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POST 9/11 ACCESS:
RESPONDING TO THE NATIONAL SECURITY CHALLENGE

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MLRC ROUNDTABLE

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New York City
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MLRC ROUNDTABLE

DEFENDING ACCESS POST 9/11:
RESPONDING TO THE NATIONAL SECURITY CHALLENGE

MODERATORS:
David Schulz, Clifford Chance
Nathan Siegel, ABC, Inc.

PANEL:
Floyd Abrams, Cahill Gordon & Reindel
David Cole, Professor of Law, Georgetown Law Center
Lee Gelernt, The American Civil Liberties Union
Laura Handman, Davis Wright Tremaine
Lee Levine, Levine, Sullivan and Koch
David McCraw, Counsel at *The New York Times*
Paul Smith, Jenner & Block

INTRODUCTION

THE PROBLEM

The aftermath of the terrorist attacks of September 11, 2001 has begun to pose the most serious challenge in years to the principle of open government. The massive investigation launched by the federal government after September 11 uses a variety of existing judicial and quasi-judicial proceedings in novel ways. Deportation hearings conducted by the Immigration and Naturalization Service, grand jury material witness proceedings in federal courts, the unilateral designation of enemy combatants by the President, and military tribunals have already been, or will likely be, used to investigate, detain, and in some cases prosecute persons suspected of having anything to do with terrorism and its perpetrators.

Almost all of these post-September 11 proceedings have been unilaterally closed to the press and public. To date, over 1100 people have been arrested, incarcerated, and in some cases deported behind closed doors. Organizations committed to open government have begun to challenge the closure policy, and two federal circuits have already considered the policy of sealing immigration proceedings.[i] To date those courts of appeals have disagreed sharply, and the United States Supreme Court may well consider the issue in the near future.

Already, these cases have prompted the most serious reconsideration of public access rights since the line of cases beginning with *Richmond Newspapers Co. v. Virginia* in the 1980s. So the Media Law Resource Center decided to bring together a distinguished panel to discuss how to effectively advocate for access in the post-September 11 era. In this *Bulletin*, we present an edited transcript of their discussion.

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[i] Detroit Free Press v. Ashcroft, 303 F. 3d 681 (6th Cir. 2002); North Jersey Media Group v. Ashcroft, 2002 WL 31246589 (3d Cir. 2002).

THE ROUNDTABLE PANEL

All six members of the panel have broad experience with both First Amendment theory and the real world of practical advocacy. The panelists were: Floyd Abrams of Cahill Gordon & Reindel; David Cole, Professor of Law, Georgetown Law Center; Laura Handman of Davis Wright Tremaine; Lee Levine from Levine, Sullivan and Koch; David McCraw, Counsel at *The New York Times*, Paul Smith of Jenner & Block and Lee Gelernt with The American Civil Liberties Union.

The Roundtable discussion was moderated by David Schulz, Regional Head of the Media Litigation Group at Clifford Chance, and Nathan Siegel, Executive Counsel at ABC, Inc.

THE DISCUSSION

Throughout the Roundtable, the panelists tackled both broad, theoretical issues and specific, practical litigation strategies to more effectively present the case for access. The panel began by talking about fundamentals: what a right of access means and why it should be grounded in the First Amendment. Next, it took a fresh look at the legal standard created by *Richmond Newspapers* and its progeny that has governed the law of access for the past two decades: the two-part test of "experience and logic."

Panelists considered whether *Richmond Newspapers* should remain the appropriate standard for access and whether it applies to proceedings other than traditional courtroom trials and hearings. Since many of the proceedings used to investigate terrorism are creations of the twentieth century, the panel examined how history and experience might be relevant to them as well. It also considered how to persuade courts that access remains a logical policy in the face of a potential national security crisis.

The discussion then turned to the specific legal arguments the Department of Justice makes to support closing proceedings it says relate to terrorism. First, the Roundtable considered the claim that the Constitution implicitly grants the Executive and Legislative Branches complete discretion to close their own proceedings. Then the panel extensively discussed what panelists believed is the most critical question presented after September 11: even if openness should usually be the norm, do the national security arguments raised by the government require closure where terrorism is concerned?

We found the discussion to be interesting and enlightening. We hope the insights of this accomplished panel will help advocates for access in this challenging environment.[ii]

[ii] This transcript has been reviewed by the panelists and edited for ease of reading and clarity.

INTRODUCTIONS

MS. BARON: MLRC decided to convene this roundtable because we came to believe that issues of access to proceedings related to the September 11, 2001 terrorist attacks, the INS detainees, material witness proceedings and other actions pose the most serious challenge in years to questions of open government.

We also think that at least one of the INS cases may go to the Supreme Court, and may prompt the most significant reconsideration of public access rights since the Richmond Newspapers[1] line of cases in the early 1980s.

So we decided to bring together this distinguished panel to discuss fundamentals -- doctrines, arguments, ideas, matters that can be used, practically we hope, in the construction of the arguments in cases before the Supreme Court and elsewhere.

Let me begin by quickly introducing who we have here and then I am just going to let them start.

Our panelists today are: Floyd Abrams of Cahill Gordon & Reindel; David Cole, Professor of Law, Georgetown Law Center; Laura Handman of Davis Wright Tremaine; Lee Levine from Levine, Sullivan and Koch; David McCraw from The New York Times; Paul Smith from Jenner and Block and Lee Gelernt from the ACLU. Thank you.

