (Boasberg) also dismisses Nos. Misc. 13-09 (ProPublica) &amp; 19-01 (Solomon).</li> <li>11/19/20: FISCR (Sentelle) Denies request to review 16-01 dismissal or certify to SCOTUS.</li> </ul> <p><i>ACLU v. United States</i>, No. 20-1499</p>

C. THE FIRST MOTION: MISC. 13-02

The first shot across the bow came just six days after the article in the *Guardian*, as the ACLU, together with Yale Law School’s Media Freedom and

379. See, e.g., *N.Y. Times Co. v. U.S. DOJ*, 872 F. Supp. 2d 309 (S.D.N.Y. 2012) (seeking Section 215-related materials).

Information Access Clinic (MFIA), filed a motion requesting that the FISC publish its opinions on the “meaning, scope, and constitutionality of Section 215.”<sup>380</sup>

An extraordinary array of amici supported the motion, underscoring the First Amendment implications of the secret legal determinations. Prominent media outlets ranging from the *Associated Press*, *Bloomberg*, and *National Public Radio* to the *New York Times*, *New Yorker*, *Newsweek*, *Reuters*, and the *Washington Post* wrote in support, as did the Reporters Committee for Freedom of the Press, Dow Jones, McClatchy, the *Tribune*, and others.<sup>381</sup> Perhaps even more notably, the separation of powers concerns raised by the Executive Branch having hampered judicial opinions from becoming public were brought into sharp relief as members of the U.S. House of Representatives (Representatives Amash, Broun, Gabbard, Griffith, Holt, Jones, Lee, Lofgren, Massie, McClintock, Norton, O’Rourke, Pearce, Salmon, Sanford, and Yoho) similarly joined forces as amici to demand access to the law.<sup>382</sup>

The FISC responded, first, by narrowing the documents being sought and, second, by repeatedly pressuring the government to release matters of law. On September 13, 2013, the FISC directed the government to identify which of its own opinions, evaluating the meaning, scope, and constitutionality of Section 215, were not part of concurrent FOIA litigation in the Southern District of New York or already subject to the publication process pursuant to Rule 62(a) and to “propose a timetable to complete a declassification review.”<sup>383</sup>

The following month, the government identified just one opinion, which was related to docket number BR 13-25, as falling between the cracks.<sup>384</sup> The court ordered the government to propose a timetable for declassification review, which the government estimated would take about three weeks.<sup>385</sup> At the expiration of

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380. Motion of the American Civil Liberties Union, the American Civil Liberties Union of the Nation’s Capital, and the Media Freedom and Information Access Clinic for the Release of Court Records at 1, *In re* Ords. of This Ct. Interpreting Section 215 of the Patriot Act, No. Misc. 13-02 (FISA Ct. June 10, 2013).

381. Motion of the Reporters Committee for Freedom of the Press, ABC, Inc., The Associated Press, Bloomberg L.P., Dow Jones & Company, Inc., Gannett Co., Inc., Los Angeles Times, The McClatchy Company, National Public Radio, Inc., The New York Times Company, The New Yorker, The Newsweek/Daily Beast Company LLC, Reuters America LLC, Tribune Company, and The Washington Post for Leave to File Brief as *Amici Curiae* in Support of the Motion for the Release of Court Records and the Motions for Declaratory Judgment, *In re* Ords. of This Ct. Interpreting Section 215 of the Patriot Act, No. Misc. 13-02 (FISA Ct. July 15, 2013).

382. Brief of *Amici Curiae* U.S. Representatives Amash, Broun, Gabbard, Griffith, Holt, Jones, Lee, Lofgren, Massie, McClintock, Norton, O’Rourke, Pearce, Salmon, Sanford, and Yoho in Support of the Motion of the American Civil Liberties Union, the American Civil Liberties Union of the Nation’s Capital, and the Media Freedom and Information Access Clinic for the Release of Court Records, *In re* Ords. of This Ct. Interpreting Section 215 of the Patriot Act, No. Misc. 13-02 (FISA Ct. June 28, 2013).

383. *In re* Ords. of This Ct. Interpreting Section 215 of the Patriot Act, No. Misc. 13-02, GID. C.00085, slip op. at 18 (FISA Ct. Sept. 13, 2013).

384. Submission of the United States in Response to the Court’s September 13, 2013 Opinion and Order and Motion for Stay of Further Proceedings Due to Lapsed Appropriations at 2, *In re* Ords. Issued by This Ct. Interpreting Section 215 of the Patriot Act, No. Misc. 13-02 (FISA Ct. Oct. 4, 2013).

385. Second Submission of the United States in Response to the Court’s October 8, 2013 Order at 2, *In re* Ords. of This Ct. Interpreting Section 215 of the Patriot Act, No. Misc. 13-02 (FISA Ct. Nov. 18, 2013).

the period, on November 18, 2013, the government concluded that the document should be withheld in full.<sup>386</sup> In response, the court requested that the government submit a detailed explanation as to why.<sup>387</sup> A month later, the government reached a new conclusion, indicating that although the document was both classified and relevant to an ongoing law enforcement investigation, “upon review and as a discretionary matter, the Government has now determined that it does not object if this Court determines, pursuant to Rule 62(a), that those portions of the Opinion that are not classified and the release of which would not jeopardize the ongoing investigation should be published.”<sup>388</sup> An attached declaration proposed redactions.<sup>389</sup>

At the court’s request, the government met with the court’s legal advisors to discuss the proposed redactions.<sup>390</sup> In February 2014, the government again changed course, stating that “[i]n response to questions from the Court’s staff, and upon further review of the Opinion, the Government has determined that certain additional information in the Opinion is not classified and the release of that additional information would not jeopardize the ongoing investigation.”<sup>391</sup>

The document, finally released in redacted form on August 28, 2014, remains, to date, the most fulsome discussion of the court’s interpretation of the prohibition against basing surveillance solely upon First Amendment-protected activities—a clause that accompanies all fifteen FISA authorities that relate to the collection of foreign intelligence against U.S. persons.

Notably, the question of standing did not undermine the plaintiff’s position. The court’s approach was consistent with that adopted by geographic Article III courts in parallel cases underway. In *Company Doe v. Public Citizen*, three consumer advocacy groups had brought a First Amendment right of access challenge against an order sealing records of an underlying consumer product safety case.<sup>392</sup> Before reaching the merits, the Fourth Circuit rejected *Company Doe*’s argument that the consumer groups lacked Article III standing.<sup>393</sup> The court explained, “[T]he right of access is widely shared among the press and the general public alike, such that anyone who seeks and is denied access to judicial records sustains an injury.”<sup>394</sup>

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386. *Id.*

387. Movants’ Response to the Second Submission of the United States in Response to the Court’s Order of November 20, 2013 at 2, *In re* Ords. of This Ct. Interpreting Section 215 of the Patriot Act, No. Misc. 13-02 (FISA Ct. Feb. 18, 2014).

388. Submission of the United States in Response to the Court’s November 20, 2013 Order at 2–3, *In re* Ords. of This Ct. Interpreting Section 215 of the Patriot Act, No. Misc. 13-02 (FISA Ct. Dec. 20, 2013).

389. *Id.* at 3–4.

390. Second Submission of the United States in Response to the Court’s November 20, 2013 Order at 3, *In re* Ords. of This Ct. Interpreting Section 215 of the Patriot Act, No. Misc. 13-02 (FISA Ct. Feb. 6, 2014).

391. *Id.*

392. 749 F.3d 246, 252–53 (4th Cir. 2014).

393. *Id.* at 265.

394. *Id.* at 263.

## D. THE SECOND MOTION: MISC. 13-08

Following the initial *Guardian* article, further investigative reporting in the *Washington Post*, *New York Times*, *Guardian*, and elsewhere, as well as the government's response to the allegations, made it clear that the Verizon call records were part of a much larger surveillance program.<sup>395</sup> According to an article in the *Washington Post* published in July 2013, moreover, additional bulk collection programs appeared to be underway.<sup>396</sup> In light of statutory requirements, this meant that there had to be other FISC opinions addressing their lawfulness.

In November 2013, the ACLU and Yale's MFIA filed a second motion seeking to uncover the legal underpinnings of bulk collection writ large.<sup>397</sup> The litigants sought opinions discussing the legal basis for the collection of records related to internet-usage history, location information, and other data or records under FISA—all matters related to basic rule of law.<sup>398</sup>

The government identified four opinions in response. Two, issued under Section 215, had been released with redactions after two members of the court had requested publication under FISC Rule 62 and the government had undertaken a declassification review.<sup>399</sup> The other two opinions arose under a different provision in FISA that covered pen register and trap and trace devices.<sup>400</sup>

395. See, e.g., Barton Gellman & Ashkan Soltani, *NSA Collects Millions of E-mail Address Books Globally*, WASH. POST (Oct. 14, 2013, 6:53 PM), [https://www.washingtonpost.com/world/national-security/nsa-collects-millions-of-e-mail-address-books-globally/2013/10/14/8e58b5be-34f9-11e3-80c6-7e6dd8d22d8f\\_story.html](https://www.washingtonpost.com/world/national-security/nsa-collects-millions-of-e-mail-address-books-globally/2013/10/14/8e58b5be-34f9-11e3-80c6-7e6dd8d22d8f_story.html); Charlie Savage, *N.S.A. Said to Search Content of Messages to and from U.S.*, N.Y. TIMES (Aug. 8, 2013), [https://www.nytimes.com/2013/08/08/us/broader-sifting-of-data-abroad-is-seen-by-nsa.html?\\_r=0](https://www.nytimes.com/2013/08/08/us/broader-sifting-of-data-abroad-is-seen-by-nsa.html?_r=0); Barton Gellman & Ashkan Soltani, *NSA Infiltrates Links to Yahoo, Google Data Centers Worldwide, Snowden Documents Say*, WASH. POST (Oct. 30, 2013, 5:50 PM), [https://www.washingtonpost.com/world/national-security/nsa-infiltrates-links-to-yahoo-google-data-centers-worldwide-snowden-documents-say/2013/10/30/e51d661e-4166-11e3-8b74-d89d714ca4dd\\_story.html](https://www.washingtonpost.com/world/national-security/nsa-infiltrates-links-to-yahoo-google-data-centers-worldwide-snowden-documents-say/2013/10/30/e51d661e-4166-11e3-8b74-d89d714ca4dd_story.html).

396. See Ellen Nakashima & Sari Horwitz, *Newly Declassified Documents on Phone Records Program Released*, WASH. POST (July 31, 2013), [https://www.washingtonpost.com/world/national-security/governments-secret-order-to-verizon-to-be-unveiled-at-senate-hearing/2013/07/31/233fdd3a-f9cf-11e2-a369-d1954abcb7e3\\_story.html](https://www.washingtonpost.com/world/national-security/governments-secret-order-to-verizon-to-be-unveiled-at-senate-hearing/2013/07/31/233fdd3a-f9cf-11e2-a369-d1954abcb7e3_story.html).

397. Motion of the American Civil Liberties Union, the American Civil Liberties Union of the Nation's Capital, and the Media Freedom and Information Access Clinic for the Release of Court Records at 1, *In re Ops. & Ords. of This Ct. Addressing Bulk Collection of Data Under the Foreign Intel. Surveillance Act*, No. Misc. 13-08 (FISA Ct. Nov. 7, 2013).

398. *Id.* at 2, 4–5.

399. The United States' Opposition to the Motion of the American Civil Liberties Union, *et al.*, for the Release of Court Records at 1–2, *In re Ops. & Ords. of This Ct. Addressing Bulk Collection of Data Under the Foreign Intel. Surveillance Act*, No. Misc. 13-08 (FISA Ct. Dec. 6, 2013); see *In re FBI* for an Ord. Requiring the Prod. of Tangible Things from [REDACTED], No. BR 13-109, GID.C.00083, slip op. at 29 (FISA Ct. Aug. 29, 2013); *In re FBI* for an Ord. Requiring the Prod. of Tangible Things from [REDACTED], No. BR 13-158, GID.C.00086, slip op. at 2 (FISA Ct. Oct. 11, 2013).

400. See [REDACTED], No. PR/TT [REDACTED], GID.C.00091, slip op. at 1 (FISA Ct. [REDACTED]); [REDACTED], No. PR/TT [REDACTED], GID.C.00092, at 1–2 (FISA Ct. [REDACTED]). These documents were released by the government on November 18, 2013. The United States' Opposition to the Motion of the American Civil Liberties Union, *et al.*, for the Release of Court Records, *supra* note 399, at 2. For pen register and trap and trace provisions, see 50 U.S.C. § 1842.

The ACLU was not satisfied. The redactions made by the government were substantial, making it difficult to understand the legal analysis.<sup>401</sup> The civil rights organization sought clarification on the definition of “metadata,” for which the court had authorized bulk collection, as well as information related to the duration of collection, how the information obtained was used, and the nature and duration of government noncompliance with the FISC orders.<sup>402</sup> The ACLU’s contentions highlighted the conflict of interest involved in giving the government the authority to redact information related to its own failure to follow judicial directions. The principle of *nemo iudex in causa sua* applied.

For more than three years, the motion languished until, abruptly, on January 25, 2017, the presiding judge issued an opinion dismissing the motion for lack of jurisdiction.<sup>403</sup> The court determined that the First Amendment did not afford movants a qualified right of access to the opinions and that they lacked standing under Article III.<sup>404</sup> That opinion brought the FISC into conflict with Judge Saylor’s prior determination in the earlier matter, Misc. 13-02.<sup>405</sup> To achieve uniformity, the court *sua sponte* granted en banc reconsideration.<sup>406</sup>

In November 2017, the en banc court issued a 6–5 ruling that the ACLU and MFIA had sufficiently alleged the invasion of a legally cognizable interest necessary to satisfy the injury-in-fact requirement.<sup>407</sup> The presiding judge, consistent with statutory provisions, certified the decision to the FISCR. Four months later, the FISCR issued its decision, siding with the en banc court.<sup>408</sup> The movants had demonstrated that denial of access to the redacted materials, consistent with cases in the geographic courts, could demonstrate an injury in fact.<sup>409</sup> Although the nature of the FISC was unique and the nature of its work sensitive, the standing requirements for a First Amendment right of access were met.

The case went back to the FISC to be determined on the merits. In February 2020, Judge Collyer ruled that FISC had ancillary subject matter jurisdiction over the petitioner’s motion because it was “necessary to [the court’s] successful functioning”—particularly its ability to “ensure that its proceedings comport with a correct understanding of both the First Amendment and statutorily required

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401. Movants’ Reply in Support of Their Motion for the Release of Court Records at 8, 10, *In re Ops. & Ords. Issued by This Ct. Addressing Bulk Collection of Data Under Various Provisions of the Foreign Intel. Surveillance Act*, No. Misc. 13-08 (FISA Ct. Dec. 20, 2013).

402. *Id.* at 11.

403. *In re Ops. & Ords. of This Ct. Addressing Bulk Collection of Data Under the Foreign Intel. Surveillance Act*, No. Misc. 13-08, GID.C.00127, slip op. at 42 (FISA Ct. Jan. 25, 2017).

404. *Id.* at 39–40.

405. *See In re Ords. of This Ct. Interpreting § 215 of the Patriot Act*, No. Misc. 13-02, GID.C.00085, slip op. at 9, 17 (FISA Ct. Sept. 13, 2013) (holding that the plaintiffs had Article III standing and determining that “it is appropriate to take steps toward publication of [certain] Section 215 Opinions” but not reaching the merits of their right of access claim).

406. This appears to be the first en banc consideration of any matter in the history of the FISC.

407. *In re Ops. & Ords. of This Ct. Addressing Bulk Collection of Data Under the Foreign Intel. Surveillance Act*, No. Misc. 13-08, GID.C.00140, slip op. at 18 (FISA Ct. Nov. 9, 2017) (en banc).

408. *In re Certification of Questions of L. to the Foreign Intel. Surveillance Ct. of Rev.*, No. FISCR 18-01, GID.CA.00006, at 2 (FISA Ct. Rev. Mar. 16, 2018) (per curiam).

409. *Id.* at 10–15.



security procedures.”<sup>410</sup> On the merits, however, the court determined that no First Amendment right of access attached to the opinions. For the court, neither the “experience” nor the “logic” test could be satisfied.<sup>411</sup>

That ruling was remarkable, in part, because of the sheer number of FISC/R rulings which at that point had entered the public domain—a matter surely probative of the experience test. In addition, Congress in 2015 had made statutory changes specifically designed to give the public more access to FISC opinions. The Legislature had inserted measures requiring the government to conduct a declassification review of any FISC/R opinions that “include[] a significant construction or interpretation of any provision of law” and to make them available to the public “to the greatest extent practicable.”<sup>412</sup> Those measures, though, placed requirements on the Executive, not the court. Under the government’s interpretation of the law, they did not apply to opinions passed prior to the USA FREEDOM Act, and they did not involve the application of the standards that courts ordinarily applied to First Amendment right of public access claims to judicial documents. The ACLU and MFIA filed a petition for review or, in the alternative, for a writ of mandamus.<sup>413</sup>

The second time the case returned to the FISC/R, the court declined appointing any amicus curiae. Instead, in April 2020, the court of appeals simply dismissed the case for lack of jurisdiction, stating that it did not “fall[] within the class of cases carefully delineated by the FISA as within [the FISC/R’s] authority as a court of appellate review.”<sup>414</sup> The court did not read FISA as supplying FISC/R with jurisdiction by giving the court authority to review the denial of any application made under the chapter.<sup>415</sup> The FISC/R further rejected ancillary jurisdiction on the grounds that the petitioner “ha[d] not been haled into court against [his] will” and that resolution was not “‘necessary[]’ to enforce [the court’s] mandates . . . or to protect the integrity of [its] proceedings.”<sup>416</sup> The FISC/R also denied the petitioner’s request for a writ of mandamus, which it viewed as “available only to assist an existing basis for jurisdiction.”<sup>417</sup> In this case, the petitioner had not identified any independent basis for subject matter jurisdiction.<sup>418</sup> Apparently, the courts could only entertain a First Amendment right of access claim if specifically empowered to do so by Congress.

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410. *In re Ops. & Ords. of This Ct. Addressing Bulk Collection of Data Under the Foreign Intel. Surveillance Act*, No. Misc. 13-08, GID.C.00267, slip op. at 6, 9, 11 (FISA Ct. Feb. 11, 2020).

411. *Id.* at 18.

412. 50 U.S.C. § 1872(a)–(b).

413. Petition for Review or in the Alternative for a Writ of Mandamus, *In re Ops. & Ords. by This Ct. Addressing Bulk Collection of Data Under the Foreign Intel. Surveillance Act* at 1, No. Misc. 13-08 (FISA Ct. Mar. 10, 2020).

414. *In re Ops. & Ords. by the FISC Addressing Bulk Collection of Data Under the Foreign Intel. Surveillance Act*, 957 F.3d 1344, 1349 (FISA Ct. Rev. 2020) (per curiam).

415. *See id.* at 1351–52.

416. *Id.* at 1356 (quoting *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812)).

417. *Id.* at 1357.

418. *Id.* at 1358.

## E. THE THIRD MOTION: MISC. 16-01

As aforementioned, in 2015 Congress amended FISA to require the government to release any FISC/R opinions containing any significant interpretation of law. According to the government's statutory interpretation, the law only applied to subsequent decisions.<sup>419</sup>

Accordingly, in October 2016, the ACLU filed a third motion seeking the release of all FISC opinions "containing novel or significant interpretations of law issued between September 11, 2001, and the passage of the USA FREEDOM Act on June 2, 2015."<sup>420</sup> Looking to documentary sources and news reporting as grounds for their concerns, the ACLU suggested that the decisions might address a range of novel surveillance activities, such as government bulk search of email received by Yahoo! customers, efforts to compel tech companies to weaken or circumvent their own encryption protocols, or the use of malware or Network Investigative Techniques.<sup>421</sup> The ACLU speculated that the government may be using FISA to compel technology companies to disclose their source code so that it can identify vulnerabilities in their systems or that it could be using Titles I or III to employ stingray cell-phone tracking devices.<sup>422</sup> Alternatively, Section 702 might be employed to undertake warrantless surveillance of Americans.<sup>423</sup>

In support of their petition, the ACLU broadened the question to meet the experience test, looking beyond the history of the FISC/R as one forum to Article III opinions addressing foreign intelligence surveillance, arguing that such proceedings have historically been open to public.<sup>424</sup> District courts, for instance, have routinely published opinions about the scope and lawfulness of surveillance conducted under FISA.<sup>425</sup> Congress, too, has recognized that some FISC opinions should be published—and many of them have been.<sup>426</sup> As a matter of logic, a qualified right of access would carry many benefits and would compromise

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419. See Defendant United States Department of Justice's Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Reconsideration at 10, *Elec. Frontier Found. v. DOJ*, No. 14-cv-00760 (D.D.C. Feb. 5, 2016), ECF No. 28.