Our moderators are David Schulz from Clifford Chance and Nathan Siegel from ABC, Inc.

MR. SCHULZ: Thanks, Sandy. The idea, as Sandy said, was to brainstorm with our panel, to share ideas, and to think a little bit more fundamentally about the right of access — how broad it is, how we define it, and, in particular, look at how it applies in the context of national security.

CONSTITUTIONAL BASIS AND SCOPE OF THE RIGHT OF ACCESS

Why don't we start with something real simple. Let's begin by defining some common ground about what we mean when we talk about a "right of access." Is it a "right?" Where does it come from? Paul, do you want to tackle that?

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[1] Richmond Newspapers, Inc. v. Va., 448 U.S. 555(1980).

MR. SMITH: Well I think what we are talking about is the basic Richmond Newspapers[2] right which the Supreme Court, having struggled with this for a while, ended up deciding is a First Amendment right. But, it is discussed not in the usual First Amendment terms of limiting speech. Rather, it is a right to be in a place where news is being made, to observe it as a kind of proxy for the people. The underlying consideration is that the press plays a sort of structural function in checking the government, when the government is exerting power against an individual.

That's perhaps a more specific answer than you wanted, but that is what we are talking about – the right to get information and be in a place where the information is.

MR. SCHULZ: Where does it come from? You mentioned that it's a First Amendment right, but is there a Sixth Amendment aspect to it? Are there due process grounds for finding this right?

MR. SMITH: Among the considerations that led the Court to recognize it are due process considerations, or you could call them Sixth Amendment if you want. The basic notion is that all the procedure in the world isn't worth anything if the government can apply it with nobody there to watch them and make sure that they are doing things fairly, without bias, without faking the evidence. That sort of thing.

The underlying consideration is that just checking the power of the government, making sure that the procedures in place if you had a criminal trial, for example, are in fact real.

MR. SCHULZ: Is this right significant for the press? Does it make a difference? Let me ask David McCraw, since you are the only in-house lawyer. As a practical day to day thing, is this a right that is exercised by the press? If the right didn't exist as an enforceable right, would anything be different?

MR. McCRAW: Well I am glad you asked me the easy one. Absolutely. Every day, virtually every day in terms of the courts, we either see the need to enforce that right or we enjoy the benefit of it.

Just today, for instance, in the Second Circuit, there was an argument that arose out of a Grand Jury case, and the lawyers immediately wanted the appellate argument closed. Fortunately, the panel of judges sitting, directed them to proceed on the theory that they could make their legal arguments without needing to close the courtroom.

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[2]448 U.S. 555 (1980)

It certainly is a right that we use as a basis for stories day in and day out. That is especially true in terms of 9/11 coverage. Everything from getting access to expert reports that were filed in the World Trade Center insurance case to trying to get access to documents under the Freedom of Information Law in New York State that federal prosecutors in the Moussouai case have asked not to be released, to seeking direct access to proceedings involving material witnesses and the like.

MR. SCHULZ: Is it fair to say that when you use the right in these instances, you are talking about court proceedings, and usually criminal proceedings?

MR. McCRAW: Yes, both criminal and civil in terms of September 11th. Some of these come out of left field and are taken care of fairly easily. For instance, in the lawsuit that was brought against United Airlines by survivors of people killed in the airplane crashes, some of those plaintiffs wanted to proceed anonymously. We intervened, making the argument that, in the normal course of things, a plaintiff should be identified. We have also exercised the right in civil suits involving insurance.

But, primarily in terms of the number of cases, it is criminal proceedings where we exercise the right most often.

MR. SCHULZ: Okay, let's try to get a little more specific, because in the cases that are being litigated right now, at least the ones that the ACLU is involved in,[3] one of the key issues is the scope of this right. Does it apply to government information generally?

If you go back to Richmond Newspapers, there is a point where Justice Brennan is trying to distinguish Houtchins v. KQED,[4] and some of the earlier prison access cases that had come down over the prior decade, to show that those holdings did not preclude the recognition of a First Amendment right of access.

Justice Brennan said, "Read with care and in context, our prior decisions must therefore be understood as holding only that any privilege of access to governmental information is subject to a degree of restraint dictated by the nature of the information and the countervailing interests in security or confidentiality." [446 U.S. at 586]

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[3]Detroit Free Press v. Ashcroft, 303 F. 3d 681 (6th Cir. 2002); North Jersey Media Group v. Ashcroft, 2002 WL 31246589 (3d Cir. 2002)

[4]Houchins v. KQED, Inc., 438 U.S. 1(1978)

If you took him literally, it almost sounds like you could advance the argument that this right of access is kind of like the freedom of information law in the sense that there is a presumption of access to all government information, and the burden is now on the other side to show some "countervailing interest."

How does this play out? Does the right extend to *all* government information — to documents, to institutions, as well as to proceedings? Could we go back to the prison cases now, and make an argument based on Richmond Newspapers? What do you think? Professor Cole.

PROF. COLE: Well, because we have freedom of information acts, statutes, we don't have to confront that question. We have made a decision legislatively to create statutory rights of certain types of access to the information, at least documentary information.