420. Motion of the American Civil Liberties Union for the Release of Court Records at 1, *In re Ops. & Ords. of This Ct. Containing Novel or Significant Interpretations of L.*, No. Misc. 16-01 (FISA Ct. Oct. 18, 2016).

421. *Id.* at 7–8.

422. *See id.* at 8.

423. *See id.* at 1.

424. *Id.* at 13, 15.

425. *See, e.g.*, *United States v. Megahey*, 553 F. Supp. 1180 (E.D.N.Y. 1982); *United States v. Nicholson*, 955 F. Supp. 588 (E.D. Va. 1997); *United States v. Sherifi*, 793 F. Supp. 2d 751 (E.D.N.C. 2011).

426. *See* *Uniting and Strengthening America by Fulfilling Rights and Ensuring Effective Discipline over Monitoring Act of 2015* (USA FREEDOM Act), Pub. L. No. 114-23, sec. 402(a), § 602, 129 Stat. 268, 281 (codified as amended at 50 U.S.C. § 1872) (requiring decisions, orders, and opinions of the FISC containing "significant construction[s] or interpretation[s] of any provision of law" be made "publicly available to the greatest extent practicable"). The ACLU cited this provision in a motion to the FISC. *See* Motion of the American Civil Liberties Union for the Release of Court Records, *supra* note 420, at 11.

neither the FISC nor the government's legitimate interest in protecting the confidentiality of properly classified information.

Following the FISC Ruling in the prior matter (Misc. 13-08), however, in September 2020, Judge James Boasberg, who had become presiding judge of the FISC, dismissed the third motion on grounds that the court lacked jurisdiction.<sup>427</sup> He wrote, “[T]he FISC is not empowered by Congress to consider constitutional claims generally, First Amendment claims specifically, or freestanding motions filed by persons who are not authorized by FISA to invoke this Court’s jurisdiction.”<sup>428</sup> Because the “reasons why the FISC Ruling found it unwarranted to exercise ancillary jurisdiction apply to the pending motion, the FISC is foreclosed from doing so here.”<sup>429</sup>

The ACLU filed a petition for review or, in the alternative, for a writ of mandamus with the FISC Ruling.<sup>430</sup> Judge Sentelle, writing for the FISC Ruling, refused to entertain the petition to revisit its earlier decision, finding that he was “unpersuaded that the Movant has shown cause as to why this Court has jurisdiction to consider its current claims.”<sup>431</sup> The court also refused to certify the matter to the Supreme Court, as provided for under statutory provisions.<sup>432</sup>

Bound by the FISC Ruling’s determination, the FISC dismissed all parallel First Amendment and common law right of access requests.<sup>433</sup> The FISC Ruling’s decision foreclosed any future efforts by the public to obtain a First Amendment right of access to the legal opinions of the court, as well as any judicial muniments on which the court bases its decisions—despite the enormous impact of FISC/R decisions, and government behavior discovered by the court in the course of its operation, on U.S. citizens’ constitutional rights.

#### F. BEFORE THE SUPREME COURT: NO. 20-1499

It was this third motion, Misc. 16-01, which the ACLU, Yale’s MFIA, and the Knight First Amendment Institute at Columbia University took to the Supreme

427. *In re Ops. & Ords. of This Ct. Containing Novel or Significant Interpretations of L.*, No. Misc. 16-01, GID.C.00285, slip op. at 3 (FISA Ct. Sept. 15, 2020).

428. *Id.*

429. *Id.*

430. Petition for Review or in the Alternative for a Writ of Mandamus, *In re Ops. & Ords. by the FISC Addressing Bulk Collection of Data Under the Foreign Intel. Surveillance Act*, No. 20-01 (FISA Ct. Rev. Mar. 10, 2020).

431. *In re Ops. & Ords. of the FISC Containing Novel or Significant Interpretations of L.*, No. Misc. 20-02, GID.CA.00015, slip op. at 2 (FISA Ct. Rev. Nov. 19, 2020).

432. *Id.* at 3; see 28 U.S.C. § 1254(2).

433. See *In re ProPublica, Inc. for the Release of Ct. Recs.*, No. Misc. 13-09, GID.C.00284, slip op. at 1, 3 (FISA Ct. Sept. 15, 2020) (seeking release of court records related to bulk collection); *In re Ops. & Ords. of This Ct. Containing Novel or Significant Interpretations of L.*, GID.C.00285, slip op. at 1, 3 (invoking Rule 62 and the First Amendment right of access “to compel the Court to disclose classified opinions and orders” containing “novel or significant interpretations of law” issued between 9/11 and the enactment of the USA FREEDOM Act); *In re Publ’n of Recs.*, No. Misc. 19-01, GID.C.00286, slip op. at 1, 3 (FISA Ct. Sept. 15, 2020) (invoking Rule 62, the First Amendment right of access, and the common law right of access to compel the court to disclose orders, opinions, decisions, sanctions or other records related to attorney misconduct or discipline).

Court, challenging the rulings and asking the Court to recognize a qualified First Amendment right of access to the opinions requested.<sup>434</sup> Plaintiffs accepted that there would be some redactions in the final documents released to the public but requested that they be limited to those which were strictly necessary for national security purposes.<sup>435</sup> The Court declined to hear the case,<sup>436</sup> but not before Justice Neil Gorsuch, joined in his dissent by Justice Sonia Sotomayor, underscored the serious implications of the government's arguments for the future ability of the Judiciary to function and the public to gain access to the inner workings of the Executive Branch.<sup>437</sup>

The ACLU's argument for the First Amendment right of access turned on the FISC's status as an Article III court, noting that, as such, it has the capacity to act on its inherent powers.<sup>438</sup> While it may be a specialized court with limited jurisdiction, like other similarly situated courts, it exercises control over its own decisions. The ACLU pointed out various ways in which the court exercises other inherent powers, such as promulgating rules or publishing its opinions.<sup>439</sup> Ancillary jurisdiction provided an independent basis for the FISC to adjudicate the motion—a finding supported by the Collyer opinion in 2020 in which the court declined to exercise its inherent authority.<sup>440</sup> In this case, the records were “ancillary to the FISC proceedings that [had given] rise to [them].”<sup>441</sup>

The ACLU argued that the Supreme Court had jurisdiction to correct the FISC/R errors. By way of relief, the ACLU looked, first, to a statutory writ of certiorari.<sup>442</sup> Alternatively, it argued, the Supreme Court could take the case pursuant to the All Writs Act, with four potential, independent bases for jurisdiction: that of the Supreme Court's inherent jurisdiction over lower courts; the Court's constitutional appellate jurisdiction (on the grounds that the FISC/R “are inferior Article III tribunals”); its “jurisdiction over claims of access to records of the judiciary”; and in aid of Supreme Court jurisdiction under the First Amendment “to review the denial of a claimed right of access to Article III proceedings.”<sup>443</sup>

The government saw the situation rather differently. It argued that the Supreme Court “itself lacks jurisdiction to issue a statutory writ of certiorari to review the decision below, and the petition does not satisfy the stringent requirements for the Court's issuance of an extraordinary writ of mandamus or

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434. Petition for a Writ of Certiorari at 21, *ACLU v. United States*, 142 S. Ct. 22 (2021) (No. 20-1499).

435. *Id.* at 10, 26 & n.7.

436. *ACLU*, 142 S. Ct. at 22.

437. *See id.* at 23 (Gorsuch, J., dissenting) (“On the government's view, literally *no court* in this country has the power to decide whether citizens possess a First Amendment right of access to the work of our national security courts.”).

438. Petition for a Writ of Certiorari, *supra* note 434, at 14.

439. *Id.* at 14–15.

440. *Id.* at 16.

441. *Id.* at 17.

442. *Id.* at 27–29; *see* 28 U.S.C. § 1254(1); 50 U.S.C. § 1803(b).

443. Petition for a Writ of Certiorari, *supra* note 434, at 29–31.

common-law certiorari.”<sup>444</sup> The underlying precept was that any issuance of a writ of mandamus “would not be in aid of this Court’s own jurisdiction.”<sup>445</sup> The government continued,

In any event, no exceptional circumstances exist that would justify an exercise of any discretionary powers this Court might have to afford such relief. And even if petitioner’s claims had merit, they would not justify the extraordinary relief petitioner seeks here because adequate alternative means of access are available. *The Executive Branch is committed to providing the public as much transparency about the FISC’s work as is consistent with the Nation’s security. And there is also a readily available judicial process under the Freedom of Information Act (FOIA), 5 U.S.C. 552.*<sup>446</sup>

For the government, the Supreme Court lacked jurisdiction over the action brought before the FISC, as well as the appellate determination of the FISC. It was an extraordinary assertion: that the highest court in the land lacked the ability to examine Article III judicial rulings.

What made the claim even more remarkable was, first, the government’s suggestion that it is committed to providing the public with as much information about the FISC as possible. A large part of the reason that so much information is now in the public domain comes down to a combination of leaks and a Judiciary increasingly unwilling to give the Executive a free pass.<sup>447</sup> Looking at the FOIA cases working their way through the courts, the Executive appears to be anything but transparent in terms of how it is handling requests.<sup>448</sup> In case after case, it ignores filings, only reluctantly coming into court, whereupon it releases a paltry amount of information. Where judges push back, the Executive eventually, in numerous cases, ends up releasing a tremendous amount of material—but only after being forced to do so.<sup>449</sup>

Second, the entire purpose of FOIA is to allow the public access to *Executive Branch* documents—not to judicial materials. There is something distinctly odd about the government coming into the Supreme Court and arguing that the public can gain access to Article III documents by requesting access to information that the government just happens to have in one of its files. Any such document is merely a copy of the original decision or order issued by the court itself. The idea, moreover, that the government can prevent the public from going directly to the courts to obtain the judicial record raises serious separation of powers concerns. The government cannot stop the public from obtaining a record owned by another branch, of which it merely retains a copy. If it could do so, it would be a

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444. Brief for the United States in Opposition, *supra* note 29, at 11.

445. *Id.*

446. *Id.* (emphasis added).

447. See generally Donohue, *supra* note 299 (detailing some of the information obtained via FOIA litigation).

448. See *id.* at 365–73.

449. *Id.* at 365–66.

significant mechanism of control, sufficient to override the other branches' powers.

Third, FOIA was *not* meant to be a way to access matters related to national security. In the statute's first iteration, President Lyndon B. Johnson issued a signing statement in which he specifically exempted matters related to national security.<sup>450</sup> In its second iteration, President Gerald Ford vetoed the bill on similar grounds.<sup>451</sup> The statute itself provides numerous ways in which the government can block access to national security records: eleven different exclusions, *all* of which have been cited in some form or another in FISA FOIA cases, apply.<sup>452</sup>

Case law has similarly paved the way for material to remain hidden from public view on national security grounds. In *Environmental Protection Agency v. Mink*, the Supreme Court construed some of FOIA's national defense and foreign policy statutory exemptions.<sup>453</sup> In one clause, the statute provides for agencies to withhold records "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy."<sup>454</sup> The test, developed in *Mink*, is "whether the President has determined by Executive Order that particular documents are to be kept secret."<sup>455</sup> This line of cases raises significant doubt about the veracity of the government's claim—not least because the government frequently takes advantage of the exception.

Fourth, the government's effort to convince the Supreme Court to rely on the lower geographic courts, instead of the FISC/R, to determine whether to release FISC/R opinions does not make logical sense. The entire purpose of having a specialized court is to allow it to develop a certain expertise—in this instance, over sensitive national security concerns. As a purely practical matter, the FISC/R are better situated to determine which portions of its rulings it would like to make public. It is also the practice of courts that when a First Amendment right of access claim is brought, it is brought in the court which generated or registered

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450. Statement by the President upon Signing Bill Revising Public Information Provisions of the Administrative Procedure Act, 2 WEEKLY COMP. PRES. DOC. 895, 895–96 (July 4, 1966) ("This 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. . . . At the same time, the welfare of the Nation or the rights of individuals may require that some documents not be made available. As long as threats to peace exist, for example, there must be military secrets. A citizen must be able in confidence to complain to his Government and to provide information, just as he is—and should be—free to confide in the press without fear of reprisal or of being required to reveal or discuss his sources. . . . [T]his bill in no way impairs the President's power under our Constitution to provide for confidentiality when the national interest so requires. . . . I have always believed that freedom of information is so vital that only the national security, not the desire of public officials or private citizens, should determine when it must be restricted.").

451. See The President's Message to the House of Representatives Returning H.R. 12471 Without His Approval, 10 WEEKLY COMP. PRES. DOC. 1318, 1318 (Oct. 17, 1974) ("I remain concerned that our military or intelligence secrets and diplomatic relations could be adversely affected by this bill. . . . [C]ourts should not be forced to make what amounts to the initial classification decision in sensitive and complex areas where they have no particular expertise.").

452. See 5 U.S.C. § 552(b)(1)–(9); *id.* § 552(c) (relating to law enforcement and national security).

453. See 410 U.S. 73, 82 (1973).

454. 5 U.S.C. § 552(b)(1)(A).

455. *Mink*, 410 U.S. at 82.

the material in question. The government's suggestion runs roughshod over practice.

When the Supreme Court denied the petition, Gorsuch, joined by Sotomayor, issued a scathing dissent.<sup>456</sup> They began by noting the abuses uncovered by the Church Committee which led to the creation of the FISC/R, as well as how the courts have evolved to no longer serve as a limited, warrant-making body: "With changes in technology and thanks to various legislative amendments, these courts have come to play an increasingly important role in the Nation's life. Today, the FISC evaluates extensive surveillance programs that carry profound implications for Americans' privacy and their rights to speak and associate freely."<sup>457</sup> The FISC/R had refused to even consider whether it had inherent power over its own records, instead claiming a lack of jurisdiction over First Amendment claims.<sup>458</sup> On top of this, the government had come into the Supreme Court and argued not only that the lower court rulings should be left undisturbed, but that the Court itself lacked any power to review FISC/R decisions.<sup>459</sup> Gorsuch raised concern about "the right of public access to Article III judicial proceedings of grave national importance" and, "even more fundamentally," the government's "challenge to the power of [the Supreme] Court to review the work of Article III judges in a subordinate court."<sup>460</sup> He added, "If these matters are not worthy of our time, what is?"<sup>461</sup>

#### V. THE SENSITIVE AND SPECIALIZED SUBJECT MATTER ASSERTION

The most common argument mounted against a public right of access to the proceedings of the FISC/R centers on the sensitive nature of the matters before them and, relatedly, the statutory framework governing FISA. The suggestion is that giving the public access to the courts' judicial documents risks grave harm to U.S. national security. Congress therefore designed the FISC/R to function in an environment of secrecy, with *in camera*, *ex parte* proceedings and requirements to seal certain records. By not explicitly granting FISC/R jurisdiction over First Amendment claims, Congress foreclosed a public right of access. The most extreme version of this argument, articulated by the government in 2021, is that neither the FISC/R *nor the Supreme Court* exercise jurisdiction over First Amendment right of access claims to FISC/R records.<sup>462</sup> This argument is unavailing on at least four grounds which stem, respectively, from the Article III status of the FISC/R, the nature of a constitutionally established right of access, the way in which FISA has evolved, and the ubiquitous nature of national security

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456. See *ACLU v. United States*, 142 S. Ct. 22, 22 (2021) (Gorsuch, J., dissenting).

457. *Id.* at 22–23.

458. *Id.* at 23.

459. *Id.*

460. *Id.*

461. *Id.*

462. See Brief for the United States in Opposition, *supra* note 29, at 11.

concerns in parallel, geographic courts—thus underscoring that the FISC/R are far from alone in dealing with sensitive matters.

#### A. ARTICLE III STATUS AND THE COMMON LAW RIGHT OF ACCESS

At some level, the argument that Congress foreclosed a First Amendment public right of access is somewhat beside the point. Regardless of what constitutional arguments may or may not present, the FISC/R, as Article III courts, have inherent powers, amongst which is control over their own records. The concomitant common law right of public access attends. Quite apart from this, the FISC/R's statuses as Article III entities mean that the separation of powers prevents the Executive Branch from being able to divest the courts of control over their own opinions.

##### 1. The FISC/R as Article III Courts

Congress designed the FISC/R to be courts fully within the third branch of government.<sup>463</sup> They are constituted by Article III individuals and situated within the Article III structure.<sup>464</sup> Seven judges from the federal district courts or courts of appeal constitute FISC, and three, drawn from the same, make up the FISC/R.<sup>465</sup> The judges therefore meet the constitutional requirements: life tenure and a salary that cannot be diminished.<sup>466</sup> How judges are selected—by the Chief Justice of the Supreme Court—further underscores their status.

As an institutional matter, Congress provided the FISC/R with the same appellate structure as regular Article III courts. Appeals from the FISC/R are to the Supreme Court.<sup>467</sup> The Chief Justice sets the rules for security measures.<sup>468</sup> The courts, moreover, are administered by the Administrative Office of the U.S. Courts, an agency within the Judicial Branch which provides a range of legal, technological, legislative, and financial support to federal courts.<sup>469</sup>

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463. See, e.g., *Foreign Intelligence Electronic Surveillance: Hearings on H.R. 5794, H.R. 9745, H.R. 7308, and H.R. 5632 Before the Subcomm. on Legis. of the H. Permanent Select Comm. on Intel.*, 95th Cong. 26 (1978) (letter from John M. Harmon, Assistant Attorney General, to Rep. Edward P. Boland (Apr. 18, 1978), noting that the FISC/R “will be Article III courts”); *id.* at 116 (describing the FISC, comprised of “article III judge[s],” as independent “and in no way dependent on the executive branch of the Government”); *id.* at 184 (letter from Sen. Edward M. Kennedy to Rep. Robert McClory (Feb. 10, 1978), recognizing the FISC as within “the constitutional jurisdiction of Article III courts”); see also *id.* at 213–16, 224 (addressing whether the issues before the court met the constitutional cases or controversies requirements).

464. Originally, Congress elected to include seven judges from seven different judicial circuits to sit on the FISC. The House version of the bill had lodged the court directly in the District Courts. The Senate version established a special court. The compromise was to allow the judges themselves to be drawn from across the country, from the federal Judiciary. See H.R. REP. NO. 95-1720, at 26–27 (1978) (Conf. Rep.) (discussing the designation of judges).

465. See S. REP. NO. 95-701, at 47–48 (1978) (discussing contours of court); H.R. REP. NO. 95-1720, at 26 (same).

466. See U.S. CONST. art. III, § 1.

467. 50 U.S.C. §§ 1803(b), 1822(d).

468. See 50 U.S.C. § 1802(a)(3).

469. See *Individual Courts*, U.S. CTS., <https://www.uscourts.gov/about-federal-courts/judicial-administration> [<https://perma.cc/X894-8K86>] (last visited Sept. 22, 2023).



The processes Congress instituted for the FISC/R mirror those in nonspecialized courts. FISA Title I orders and Title III warrants mirror the criminal warrant procedures for Title III of the Omnibus Crime Control Act of 1968.<sup>470</sup> Judges, in turn, are to ascertain probable cause, albeit applied to different contexts (not that certain crimes have been, are being, or will be committed, but as to whether the target is a foreign power or an agent of a foreign power and likely to use the facilities to be placed under surveillance or exert full control over the place to be searched).