I also think that the Court is never very comfortable with creating affirmative rights — always much more comfortable with negative rights. The right of access is, in some sense, an affirmative right and so what you see is, it creates it in an area where there is a kind of counter — not really accountability, but there is a right of the criminal defendant to a public trial, already on the other side, so that it's in fact not creating some wholly new right of access.

I think also in the immigration area, there are arguments that aliens have a right to have their hearings be open as a matter of due process, which dovetails nicely with the public right of access.

It does strike me that the Court — to the extent that this Court is likely to recognize the right of access, it will be in situations where there is a dovetailing claim. It may not have to get to that dovetailing claim but there is this other interest.

In criminal cases and in immigration cases, the interest on the other side is the interest in liberty. This isn't just any government process. We are not talking about access to all government decisions. We are talking about adjudications which ultimately decide whether a person should be locked up or not, whether a person should be deported, which as the court has recognized is a liberty issue.

So I think that it is very important to see the link between the kind of fairness interest of the person who is being locked up or threatened with criminal or immigration sanctions and the press/public right of access.

MR. SCHULZ: Let me throw out just one more question and then open the discussion. We have a statute for access to documents so, as Professor Cole says, we don't really need to argue about the scope of the constitutional right in most document cases. But, FOIA doesn't apply to court records. People therefore have argued that there is a First Amendment right of access to court records, sometimes winning, sometimes getting access to the records on another theory.

Laura, you are involved now in a case where you argue that even when FOIA applies, a statute can't remove a constitutional right,[5] so that access to records in some cases may be broader than FOIA?

MS. HANDMAN: Yes. This is sort of the reverse, or converse, of what you have argued for, a "right" of access. We argue that there is a long tradition, we date it back to the Star Chamber in our case, against secret arrests and that for the government, really for the first time with maybe the exception of the Palmer raids, to *withhold* the identity of whom they have deprived of their liberty is to, in effect, take away something that we have always had access to.

Viewed in this way, it is suppression of speech by taking away, removing from the public arena, where there is that long history of information about things as critical as a deprivation of liberty. I do think deprivation of liberty is a touchstone here. But, I don't want to link it necessarily to the rights of the defendant, because there are instances that we all see where the defendants don't want the press there. So it can't be just simply connected to their rights. But of course it's the right to guarantee that the public has confidence in the process, whatever the process may be.

If someone is being detained, I don't view that as simply an exercise of administrative or executive authority. I view it as sort of the first step in a deprivation of liberty that could result in immigration proceedings, could result in criminal proceedings.

In our case, these people were all detained as part of the criminal investigation and it was only sort of an afterthought that they came upon some immigration violations which led to continued detention.

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[5]Center for National Security Studies v. Dep't of Justice, 215 F. Supp. 94 (D.D.C. 2002), appeal pending.

THE SPARSE SUPREME COURT JURISPRUDENCE DEFINING WHERE THE RIGHT EXISTS

MR. SIEGEL: Floyd, let me ask you and then invite everyone to join in. It seems to me that part of what is underlying some of these cases, especially the immigration cases, is whether there really is a two-part access analysis implicit in the Supreme Court cases. Part two being the Richmond Newspapers test itself.

But number one being, is there some subset of government information or proceedings to which you don't even get to apply the Richmond Newspapers test in the first place, in which there is no question that even arises about whether a presumption of access might apply?

Can one draw some boundaries around what the Richmond Newspapers test or something like it might apply to and what it might not?

MR. ABRAMS: Well I start with the notion that I think it is unrealistic at best, to try to persuade courts that there is a generalized right of access to information, or to be in places, or to learn certain things. Justice Brennan's opinion in Richmond Newspapers was for himself and Justice Marshall -- and even Justice Brennan did not say that the right of access is a general right, he only left open the possibility that one might argue it some day in some other court.

[Laughter]

So I think it's a non starter to think of a generalized right of access with only some exceptions in which the government must make some sort of showing to justify keeping the press out. I also don't think that, as an ideological matter, the press should want to argue that. But that's for another day.

In terms of Richmond Newspapers, I do think that one has a serious chance in almost any court-like, even "criminal justice connected with the court"-like situation, to make the sort of Richmond Newspapers or, Richmond Newspapers-by-analogy, arguments. Richmond Newspapers itself has certain requirements as the Third Circuit certainly pointed out.

But, I don't think it has to be limited, and it hasn't been limited, just to criminal trials. But I would be careful about articulating a right so broad, at least at the Supreme Court level and in most courts of appeals at least, that it doesn't seem to me to have much in the way of doctrinal support from the Court itself.

It might work in some state supreme courts but I don't think it will work anywhere else.

MR. SIEGEL: Is there a unifying principal that would more succinctly define what type of proceedings or information we should be arguing this right potentially applies to? Lee?

MR. GELERNT: Tough question. I don't know that there is any one unifying principle that we can all agree upon. I do agree, however, with the general sentiment being expressed that we need a limiting principle and that as a strategic matter we probably should not be arguing for a general, all-encompassing right of access. That is an argument that is not likely to be successful in any court. Thus, whatever the limiting principle may be – history or something else – we do need one in my view.

Picking up on Laura's comments, I think it is right that history provides a potential limiting principle. One way that is true is in the sense that, if a given process or type of proceeding has historically been open, the government's attempt to close the process or proceeding might be characterized as taking something away from the public that it has always enjoyed, rather than simply refusing to grant the public an affirmative right of access.