The FISC/R exhibit the same powers as geographic courts. Their decisions have the same force as judicial rulings do in the geographic courts. If the government does not prevail in a matter before the FISC/R, it cannot just shop around until it gets a better answer. Outside of direct appeal to the Supreme Court, it is foreclosed from doing so. The courts' orders thus are "final and binding."<sup>471</sup> The government is required to comply. Thus, as recognized by Congress, "Willful failure to abid[e] by the minimization procedures may be treated as contempt of court."<sup>472</sup>

As a matter of substance, the FISC/R, like all Article III entities, protect the rights of U.S. persons (USPs). A higher standard is applied to USP communications—this is the underlying premise of standard minimization procedures.<sup>473</sup> If USP communications are collected from facilities under the exclusive control of foreign powers, they must be destroyed unless authorized by court order.<sup>474</sup>

Not only do the FISC/R walk, talk, and act like Article III entities, but part of the original controversy over their creation was that the structure was designed to function as an Article III entity. One of the key questions at the time was whether the *in camera*, *ex parte* nature of the proceedings, together with the subject matter (which implicated Article II interests), undermined the enterprise.<sup>475</sup> To the extent that any question existed as to the courts' status, it has long since been settled. Both specialized and general Article III courts have repeatedly recognized the FISC's status.<sup>476</sup> Sixteen years ago, the FISC affirmed itself as an Article III court.<sup>477</sup> Ten years later, the court again underscored its position.<sup>478</sup> In *In re*

470. See 124 CONG. REC. 28,126–27 (1978).

471. H.R. REP. NO. 95-1720, at 25 (1978) (Conf. Rep.).

472. S. REP. NO. 95-701, at 55 (1978).

473. See 50 U.S.C. § 1801(h).

474. See 50 U.S.C. §§ 1802, 1806.

475. See, e.g., 124 CONG. REC. 33,787 (1978) (expressing skepticism as to whether the FISC would be serving in a judicial function under Article III of the Constitution); *id.* at 28,126–27 (discussing the debate between proponent and opponents); *id.* at 36,412 (statement of Mr. Wiggins) (critiquing the FISC for "fail[ing] in the essential ingredient of an article III case or controversy" and stating that "[t]here is no adversary relationship before the court between the real parties in interest"); *id.* at 28,141 (statement of Mr. Drinen) (stating that the bill "imposes duties on Federal courts totally at variance with anything that we know as a 'case or controversy'").

476. See, e.g., *United States v. Cavanagh*, 807 F.2d 787, 791–92 (9th Cir. 1987); *In re Release of Ct. Recs.*, 526 F. Supp. 2d 484, 486 & n.4 (FISA Ct. 2007).

477. *In re Release of Ct. Recs.*, 526 F. Supp. 2d at 486 & n.4.

478. *In re Ops. & Ords. of This Ct. Addressing Bulk Collection of Data Under the Foreign Intel. Surveillance Act*, No. Misc. 13-08, GID.C.00127, slip op. at 6 (FISA Ct. Jan. 25, 2017) ("Because the

*Sealed Case*, part of the government's argument was precisely that the minimization restrictions imposed by the FISC exceeded the court's constitutional authority as Article III judges.<sup>479</sup> The FISC/R agreed.<sup>480</sup> So did their geographic sistren. In *United States v. Cavanagh*, less than a decade after the FISC/R's creation, the Ninth Circuit "reject[ed]" the assertion "that the FISA court is not properly constituted under article III" and observed that "the judges assigned to serve on the FISA court are federal district judges, and as such they are insulated from political pressures by virtue of the protections they enjoy under article III."<sup>481</sup> Other courts have followed suit.<sup>482</sup>

Finally, the mere fact that the court has specialized subject matter jurisdiction does not alter the nature of the institution. U.S. history is replete with specialized Article III courts. The Customs Courts,<sup>483</sup> Emergency Court of Appeals,<sup>484</sup> Commerce Court,<sup>485</sup> Special Railroad Court,<sup>486</sup> Court of Claims,<sup>487</sup> and D.C. Courts (none of which currently operate) previously served as Article III entities. Currently, the U.S. Court of Appeals for the Federal Circuit,<sup>488</sup> the U.S. Court of International Trade,<sup>489</sup> and the Alien Terrorist Removal Court,<sup>490</sup> along with the

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FISC is an Article III court, it cannot exercise the judicial power to resolve the Movants' motion unless there is an actual 'case or controversy' in which the Movants have standing." (footnote omitted)).

479. 310 F.3d 717, 722 (FISA Ct. Rev. 2002) (per curiam).

480. *Id.* at 731 ("The FISA court's decision and order not only misinterpreted and misapplied minimization procedures it was entitled to impose, but as the government argues persuasively, the FISA court may well have exceeded the constitutional bounds that restrict an Article III court."); see *In re Certification of Questions of L. to the Foreign Intel. Surveillance Ct. of Rev.*, No. FISC/R 18-01, GID.CA.00006, slip. op. at 8 (FISA Ct. Rev. Mar. 16, 2018) (per curiam) (affirming Article III status of the FISC/R).

481. 807 F.2d at 791–92.

482. See, e.g., *In re Kevork*, 634 F. Supp. 1002, 1014 (C.D. Cal. 1985) (rejecting the claim that the FISC "is not a proper Article III court"), *aff d*, 788 F.2d 566 (9th Cir. 1986); *United States v. Megahey*, 553 F. Supp. 1180, 1197 (E.D.N.Y. 1982) (rejecting the argument that the appointment of judges to the FISC for a fixed seven-year period violates Article III on the grounds that "[t]he FISC is wholly composed of United States District Court judges, appointed for life by the President with the advice and consent of the Senate, whose salaries cannot be reduced during their tenure"), *aff d*, 729 F.2d 1444 (2d Cir. 1983), and *aff d sub nom.* *United States v. Duggan*, 743 F.2d 59 (2d Cir. 1984); *United States v. Falvey*, 540 F. Supp. 1306, 1313 n.16 (E.D.N.Y. 1982) (rejecting the argument that the FISA structure turns Article III judges into Article I adjudicators).

483. See Act of July 14, 1956, Pub. L. No. 84-703, ch. 589, 70 Stat. 532, 532 (Customs Court); Act of Aug. 25, 1958, Pub. L. No. 85-755, 72 Stat. 848, 848 (Court of Customs and Patent Appeals).

484. See Emergency Price Control Act of 1942, 50 U.S.C. § 924; Economic Stabilization Act Amendments of 1971, Pub. L. No. 92-210, sec. 2, § 211(b), 85 Stat. 743, 748–49.

485. See Act of June 18, 1910, Pub. L. No. 61-218, ch. 309, 36 Stat. 539, 539.

486. See Regional Rail Reorganization Act of 1973, Pub. L. No. 93-236, § 209, 87 Stat. 985, 999–1000 (1974).

487. See Act of July 28, 1953, ch. 253, sec. 1, § 171, 67 Stat. 226, 226.

488. See Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (establishing the U.S. Court of Appeals for the Federal Circuit).

489. See 28 U.S.C. § 1581 (establishing the U.S. Court of International Trade).

490. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, sec. 401, §§ 501–504, 110 Stat. 1214, 1259–63 (codified as amended at 8 U.S.C. §§ 1531–1534) (establishing the Alien Terrorist Removal Court (ATRC)); see also Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 354, 110 Stat. 3009, 3009–641 to 3009–644 (1996) (revising the ATRC structure

FISC/R, fulfill a specialized Article III function.<sup>491</sup> Every such entity retains all the powers that adhere to the Judiciary as a coordinate branch of government. In sum, there is no question that the FISC/R qualify as Article III entities. Certain implications follow.

## 2. Implications of Article III Status

For our present purposes, the most important implication of the FISC/R's constitutional status is that, as Article III courts, the FISC/R are imbued with the judicial power of the United States. Certain inherent powers follow. Many center on the courts' responsibility to ensure justice and fairness.

Courts, for instance, have the authority to adopt special discovery measures in habeas proceedings.<sup>492</sup> They can appoint auditors, special masters, and commissioners to make investigations.<sup>493</sup> They can exclude, admit, or strike evidence or exhibits on grounds of fairness.<sup>494</sup> They can require that witness statements be produced.<sup>495</sup> Article III courts can insist that parties attend hearings to address evidence missing from the record.<sup>496</sup> They can mediate the impact of common law rules of procedure.<sup>497</sup> They can fashion equitable remedies—directly linked to constitutional authority to hear cases in equity.<sup>498</sup> And they can issue and answer letters rogatory to obtain evidence from an individual within the jurisdiction of a foreign court.<sup>499</sup>

Various inherent powers relate to the conduct of juries to ensure that they operate in a manner that will yield just results. Once a jury is convened, Article III courts have the power to fine jurors,<sup>500</sup> withdraw a juror mid-trial,<sup>501</sup> discharge a

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to allow removal proceedings to proceed despite a judicial finding that the unclassified summary is inadequate).

491. For further discussion of Article I, II, III, and IV courts, see generally Donohue & McCabe, *supra* note 13.

492. See, e.g., *Harris v. Nelson*, 394 U.S. 286, 290 (1969).

493. See *Ex parte Peterson*, 253 U.S. 300, 312–14 (1920); *Ruiz v. Estelle*, 679 F.2d 1115, 1161 (5th Cir. 1982), *amended in part and vacated in part on other grounds*, 688 F.2d 266 (5th Cir. 1982); *Schwimmer v. United States*, 232 F.2d 855, 865 (8th Cir. 1956); *Heckers v. Fowler*, 69 U.S. 123, 127–29, 134 (1864).

494. See *Unigard Sec. Ins. Co. v. Lakewood Eng'g & Mfg. Corp.*, 982 F.2d 363, 368 (9th Cir. 1992); *Walker v. Action Indus., Inc.*, 802 F.2d 703, 712 (4th Cir. 1986); *Admiral Theatre Corp. v. Douglas Theatre Co.*, 585 F.2d 877, 897–98 (8th Cir. 1978).

495. See *Jencks v. United States*, 353 U.S. 657, 668–69 (1957).

496. See *id.*; *Brockton Sav. Bank v. Peat, Marwick, Mitchell & Co.*, 771 F.2d 5, 11–12 (1st Cir. 1985).

497. See *Funk v. United States*, 290 U.S. 371, 382 (1933).

498. See U.S. CONST. art. III, § 2; see also Judiciary Act of 1789, ch. 20, § 19, 1 Stat. 73, 83 (recognizing Article III authority over cases in equity).

499. *In re Letter Rogatory from Just. Ct.*, 523 F.2d 562, 564 (6th Cir. 1975) (“[I]t has been held that federal courts have inherent power to issue and respond to letters rogatory.” (citing *United States v. Reagan*, 453 F.2d 165, 173 (6th Cir. 1971)); *United States v. Staples*, 256 F.2d 290, 292 (9th Cir. 1958); *In re Pac. Ry. Comm'n*, 32 F. 241, 256–57 (C.C.N.D. Cal. 1887)).

500. See *Offutt v. Parrott*, 18 F. Cas. 606 (C.C.D.C. 1803) (No. 10,453) (fining jurors who jumped out a window to try to escape jury service).