But I also think history may not always be necessary to establish a right of access and, strategically, may be dangerous as a limiting principle. It does not seem to me that we want to create the impression that a certain amount of history is necessarily required. That could be a very dangerous principle for us to establish.

There is also another possible limiting principle that can be linked to Richmond Newspapers. The principle would be that we are only asking for a First Amendment right of access to those proceedings that are already required to be open by virtue of a constitutional provision other than the First Amendment. That is, proceedings that the Constitution, irrespective of the First Amendment, assumes will be open.

In Richmond Newspapers, the Court held that the press and public have a First Amendment right to attend criminal trials, which of course must also be open by virtue of the Sixth Amendment. David Cole mentioned that the Due Process Clause might require open deportation proceedings. I think that is right. I would also look at the role of habeas corpus. As the Supreme Court made clear in the St. Cyr[6] case two Terms ago, the Constitution, and in particular the Suspension Clause, guarantees habeas corpus review of deportation decisions. Insofar as habeas

[6]INS v. St. Cyr, 533 U.S. 289 (2001)

corpus proceedings were intended to be open, then one might say that the Constitution, irrespective of the First Amendment, did not contemplate the possibility of the government depriving an individual of his or her liberty in secret. Here that means that the government cannot detain and deport an individual based on secret proceedings.

Thus, the Due Process Clause and the Suspension Clause would play the role the Sixth Amendment plays in the criminal context and would mandate that, irrespective of the First Amendment, the deportation process must be open. Consequently, one might argue that granting a First Amendment right of access to deportation proceedings would not pry open a process that otherwise could have remained closed, just as granting a First Amendment right to attend criminal trials did not pry open a type of proceeding that otherwise could have been closed.

MR. LEVINE: I think this whole discussion has to be informed, and what Floyd said points to this, by how we got to this point in the first place. If you look at the Richmond Newspapers line of cases, they constitute a heavy concentration of several Supreme Court decisions over a very few years, and then they stop.

But, if you look at those cases, the Court was very slow and hesitant about expanding what this First Amendment right of access applies to, starting very narrowly with the criminal trial itself. You read the Richmond Newspapers decision and the phrase "criminal trial" is in every other sentence of the Chief Justice's plurality opinion.

Then, you go to Press Enterprise I,[7] and I remember the oral argument in that case, the whole pitch was, voir dire is part of the criminal trial. It is not something separate. It's part of the criminal trial, it's a part of the criminal trial.

Then you got to Press Enterprise II,[8] and of course you weren't talking about part of the criminal trial anymore. So, the argument there, which I think the Court bought, was that a preliminary hearing is an adjudicatory procedure in which a neutral, detached, decision maker is asked to make a ruling on an issue in a setting that is very much like a trial. This is very similar to the due process notion that David [Cole] was talking about.

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[7]Press-Enter. Co. v. Super. Ct. Of Cal., 464 U.S. 501 (1984)

[8]Press-Enter. Co. v. Super. Ct. Of Cal., 478 U.S. 1 (1986)

I think that is at least one unifying principle which I think the Sixth Circuit gets at in the Detroit case.[9] If you were talking about a proceeding in which there is a neutral independent decision maker called upon to make a decision, then the "experience" prong of the Richmond Newspapers test comes into play in full force and you don't have to revisit the issue in each case to determine whether or not the particular species of adjudicatory proceeding at use is one in which there is a history or a tradition of access.

Simply put, adjudicatory proceedings have a tradition of access. You can argue about whether or not there is compelling governmental interest in closing a particular kind of proceeding or a particular proceeding in a given case, but you can't argue about the basic right.

So one unifying distinction that you can glean from the cases is, whether it is an adjudicatory proceeding, on the one hand, or a deliberative proceeding like what happens when a congressional committee meets to decide whether or not it's going to vote out legislation or when the president consults with his advisors, or an investigative proceeding like what a prosecutor does when interrogating witnesses or plea bargaining. So that's a possibility.

MR. MCCRAW: You know, I think one of the ironies here is the last Justice to articulate a general right was Stevens. He comes up with bizarre results starting from that. He finds that there should be a right to go into the prison, but dissents in Press Enterprise over the preliminary hearing.

In part, that's a function of the test that he ends up using which is sort of a rough balancing. But I think that that particular theory has probably seen its last legs in that particular case. I think that we are now in an environment where we live with whatever we get from Richmond Newspapers.

THE RELEVANCE OF "HISTORY" AND "LOGIC" IN IDENTIFYING THE RIGHT

MR. SMITH: Nathan, I agree that we shouldn't be arguing that there is this wide general right of access. But I think that as an analytic matter, when this case gets briefed in the Supreme Court, it doesn't make sense to buy into the notion that you have to get over two hurdles, that you first have to get into the Richmond Newspapers world and then you have to pass the test separately.

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[9] Detroit Free Press v. Ashcroft, 303 F.3d 681 (3d Cir. 2002)

Because I think that the test is what you would want to look at to decide if you are in the ballpark where there should be access. It looks at history and logic, logic being, is this a particular kind of government function where having the press there would be valuable, serves the functions that public attendance at criminal trials has served over the years. So what else are you going to look at? You know, that ought to be what the test should be, and I think we articulate it well.

We just need to get past a very mechanical application of that test and look at this as an adjudication-like proceeding where liberty is at stake, that's comparable and parallel to what for five hundred years has been a criminal trial in Anglo-American law, with public access.

MR. GELERNT: I agree with that. I think Nathan may have been picking up on something in the government's Third Circuit brief, which argued in the alternative that the Richmond Newspapers test did not apply at all to administrative proceedings, but that even if the test did apply, administrative deportation proceedings cannot satisfy the test. But, as even the government appeared to concede at oral argument in the Third Circuit, the distinction between these two alternative arguments is somewhat contrived, and in fact the government made essentially the same points to support both arguments in its briefs.

MR. SMITH: The courts of appeal seem to have bought the notion that there is this two-step analysis and both get to the second question.

MR. SIEGEL: Are you suggesting we should be moving away from an application of the history test that looks at the history of the particular proceeding itself? Presumably, at least in some of the non-traditional court proceedings we are dealing with, the history may be ambiguous or there may not be much evidence to draw on.

Should we be affirmatively advocating moving away from a literal application of the history test?

PROF. COLE: This is even before you get to the history test, right. The Sixth Circuit says, we have to first decide whether the right applies, and to do that we have to go through history and logic. The reason history is important is because of what it tells us about logic essentially. History is not important in and of itself. History is important in terms of what it tells us about the ultimate value judgments, value choices about whether it's, as a categorical matter, generally a good thing or generally a bad thing to have proceedings be open.

I think that's a very important point. The government wants to say, unless you have a history that goes back to well before the Framers, we don't even pass that first prong. We clearly can't allow the argument to end there.

The Supreme Court's own explanation of the history test allows you to not get caught on that.

MR. SCHULZ: That is a point that the Third Circuit's bought, although maybe you could argue it's not crucial to their holding. But they go through the history prong and they say, you know, we find that 40 years of a regulatory presumption of openness is inadequate to satisfy the long history that the Richmond Newspapers test requires.

MR COLE: Right. Right.

MS. HANDMAN: Now it really depends how you define what you are looking at, because if you define it as what Lee says, adjudicatory proceedings, and look at the function of it, and not who is discharging that function, an administrative agency or a court, but the function of it, then you can go into the history with a much more generalized description. In our case, if you define it as secret arrests, you find a long history of access. If you define it as immigration detentions, you don't.

PROF. COLE: Well that also is a problem, because the level of generality here is very slippery and can be dangerous. If the government wants to go to this very broad level of generality, they want to say what you are talking about is a right of access to all administrative proceedings or all executive branch proceedings. What we want to say is that we are talking about a right to immigration proceedings.

Then what the Third Circuit says is, we are talking about a right to immigration proceedings but we are going to rely on the specific concerns raised by 600 immigration proceedings to find that there is no general right.

MR GELERNT: That was how the Third Circuit dealt with the logic prong inquiry under the Richmond Newspapers line of cases, the inquiry that is made in addition to history. I agree that the Third Circuit's approach on the logic prong was wrong because the logic prong looks at whether openness would be beneficial to the general process at issue, here the deportation proceeding, and not at whether there may be reasons to close portions of hearings in particular cases or subsets of cases, such as national security cases, to protect against the disclosure of substantive information. The government's reasons for closing particular cases must be subject to exacting scrutiny.

With respect to the history prong, questions may arise in deciding which process should be examined, in other words, in determining the proper level of generality. The government wants to lump all administrative proceedings together and apply the Richmond Newspapers test to administrative proceedings generally. But, one might look specifically at immigration proceedings, or more generally at civil proceedings, or even proceedings involving the deprivation of liberty.

MR. ABRAMS: I think we have to recognize that this is a hard sell and it would be even without 9/11. I mean we shouldn't deceive ourselves. Richmond Newspapers itself was a great victory in part because it was so difficult to get there and to move the Court there and to move them much beyond it is more difficult still.

So that's just a - unhelpful,

[Laughter]

but nonetheless realistic sense that you know, we ought to try to be as unambitious as possible, consistent with trying to come out with something for the cause.

MR. SMITH: Given that reality, it seems to me that the dissent in the Third Circuit, Judge Scirica, had a really nice approach to this, which is to say, the key thing is how is this being decided? Case by case with findings or as a general matter? Some guy in Washington just is checking cases on a list and doesn't, we don't get to have any inquiry into how that decision was made.

He goes on to say, it may well be that lots and lots of these proceedings would wind up being closed even if the access right applies. You don't even have to have a public hearing on the issue whether to close any particular one. You can have that in camera.

But we ought to insist on the principle that the government has to make a case to some person who looks like a judge in each individual case - not just come in and have a blanket closure policy for hundreds of different proceedings.

It seems to me, if we insist on that principle, and maybe give the Court some notion that may well mean that there is still going to be a lot of protection, and, that's a way to get through a difficult time.

MR. SCHULZ: That's sort of an above the line, below the line argument that we'll come back to. I want to pick up on one thing first, that Lee [Gelernt] was articulating in trying to define where the right exists.

When you look at the experience prong, there is a certain logic to arguing that whenever you have any "adjudicatory" type proceeding, the First Amendment right should exist for the same reasons recognized in the Richmond line of cases.

If we advance that argument however, we have to take into account that this is not how the lower courts have dealt with the issue in all of the decisions that have gotten us to where we are today. Where courts have recognized the right, they have looked at the history of the particular proceeding at issue. So we've had cases on bail proceedings, motions to suppress, and other specific types of proceedings that have been opened. The courts haven't said, "What's the difference between a hearing on bail and a hearing some other issue?" They have looked at the history of access to bail proceedings.