501. See *United States v. Coolidge*, 25 F. Cas. 622, 623 (C.C.D. Mass. 1815) (No. 14,858) (providing for withdrawing a juror in the event that it would be “a total failure of justice if the trial proceed[ed]”).

jury from delivering a verdict,<sup>502</sup> excise jury determinations and order a reduction in an excessive verdict,<sup>503</sup> rescind a discharge order,<sup>504</sup> and recall the jury for further deliberation.<sup>505</sup>

Other inherent powers focus on the necessity of allowing the court fully to air arguments relating to the scope and meaning of the law. For instance, they can require parties to submit memoranda addressing matters of law.<sup>506</sup> Alternatively, they can appoint amici curiae.<sup>507</sup> They can require parties to retain legal assistance.<sup>508</sup> They can place attorneys on standby in the event that their services may be required.<sup>509</sup> Courts, on their own authority, follow stare decisis to ensure vertical and horizontal parity among courts.<sup>510</sup>

One of the most important inherent powers of an Article III entity is control over its own records. It is a power which lies beyond the reach of the other branches. When acting in its core capacity, the separation of powers prevents interference from the other branches. If the other branches could effectively bury judicial decisions, it would render Article III impotent.

Even as they exercise inherent authority over their own records, the FISC/R, as specialized Article III courts, have a nonstatutory obligation to hear cases arising under common law and the Constitution that are properly before them. The Supreme Court has long held that constitutional review is available where federal officials may be acting outside the law.<sup>511</sup> Lower courts have followed course.<sup>512</sup>

502. See *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824).

503. The first recorded use of remittitur was by Justice Joseph Story. See *Blunt v. Little*, 3 F. Cas. 760, 762 (C.C.D. Mass. 1822) (No. 1,578); Amy Coney Barrett, *Procedural Common Law*, 94 VA. L. REV. 813, 829 (2008). Even though the rules provide for the grant of a new trial, it remains a judicial power. See FED. R. CIV. P. 59(a)(1).

504. *Dietz v. Bouldin*, 579 U.S. 40, 46 (2016).

505. *Id.*

506. *Alameda v. Sec’y of Health, Educ. & Welfare*, 622 F.2d 1044, 1047 (1st Cir. 1980).

507. *In re Utils. Power & Light Corp.*, 90 F.2d 798, 800 (7th Cir. 1937).

508. See *Martinez v. Ct. of Appeal of Cal.*, 528 U.S. 152, 164 (2000) (“In requiring Martinez, under these circumstances, to accept against his will a state-appointed attorney, the California courts have not deprived him of a constitutional right. Accordingly, the judgment of the California Supreme Court is affirmed.”); *Barnes v. Sec’y, Dep’t of Corr.*, 888 F.3d 1148, 1153–54 (11th Cir. 2018) (“Among other claims asserted in support of his direct appeal, Petitioner argued that the trial court had violated his Sixth Amendment right to self-representation, as recognized by the United States Supreme Court in *Faretta*, by appointing special counsel to investigate and present mitigation evidence during the penalty phase of his trial. The Florida Supreme Court considered and rejected Petitioner’s Sixth Amendment self-representation claim on the merits. The United States Supreme Court denied certiorari.” (citations omitted)).

509. See *United States v. Bertoli*, 994 F.2d 1002, 1018 (3d Cir. 1993).

510. See *Agostini v. Felton*, 521 U.S. 203, 235 (1997) (discussing how stare decisis “reflects a policy judgement that ‘in most matters it is more important that the applicable rule of law be settled than that it be settled right’” (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932))).

511. *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 326 (2015) (noting that the Supreme Court has “long held that federal courts may in some circumstances grant injunctive relief against . . . violations of federal law by federal officials”).

512. See, e.g., *Dart v. United States*, 848 F.2d 217, 224 (D.C. Cir. 1988) (“When an executive acts *ultra vires*, courts are normally available to reestablish the limits on his authority.”); *Chamber of Com. of U.S. v. Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996) (“[C]ourts will ‘ordinarily presume that Congress intends the executive to obey its statutory commands and, accordingly, that it expects the courts to grant

The history of allowing nonstatutory common law and constitutional claims, as detailed in Parts II and III, above, extends to judicial records.

In short, separation of powers prevents the Executive Branch from being able to usurp the Judiciary's control over its own records. Questions, then, about access to such opinions lie with the courts and with the courts alone, as shaped by the constitutional rights of the People.

#### B. CONSTITUTIONAL STATUS OF THE RIGHT TO PETITION

The argument that Congress declined to provide either the Supreme Court or the FISC/R with jurisdiction over First Amendment right to petition claims ignores the constitutional status of the entitlement itself.

At the broadest level, there is no question that the Supreme Court exercises jurisdiction over First Amendment claims. As this Article has already addressed, the Founders included the right to petition in the Bill of Rights at the demand of certain states as a condition of ratification.<sup>513</sup> It was a preexisting entitlement held by the colonists: in the British context, the right centered on Parliament, which acted as both a judicial and legislative body.<sup>514</sup> In reflection of the Founders' decision to commit to a separation of powers, the Select Committee at the time the Bill of Rights was drafted altered Madison's reference to the Legislature to include the entire "government."<sup>515</sup> The right therefore is one held by the People against the courts as well as the other two branches.

Having established the right, the Constitution is explicit on the jurisdictional question: it vests judicial power in "one supreme Court," as well as any lower Article III courts which Congress decides to bring into being.<sup>516</sup> This power "extend[s] to all Cases, in Law and Equity, arising under this Constitution, [and] the Laws of the United States."<sup>517</sup> In 1821, *Cohens v. Virginia* clarified that cases "arise under" the Constitution or laws of the country "whenever [their] correct decision depends on the construction of either."<sup>518</sup> A few years later, the Court elaborated, noting that the "arising under" clause "enables the judicial department to receive jurisdiction to the full extent of the constitution . . . when any question respecting [it] shall assume such a form that the judicial power is capable of acting on it."<sup>519</sup>

Regardless of whether Congress by statute explicitly conferred the Supreme Court with jurisdiction over the First Amendment right to petition does not matter. Congress *cannot*, by majoritarian vote, override constitutional provisions,

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relief when an executive agency violates such a command.'" (quoting *Bowen v. Mich. Acad. of Fam. Physicians*, 476 U.S. 667, 681 (1986)); *Aid Ass'n for Lutherans v. U.S. Postal Serv.*, 321 F.3d 1166, 1168, 1172-73 (D.C. Cir. 2003) (holding that nonstatutory review "is available when an agency acts *ultra vires*").

513. See *supra* Section II.A.

514. See Mark, *supra* note 200, at 2167.

515. See *supra* note 207 and accompanying text.

516. U.S. CONST. art. III, § 1.

517. *Id.* § 2.

518. 19 U.S. (6 Wheat.) 264, 379 (1821).

519. *Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738, 819 (1824).

which establish that “the judicial power” includes jurisdiction over *all* cases *arising under the Constitution*—and that ultimate authority for the judicial power resides in the Supreme Court. The Court is, moreover, entirely capable of acting on the claim on the grounds that the documents being sought in the right to petition in question are documents held by Article III.

The fallback argument articulated by the Government, and the one that prevailed before the FISC/R, is that the lower courts entrusted with overseeing FISA applications and orders lack jurisdiction over the constitutional claim. The Supreme Court has described the three limitations on Article III courts as (a) the constitutional case or controversy requirement; (b) the Arising Under Clause; and (c) a statutory grant of jurisdiction over the action in question.<sup>520</sup> In the context of the First Amendment right to petition to the FISC/R, while the first two elements may be met, the third has not. The omission, the argument suggests, is of great consequence: Congress plays a key role in conferring federal question jurisdiction on lower courts. In 1845, the Supreme Court explained:

[T]he judicial power of the United States, although it has its origin in the Constitution, is (except in enumerated instances . . .) dependent . . . entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court) for the exercise of the judicial power, and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.<sup>521</sup>

Congress specifies which aspects of federal power can be exercised by which Article III entities below the level of the Supreme Court. So the fact that Article III itself holds the authority to adjudicate matters related to constitutional claims does not, by itself, ensure that all such claims be made available to every lower court. Congress, moreover, has acted to entrust the geographic courts with a similar power: the law grants federal district courts “original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”<sup>522</sup> Other provisions allocate different powers.<sup>523</sup>

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520. *Baker v. Carr*, 369 U.S. 186, 198 (1962); *see In re Ops. & Ords. by the FISC Addressing Bulk Collection of Data Under the Foreign Intel. Surveillance Act*, 957 F.3d 1344, 1349 (FISA Ct. Rev. 2020).

521. *Cary v. Curtis*, 44 U.S. 236, 245 (1845).

522. 28 U.S.C. § 1331.

523. *See, e.g.*, 28 U.S.C. § 1257 (giving the Supreme Court jurisdiction over “[f]inal judgments or decrees rendered by the highest court of a State . . . where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States”); *id.* § 1258 (giving the Supreme Court jurisdiction over “[f]inal judgments or decrees rendered by the Supreme Court of the Commonwealth of Puerto Rico”); *id.* § 1259 (giving the Supreme Court jurisdiction over certain decisions of the United States Court of Appeals for the Armed Forces); *id.* § 1334 (giving district courts jurisdiction over bankruptcy cases); *id.* § 1337 (giving district courts original jurisdiction over commerce and antitrust cases); *id.* § 1338 (giving district courts original jurisdiction over cases relating to patents, copyrights, trademarks, and other statutory provisions).

There are many problems with this argument, which the FISCR embraced in 2020.<sup>524</sup> First, it ignores the nature of the constitutional claim before it, instead assuming that Congress even has the power to allocate constitutional rights, held by the People as against the courts themselves. Indeed, the Court's concern in 1845 in articulating the role of Congress in setting the lower court's jurisdiction—a case cited by the FISCR in reaching its determination—was that the Judiciary, and not the Legislature, assume statutory drafting powers:

To deny [the role of Congress] would be to elevate the judicial over the legislative branch of the government, and to give the former powers limited by its own discretion merely. It follows, then, that the courts created by statute must look to the statute as the warrant for their authority; certainly they cannot go beyond the statute, and assert an authority with which they may not be invested by it, or which may be clearly denied to them.<sup>525</sup>

In that case, Congress had devised a system for collecting public revenues<sup>526</sup>—a statutory manifestation of Congress's Article I, Section 8 powers. It was thus up to Congress to determine jurisdiction over actions taken under the statute.

The various jurisdictional statutes follow course. They are all either focused on ensuring that any questions of law or (federal) constitutional construction that arise in a different (e.g., state or territorial) court are ultimately handled by the Supreme Court, ensuring consistency within Article III, or they deal with provisions that have been statutorily created by Congress, such as antitrust law. They do not attempt to allocate *constitutional rights* among the lower courts.