So, it may well be that the argument to be developed involves stepping back, and arguing that all of these cases over two decades have helped illuminate a fundamental principle that we can articulate now with the benefit of these decisions. And, through that review of the precedent conclude that history is really less relevant than the nature of the process being invoked by the government.

MR. LEVINE: Well the lower courts haven't because the lower courts think after Press Enterprise II that they are bound by this very rigid two-part, logic and experience test.

If the United States Supreme Court in one of these cases now, twenty years later, picks this issue up again, I am not so sure that the two-part test is going to survive. You have a number of justices on this Court, Justice Breyer and Justice O'Connor foremost among them, who don't like bright-line tests.

I would not be surprised if you got a Bartnicki-type[10] opinion out of Justice Breyer slicing the salami in a very, very different way. If you go back and you look at how we got this history test in the first place - Paul is right, it's a happy accident that it actually does make sense -

[Laughter]

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[10]Bartnicki v. Vopper, 532 U.S. 514, 535 (2001) (Breyer, J., concurring).

- but the fact of the matter is, you had a very divided court in Richmond Newspapers. The Chief Justice at the time had a real penchant for history and was an Anglophile of the first order and loved to go back and write about the Norman conquest. He found himself in dissent in Globe Newspapers[11] and Justice Brennan had the pen, one brief shining moment and wrote a footnote that said history isn't really that important.

[Laughter]

That pendulum swung back in the other direction when the Chief Justice got the pen back in the two Press Enterprise cases, and was thrilled to death to tell the story about the Aaron Burr treason trial.

But, I am not so sure that many justices on the Court are going to be that interested in history. If they are, I agree wholeheartedly they are going to be interested in some limiting principle. Because if they don't find one, they are going to do away with the right, except in those areas in which they have clearly already found it to exist.

MR. SCHULZ: Just as a footnote, Justice Breyer sat on a panel when he was a circuit judge in a case called In re Globe,[12] which involved access to a bail hearing, and essentially that opinion said, even though there is no history of access to bail proceedings, that's no problem. He didn't seem to see the absence of history as a problem, at least as a circuit judge.

MR. McCRAW: I think that's the unfortunate thing about - one of the many unfortunate things about the Third Circuit opinion is that, in a lot of courts, the history prong had fallen away. You look at in the Second Circuit, United States v. Suarez,[13] which involves access to CJA forms filled out by indigent clients to qualify for appointed counsel.

The court says you know, why shouldn't they be opened and immediately goes into the below the line test. The same thing was true in some of the Third Circuit cases that get mowed down or at least cut back significantly in the most recent decision.

MS. HANDMAN: I really think though, in terms of having a chance of success, in these 9/11 cases, that history framed correctly is going to be our best argument because I think that they will take refuge in the history. I

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[11]Globe Newspaper Co. V. Super. Ct., 457 U.S. 596 (1982).

[12]In re Globe Newpaper Co., 729 F.2d 47 (1st Cir. 1984).

[13]United States v. Suarez, 880 F.2d 626 (2nd Cir. 1989).

think the judges will feel emboldened by it and it's really a question of framing the issues so that it fits the history, rather than abandoning the history.

I don't think you are going to get enough votes abandoning the history.

MR. SMITH: I think Laura and David Cole started off with the key thing – we need to say that when the country has faced crises in the past, when things have involved the government coming in and pulling people off the street because they were perceived as bad people that we have to have in custody and liberty is being taken away and they are either being sent out of the country or kept in jail for extended periods of time, the courts have come along and said, this is an important public event that ought to be visible to people and that that is the principle that we ought to be focusing on.

MR. ABRAMS: I agree with Laura that while one is using history, however one slices the range of human experience to make it useful for us, but while one is using history, in a 9/11 or post-9/11 context, I think one has to take the cards one is dealt.

I think that one of the cards that we are dealt, is an argument of Judge Keith in the Sixth Circuit[14] which goes something like this: the government has enormous power here, which we don't doubt, and they have that power from history. They can decide with no judicial review to speak of and nothing but executive branch involvement to speak of, what to do in this case.

The contravening historical answer to that is the only check on this power is access for the public and press to see what's going on so that they can criticize it. I think that one needs to press this theme of the press as a sort of lonely check on governmental abuse.

RELEVANCE OF HISTORY TO THE DEPORTATION CASES

MR. SIEGEL: This may be more of a provocative research question, but I am curious for those of you who have been the most directly involved in this litigation or anyone else, do we know for a fact that history is on our side? Meaning that if we ultimately would be advocating for a limiting principle of adjudicatory-like proceedings as Lee mentioned, involving deprivation of liberty, are there examples of such proceedings of common law that were not historically opened?

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

MR. ABRAMS: Can we turn the camera off here?

[Laughter]

MR. SCHULZ: Isn't that part of the point Floyd was just making? At a minimum, the history we have on our side is the history of the need to check abuses in all these contexts. Again, we're bact to the level of generality you look at.

Is it the history of deportation proceedings. The history of administrative proceedings? If we look more generally at the role of openness on abuses of power in a lot of different contexts, and underscore that as a key element of the strategy, it may give the Court some backbone.