The FISCR's understanding of the third limitation underscores the point: the court noted that the action in question (in this case, the constitutional right to petition) "must be 'described by any jurisdictional statute' as the kind of action that Congress intended to be subject to 'a court's adjudicatory authority.'"<sup>527</sup> The court went on to write, "If a dispute is not of the kind that Congress has determined should be adjudicated, we 'have no business deciding it.'"<sup>528</sup> This approach, however, to a *constitutional* right held by the People against the courts suggests that Congress, by majoritarian vote, can divest the People of this right. It cannot. It has neither the power to confer it nor the power to deprive the public of its ability to seek judicial records from Article III courts. That right is held against the government as a whole—which includes the courts—regardless of what Congress does or fails to do.

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524. See *In re Ops. & Ords. by the FISC Addressing Bulk Collection of Data Under the Foreign Intel. Surveillance Act*, 957 F.3d at 1349.

525. *Cary*, 44 U.S. at 245.

526. See *id.* at 241.

527. *In re Ops. & Ords. by the FISC Addressing Bulk Collection of Data Under the Foreign Intel. Surveillance Act*, 957 F.3d at 1349 (footnote omitted) (first quoting *Baker v. Carr*, 369 U.S. 186, 198 (1962); and then quoting *Eberhart v. United States*, 546 U.S. 12, 16 (2005) (per curiam)).

528. *Id.* at 1350 (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006)).

The FISC R sought to bolster its finding by turning to the limitations of the cases before it, as well as the subject matter it handles. These arguments fail to take into account both the evolution of FISA and the extent to which the ordinary geographic courts routinely handle matters relating to national security law, as the next two Sections address.

### C. EVOLUTION OF FISA

In support of its decision, the FISC R highlighted that, compared to other federal courts, the FISC's work was conducted within strict limitations.<sup>529</sup> Its primary responsibility, the court noted, is to review surveillance applications related to foreign intelligence collection.<sup>530</sup> Only specific types of disputes, as a statutory matter, fall within the appellate court's review: denial of any application; petitions for review of FISC decisions related to FISA production or nondisclosure orders; Attorney General/Director of National Intelligence directives issued to electronic communication service providers (ECSPs); orders approving certification and targeting, minimization, and querying procedures for Section 702; and orders for approving the targeting of U.S. persons under Sections 703 and 704.<sup>531</sup> Further, the statute specifies which parties can file petitions for the FISC R to review certain matters—namely, the government, ECSPs, or anyone receiving a nondisclosure order.<sup>532</sup> In short, matters before the court must relate in some manner to FISA applications and surveillance orders, “not just any request for relief relating to the FISC.”<sup>533</sup>

The problem with this description is that it mischaracterizes the nature of the FISC/R. While the FISC at its inception may have been akin to a specialized warrant-granting body, for more than two decades, both the FISC and FISC R have operated in a manner which reflects their full power as Article III entities. They rule on complex constitutional questions which, daily, impact U.S. citizens. They engage in statutory construction. They determine what the law is. And they adjudicate matters central to how the government wields its power—including when the Executive violates the law or misuses its power against citizens. As such, the FISC/R fulfill the same core functions for which public access has been deemed an indispensable part of not just Article III but also the rule of law.

Increasingly, moreover, the courts' documents are publicly available: there are now nearly 100 cases and more than 300 orders in the public domain.<sup>534</sup> Congress has gone on to statutorily require that much of the court's work, and documents filed with the court by either the government or amici, be made available to

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529. *Id.*

530. *Id.*

531. *Id.* at 1350–51.

532. *Id.* at 1351.

533. *Id.* at 1353.

534. The author has made all formally declassified and redacted documents relating to foreign intelligence collection available online through Georgetown Law Library. See Donohue, *supra* note 15.



Congress, as well as that significant decisions, orders, and opinions be declassified and made public.<sup>535</sup>

While the specific statutory contours of matters before the court may be limited, at some level it is no different than the bankruptcy courts, for which there is no question about the public right of access, despite the absence of explicit statutory authorization giving those courts jurisdiction over such claims.<sup>536</sup> This understanding, moreover, does not render the other jurisdictional bases “meaningless or superfluous,” as suggested by the FISC/R.<sup>537</sup> It simply acts as a separate, independent ground for jurisdiction.

#### D. NATIONAL SECURITY AND PARALLEL CLAIMS

The final component of the government’s argument, and one mentioned also by the FISC/R in declining to exercise jurisdiction over the First Amendment motion, centers on the nature of matters before the court. The argument runs that national security brings important considerations which must be taken on board—and which Congress considered in drafting FISA—thus creating a carve-out to the right of public access which might otherwise apply.

The problem with this argument is that the mere fact that something implicates national security is far from dispositive on matters of public access. There are all sorts of national security-related judicial documents in the public domain.<sup>538</sup> The FISC/R erred insofar as its ruling suggested that every matter before it or document that has been filed with it lies outside either the common law or First Amendment right of access. The mere fact that so many FISC/R opinions and orders are in the public domain suggests otherwise.

The FISC/R, moreover, are not the only courts in the federal system that deal with matters related to national security. In nonspecialized courts, such cases also arise, and at times third parties seek more information related to matters under review. Under such circumstances, the right of public access may apply. While there are exceptions, the issue is not whether the public can even seek access, but whether it is ultimately given. The bar to preclude access is high given the presumptive right. The fact that those seeking the material are not directly implicated in a case itself does not matter for either common law or First Amendment right of access questions. Nor is it of consequence that the matter has concluded.

In the 2019 case of *Cable News Network, Inc. v. FBI*, for instance, the D.C. District Court determined that a memo submitted to the court *ex parte* and *in camera* by the FBI’s Deputy Assistant Director (explaining why memos of the former

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535. Foreign Intelligence Surveillance Act, 50 U.S.C. § 1872; Uniting and Strengthening America by Fulfilling Rights and Ensuring Effective Discipline over Monitoring Act of 2015 (USA FREEDOM Act), Pub. L. No. 114-23, sec. 604, § 601, 129 Stat. 268, 297 (requiring that any FISC/R decision, order, or opinion containing “a significant construction or interpretation” of FISA and any associated pleadings, applications, or memoranda be submitted to Congress).

536. See, e.g., *In re Analytical Sys.*, 83 B.R. 833, 835–36 (Bankr. N.D. Ga. 1987).

537. *In re Ops. & Ords. by the FISC Addressing Bulk Collection of Data Under the Foreign Intel. Surveillance Act*, 957 F.3d at 1354.

538. See generally Donohue, *supra* note 15.

FBI Director should be redacted) constituted a public record to which the common law right of public access applied.<sup>539</sup> Although the FBI had redacted the underlying memoranda to protect intelligence sources and methods, CNN still had a common law right to the information. The court ordered it to be unsealed. On appeal, the court noted that “the purpose *and* the effect of the Archey Declaration was ‘to influence a judicial decision.’”<sup>540</sup> It wrote,

The whole point of filing the Archey Declaration was to help the FBI demonstrate to the court the national security interests at stake in the case. And it worked. The district court acknowledged having read the Archey Declaration when it granted the FBI partial summary judgment the first time. And the district court did so again in its second summary judgment decision.<sup>541</sup>

Because the declaration constituted a public record, the court applied a strong presumption in favor of disclosure. “Accessing judicial records,” the court explained, “is ‘fundamental’ to ‘the rule of law’ and ‘important to maintaining the integrity and legitimacy of an independent Judicial Branch.’”<sup>542</sup> In this case, *Hubbard* had not been properly applied, so the court sent it back to be reconsidered. In the process of doing so, the court wrote, “We emphasize that our ruling does not mean that the Archey Declaration should remain redacted. Rather, we remand for the district court to reapply the *Hubbard* factors . . . .”<sup>543</sup> As recognized by the Third Circuit in a case involving the investigation of a public official, how the government undertakes investigations “is an important matter of public concern.”<sup>544</sup>

In a separate context, this time a case involving biological weapons, an effort was made to obtain search warrants.<sup>545</sup> The D.C. District Court held that there was no compelling interest in withholding “search warrants, warrant applications, supporting affidavits, court orders, and returns for all warrants requested” in relation to the suspect in the Anthrax mailings; therefore, both a common law and First Amendment qualified right of access applied.<sup>546</sup> The court noted that it was public knowledge that the suspect had been cleared and that disclosure of the materials did not risk identifying another innocent person.<sup>547</sup> The suspect had filed a lawsuit against the DOJ and had already made some details of the search public, so there was no additional privacy interest at play.<sup>548</sup>

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539. 384 F. Supp. 3d 19, 27, 44 (D.D.C. 2019), *vacated*, 984 F.3d 114 (D.C. Cir. 2021).

540. *Cable News Network*, 984 F.3d at 118 (quoting *League of Women Voters of U.S. v. Newby*, 963 F.3d 130, 136 (D.C. Cir. 2020)).

541. *Id.* (citation omitted).

542. *Id.* (quoting *In re Leopold to Unseal Certain Elect. Surveillance Applications & Ords.*, 964 F.3d 1121, 1127 (D.C. Cir. 2020)).

543. *Id.* at 121 (citation omitted).

544. *United States v. Wecht*, 484 F.3d 194, 210 (3d Cir. 2007).

545. *In re N.Y. Times Co. for Access to Certain Sealed Ct. Recs.*, 585 F. Supp. 2d 83, 86 (D.D.C. 2008).

546. *Id.* at 86–87, 90.

547. *Id.* at 91.

548. *Id.* at 93.