MR. ABRAMS: I have another question which goes with Nathan's. Are there examples we can cite of the sort of abuses that have occurred in immigration proceedings, that one could use to bring before the courts as we have in other areas of law, to show that in this very narrow area now, look what happened in this case, in that case and in that case. Look what a good thing it was to have journalistic reporting or what a bad thing it was not to have it in these particular cases.

If one can come up with those, I think that it would certainly be very useful.

PROF. COLE: I think that's right. I actually think that there may be such evidence in the Palmer raids when 4,000 to 10,000 people were picked up on immigration charges after a series of terrorists bombings.

There is a tremendous book that I read recently by Lewis Post, who is kind of the hero of the Palmer raids. He was the acting secretary of labor and it was his responsibility to review all the deportations orders that arose out of the Palmer raids and he ended up reversing a huge number of them.

So out of 4,000 to 10,000 people arrested on immigration charges, only 556 were actually deported. But in his book, he tells the stories of how the government changed the rules right before the proceedings, right before they went out and arrested this massive group of people. They changed the rules which previously had required that counsel be provided the outset of the proceedings.

They changed the rule at the suggestion of J. Edgar Hoover to say that counsel should be provided only after the government has gotten all the information that it needs. So they didn't provide counsel to these people and they basically used the proceedings which were largely held in informal, secret contexts to extract confessions.

Everybody recognizes the Palmer raids. Even if you don't know what the Palmer raids were about, you know that they were wrong.

So it's an important history to show what can go wrong.

MR. SMITH: If you apply the history tests the way the courts have applied it, that history goes exactly the opposite way.

PROF. COLE: I don't know that they were literally closed. There was no closure order. It was just that you know, they were being held in all kinds of odd places and nobody was particularly paying a lot of attention to it. The issue wasn't really litigated.

MS. HANDMAN: Even if you go back to the civil war when people were rounded up for non-criminal reasons and President Lincoln suspended habeas corpus, the Congress actually required that he reveal the names of everyone he detained to the federal court.

So there really, the Palmer raids are a black mark. But they hardly are evidence of what preceded or has come after.

MR. LEVINE: That is another odd thing though, Paul's point about the history prong.

The First Amendment was enacted because we didn't want to repeat the experience that history taught us was bad in the land of our forefathers. Now, we are tying the nature of the right only to what was open back in the time of the Norman conquest.

[Laughter]

MS. HANDMAN: They abandoned the Star Chamber with all the secret proceedings exactly for that reason. Clearly our forefathers were wise.

APPLYING THE LOGIC PRONG IN THE DEPORTATION CASES

MR. MCCRAW: One of the things that's curious about it in the Third Circuit decision, about trying to expand the logic prong, is it may give you an opening to argue about why closing is illogical, not merely why openness is good.

In a lot of these cases, that's a much better, much tighter argument to make than to try to justify openness, because we tend to sort of fall into the parables and aphorisms about how great openness is.

[Laughter]

PROF. COLE: That's a good point. I think when you look at the reasons that they give for why you have to close, which the Third Circuit parrots verbatim, they apply equally to all of the criminal detainees who were picked up after September 11th.

So if that logic is sufficient, it would justify closing all the criminal proceedings as well. Their arguments prove too much.

The second response is, and I think and it's been Lee Gelernt's sound bite every time he's talked about this case, that we are not saying these proceedings can't be closed where there are legitimate security interests in particular cases.

Many of the security interests that they identified are those which could be articulated and could be justified in a particular case and that particular case could be closed.

Then you have cases like Haddad[15] where the reason they give for why it had to be closed is, we can't allowed the identity of this person to be known. But his arrest was reported the next day in the Detroit Press and the day after that in the New York Times.

So you can attack their justifications with specific cases. And you can suggest that where those justifications are legitimate there ought to be a particularized showing.

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[15]Haddad v. Ashcroft, 221 F.Supp.2d 799 (E.D. Mich. 2002); see also Detroit Fress Press, 303 F.3d 681 (6th Cir. 2002).

MR. ABRAMS: I would also go to the cases that our side won. Remember the arguments against us were not non-existent in those cases. There were arguments of seriousness made about harm not just to the judicial process, but to right of fair trial and to other constitutional interests, all of which were overcome if you will, by the victory starting with Richmond Newspapers.

There are a number of examples in which our victories came at the expense of significant societal interests. Nonetheless, victories they were.

MR. SCHULZ: What Floyd and what David Cole just called into question about the Third Circuit, raises the issue of whether the Third Circuit got the logic prong right. Fundamentally, you could argue that there are two different analyses going on here:

One is the analysis Lee Gelernt started articulating, which says let's look at process. If you go back to Richmond Newspapers, one of Justice Brennan's statements, when he is trying to deflect the Chief Judge's history, says that the value of access must be measured in specifics:

"Analysis is not advanced by rhetorical statements that all information bears upon public issues. What is crucial in individual cases, is whether access to a particular governmental process is important in terms of the process."[16] That sounds a lot like the point that Lee was making – the reason we have access is because it benefits the procedure. Are you having fact finding where you have witnesses testifying under oath, where watching the proceeding can avoid perjury and offer all the other benefits that Justice Brennan articulates?

If that's what the logic prong means, maybe it is defining a test that's narrower than all of the things that Judge Becker is talking about in his analysis of the logic prong. If you are going to talk about protecting national security, that arguably isn't really part of the logic test as Justice Brennan conceived it. That is something that comes later in deciding whether to close a specific proceeding. Yes? No?