In another national security context, this time an espionage case, the Fourth Circuit determined that the First Amendment right of access extends to plea hearings and sentencing hearings, both of which are typically held in public.<sup>549</sup> “The presence of the public operates to check any temptation that might be felt by either the prosecutor or the court to obtain a guilty plea by coercion or trick, or to seek or impose an arbitrary or disproportionate sentence.”<sup>550</sup>

In yet another case, this time involving an international narco-terrorist, the Fifth Circuit upheld a First Amendment right of access. In *In re Hearst Newspapers, L.L.C.*—concerning the former leader of the Gulf Cartel, “one of the most wanted, feared, and violent drug traffickers in the world” and “widely believed to be partly responsible for the ongoing drug trafficking wars and ‘bloodbaths’ along the Mexican border, resulting in the deaths of approximately 2000 persons”—the court overturned the lower court’s refusal to allow the public to attend the sentencing hearing.<sup>551</sup>

Despite the secrecy surrounding grand jury operations, courts consider them part and parcel of the judicial process. All plaintiffs have a right to petition, even if access might eventually be denied: “To hold otherwise would amount to denying standing to everyone who cannot prevail on the merits, an outcome that fundamentally misunderstands what standing is.”<sup>552</sup> The common law right of access demands that “documents filed in court are presumptively open to the public.”<sup>553</sup>

Article III courts have extended the public right of access to sensitive documents related to the same types of powers at issue in FISA. In one case, for instance, an investigative journalist brought suit in a closed criminal investigation seeking to unseal a surveillance application for warrants issued under the Stored Communications Act.<sup>554</sup> The court had issued orders to compel electronic communication/remote computing service providers to disclose the contents of wire or electronic communications.<sup>555</sup> It also had directed the companies to provide subscriber records.<sup>556</sup> For the D.C. Circuit, such documents constituted judicial records subject to the common law presumption of access.<sup>557</sup> Chief Judge Beryl Howell had held below that the plaintiffs had a common law right to retrospective and limited prospective access to information extracted from the sealed surveillance applications.<sup>558</sup>

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549. *In re Wash. Post Co.*, 807 F.2d 383, 389 (4th Cir. 1986).

550. *Id.*

551. 641 F.3d 168, 172, 186–87 (5th Cir. 2011).

552. *Carlson v. United States*, 837 F.3d 753, 759 (7th Cir. 2016); *see Bond v. Utreras*, 585 F.3d 1061, 1073 (7th Cir. 2009).

553. *Bond*, 585 F.3d at 1073.

554. *See In re Leopold to Unseal Certain Elec. Surveillance Applications & Ords.*, 964 F.3d 1121, 1125–26, 1130 (D.C. Cir. 2020) (“In sum, with respect to SCA materials, we conclude that Congress displaced neither the common-law presumption of access nor the *Hubbard* test for making unsealing decisions.”).

555. *See id.*

556. *See id.*

557. *Id.* at 1129–30.

558. *See id.* at 1126.

In another case, the D.C. District Court considered an *ex parte* application ordering an email provider to provide non-content header information relating to journalists' email accounts, as well as the district court's order sealing the application and precluding the provider from giving notice to account holders.<sup>559</sup> For the court, both constituted judicial records subject to the common law presumption of access.<sup>560</sup>

Courts, of course, do not always release such material—in some situations, they may determine that release of the information presents too great of a risk. In *Dhiab v. Obama*, for instance, a detainee at Guantanamo Bay who had gone on hunger strike filed a motion to enjoin the government from forcibly removing him from his cell and force-feeding him.<sup>561</sup> The court reviewed some twenty-eight videotapes showing the government's actions.<sup>562</sup> The Hearst Corporation and other news organizations brought suit seeking access to the tapes. The D.C. District Court went on to recognize a First Amendment right of public access to the information.<sup>563</sup> The D.C. Circuit subsequently overturned the lower court.<sup>564</sup> But in making this determination, specific consideration was given to the material in question—it was not a blanket determination akin to the one issued by the FISCR in 2020.<sup>565</sup>

That the suits are being brought by third parties in relation to separate proceedings is of little moment. At some level, third party considerations are almost inherent in the right of access itself: claims will almost always be raised by outside third parties, such as journalists or other members of the public, because the original parties to a proceeding will already have access to records and proceedings due to their status as parties. In dozens of cases, third parties have been granted a nonstatutory right of access to judicial records relating to a separate action. The First Circuit in 2013, for instance, held that a journalist had a common law right of access to the advocacy memoranda and sentencing letters submitted by an outside party.<sup>566</sup>

Just because a record has been sealed at one time does not defeat a public right of access claim. Thus, in the Second Circuit, where a confidentiality order had been placed on records, the presumption of public access for the media still

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559. *In re USA for 2703(d) Ord. for Three Email Accts. Serviced by [REDACTED] for Investigation of Violation of 18 U.S.C. §§ 641 & 793*, 548 F. Supp. 3d 31, 32 (D.D.C. 2021).

560. *Id.* at 33.

561. 70 F. Supp. 3d 486, 490–91 (D.D.C. 2014), *rev'd sub nom. Dhiab v. Trump*, 852 F.3d 1087 (D.C. Cir. 2017).

562. *Id.* at 497.

563. *See id.* at 494–95, 501.

564. *See Dhiab*, 852 F.3d at 1098.

565. *See id.* at 1091–96.

566. *United States v. Kravetz*, 706 F.3d 47, 56–59 (1st Cir. 2013); *see also In re Providence J. Co.*, 293 F.3d 1, 9–13 & n.5 (1st Cir. 2002) (holding that a district court's blanket legal memoranda nonfiling policy violated right of access to criminal proceedings under the First and Fourteenth Amendments and the common law right of access in civil actions).

applied.<sup>567</sup> Other circuits adopt the same approach.<sup>568</sup> In one suit brought by a taxpayer moving to unseal three probable cause affidavits, the Fifth Circuit held that the district court had jurisdiction to determine whether a common law qualified right of access extended to preindictment search materials.<sup>569</sup>

Finally, that third parties attempt to access material after a matter has concluded similarly carries little import: courts have repeatedly held that the common law and First Amendment right to inspect judicial records persists even after conclusion of the matter before the Court if there is a showing of good cause.<sup>570</sup>

In *Carlson v. United States*, for instance, the Seventh Circuit recognized that scholars had a constitutional right of access to transcripts of witness testimony from a grand jury investigation of alleged Espionage Act violations some seventy years prior.<sup>571</sup> Carlson and others chose the Northern District of Illinois to bring the claim “because it was the court that originally had supervisory jurisdiction over the grand jury in question.”<sup>572</sup> Carlson argued that the “same court has continuing common-law authority over matters pertaining to that grand jury, including any application to unseal the grand-jury materials.”<sup>573</sup> The court agreed:

As a member of the public, Carlson has standing to assert his claim to the grand-jury transcripts, because they are public records to which the public may seek access, even if that effort is ultimately unsuccessful (perhaps because of sealing, national security concerns, or other reasons). . . . Carlson’s injury-in-fact [wa]s the denial of access to government documents that he ha[d] a right to seek.<sup>574</sup>

Although the FISC/R are specialized, they are not unique in their status as Article III entities, in dealing with substantive matters of constitutional and statutory law, in confronting questions related to national security, or in considering third-party requests to access information otherwise shielded from public view.

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567. *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 126 (2d Cir. 2006) (holding that, in response to media organizations’ efforts to obtain access to documents filed under seal, the materials were judicial documents, and the existence of a confidentiality order did not defeat the presumption of public access).

568. *See, e.g.*, *United States v. Smith*, 776 F.2d 1104, 1107–13 (3d Cir. 1985) (holding that a newspaper had a First Amendment and common law right of access to bills of particular that arose in the context of a federal prosecution); *Co. Doe v. Pub. Citizen*, 749 F.3d 246, 265–69 (4th Cir. 2014) (holding that the First Amendment right of access extends to a judicial opinion ruling on a motion for summary judgment and a docket sheet); *Balt. Sun Co. v. Goetz*, 886 F.2d 60, 64–65 (4th Cir. 1989) (holding that the newspaper had a common law public right of access to warrant materials).

569. *United States v. Sealed Search Warrants*, 868 F.3d 385, 390 (5th Cir. 2017).

570. *See, e.g.*, *United States v. Bus. of Custer Battlefield Museum & Store*, 658 F.3d 1188, 1192–96 (9th Cir. 2011) (holding that common law right of access applied to search warrant applications and affidavits following termination of the investigation); *Chi. Trib. Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1310 (11th Cir. 2001) (holding that the constitutional right of access to unseal court records applied after settlement of a products liability action).

571. 837 F.3d 753, 757–61 (7th Cir. 2016).

572. *Id.* at 757.

573. *Id.*

574. *Id.* at 757–58.

Where the FISC/R, in contrast, is entirely unique is in determining that the First Amendment right to petition does not apply to either the FISC or the FISC/R. In light of the importance of rule of law to the U.S. legal system, such a move is deeply concerning.

#### CONCLUSION

As Antonin Scalia observed in 1989, “In a judicial system such as ours, in which judges are bound, not only by the text of code or Constitution, but also by the prior decisions of superior courts, . . . courts have the capacity to ‘make’ law.”<sup>575</sup> FISC/R rulings, and the logic on which they rely, constitute law. As such, the public has both a common law and First Amendment presumed right of access to them.

The courts’ prior legal analysis no longer applies. The rulings in 2007 and 2008 took place against a background in which only two FISC opinions and no orders had ever been publicly released. There are now approximately 100 FISC/R opinions and more than 300 FISC orders that have been formally declassified and released.<sup>576</sup> In addition, Congress has introduced significant statutory changes which *require* the FISC/R and the government to release matters related to the rule of law. In short, the “experience” and “logic” tests, applied in the contemporary environment, look very different than they did fifteen years ago. Although many of the proceedings themselves remain closed, rulings of the court, and the rationales undergirding them, are in many cases available.

There is a world of difference between an Executive Branch decision to classify certain information and the *Judiciary’s* authority to determine whether a particular judgment, issued by the court, should be sealed. Constitutionally, the separation of powers requires that Article III courts control the final determination. As the D.C. Circuit explained in 2007, “It is the court, not the Government, that has discretion to seal a judicial record.”<sup>577</sup> An Article III court may ultimately decide that certain particulars encapsulated in its muniments may be withheld, but the right of the People to seek them is not in question—nor is FISC/R’s jurisdiction over their own records. Even more egregious is the government’s assertion that the Supreme Court itself lacks jurisdiction over the public’s effort to obtain the FISC/R’s constitutional and statutory determinations. It is time for the Supreme Court to step forward to shore up one of the rights deemed most important at the time of the Founding: the right to petition the government for redress.

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575. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1176–77 (1989).

576. See Donohue, *supra* note 15.

577. *Bismullah v. Gates*, 501 F.3d 178, 188 (D.C. Cir. 2007), *vacated on other grounds*, 554 U.S. 913 (2008); see *United States v. Moussaoui*, 65 F. App’x 881, 887 (4th Cir. 2003) (observing that courts must “independently determine whether, and to what extent, the proceedings and documents must be kept under seal”).