PROF. COLE: I think that's right, because I think the question is about the process and the process is not national security deportation cases. It's deportation cases. Then where there are - if we conclude that deportation cases as a whole ought to be opened and that there ought to be a presumption, it's only a presumption. It can be over

[16]448 U.S. at 589 (Brennan, J. concurring).

come where there are strong arguments in specific subsets of cases and national security cases maybe.

Judge Becker essentially treats the category as national security deportation cases. But his holding is not that there is no right of access to the national security deportation cases. His holding is that there is no right of access to deportation cases.

So really, he really is shifting the ball and I think it's quite easy to show that is wrong and that national security deportation cases is just not a coherent, logical category.

MR. GELERNT: Right. I think the government's argument proves too much. If the government's affidavits in these cases are sufficient to satisfy First Amendment scrutiny, then they would have to be sufficient to satisfy First Amendment scrutiny in criminal cases involving national security, since the strict scrutiny analysis would be the same in both contexts once a First Amendment right of access attaches for a given type of proceeding. Yet the government has not been arguing that it can categorically close criminal cases involving national security.

MR. ABRAMS: I think you are both right but I think you have to be prepared to answer then, if that's the argument, whether you would agree that in all, in the subset of national security immigration cases, they can be carved out as a group.

Obviously your answer has got to be no. But you then have to still answer Judge Becker talking about that subset of cases.

MR. GELERNT: Right. But what the Third Circuit did, I think, was impermissibly side-step strict scrutiny. It may be that there are reasons to close particular cases but that should not negate a general right of access to a particular type of proceeding. And once there is a general right of access to a type of proceeding, the government should have to meet strict scrutiny to overcome the qualified First Amendment right, which the Third Circuit majority did not apply, and even suggested might be fatal to the government's arguments. The government should not be permitted to allege in a conclusory, vague and general way that there are national security concerns, but should have to demonstrate that there are specific reasons why specific portions of a given hearing must be closed.

PROF. COLE: Yes, I think I would take issue with first of all, strict scrutiny almost implies it's got to be done in an individual case by case basis, rather than the categorical cases.

But even if one could justify it on a categorical basis, it's got to be done through that strict scrutiny lens.

MR. GELERNT: The government has of course argued in these cases that there is no First Amendment right to attend deportation proceedings, and consequently, that the Justice Department can close proceedings without meeting any level of scrutiny. But the government has also argued that its categorical closure directive can satisfy strict scrutiny because a case-by-case approach would threaten national security. Notably, no court, including the Third Circuit, has accepted the latter argument. Of the government's two arguments, which one will be hardest for us if these cases go to the Supreme Court? What do people think?

MR. ABRAMS: I think with respect, we are taking a little too seriously, the doctrinal analysis articulated by the courts. I mean – I don't mean for a moment that we don't have to brief it that way.

[Laughter]

But just as Chief Judge Becker treated the recent Supreme Court Maritime case[17] with a deep level of cynicism, essentially saying notwithstanding what the Supreme Court *said*, I know they meant this as part of their Tenth/Eleventh Amendment thing.

[Laughter]

I mean in a deeply cynical way of treating a Supreme Court ruling dealing with issues so relevant to this case, that he had to say, "it gives me pause," by ruling right over it on the ground that the Court couldn't mean what it was saying.

So the conclusion I offer is not about briefing, but about factual presentation. I think that one needs to combat in as strong a way as one can, the government's affidavit.

If the court should be persuaded that there is a pervasive national security problem with every single immigration case in this area, we are going to lose the case and they will find the words for us to lose it.

So it seems to me that if one can at least put some holes in it, to provide a basis for some serious skepticism about whether in every case, the government's affidavit works, it would be helpful. Not whether there is a national

[17] Fed. Maritime Comm'n v. S.C. State Ports Auth., 535 U.S. 743 (2002).

security crisis or not whether these people or these sorts of people might well be people who could do us grievous harm, but whether there might be some cases in which they have the wrong person.

There will be some cases in which the proof will be so insubstantial, of involvement in something which could do harm, that you just can't say across the board, that in every single case where there is an accused, that we must presume guilt for the purpose of closing the courtroom.

MR. LEVINE: Can I underscore that, because I think we also have to be cognizant of the slippery slope here if we don't do that. Let's say we win the doctrinal argument about whether Press Enterprise applies and you apply the two-part test, then you get to the question of whether or not this showing constitutes a compelling governmental interest that's narrowly tailored across this category of cases.

If we lose that argument, then we have a judicial decision coming from the United States Supreme Court that says, A, this is a compelling interest and B, it is narrowly tailored. That has implications both for criminal trials involving terrorism and, the way the Court has phrased the test, it even has implications for prior restraints - theoretically, a compelling governmental interest narrowly tailored, that's the prior restraint test as articulated in Nebraska Press.[18]

MR. SCHULZ: I think that's one of the reasons that Judge Becker went so far in finding that there was no First Amendment right. As soon as you say the First Amendment right of access attaches, you run into Globe Newspapers which essentially says, you can't have blanket rules, that you have to do a case by case assessment.

MR. SMITH: But what's striking about the cases so far, is that even the judges on our side were so completely unwilling even to question this affidavit and these supposed interests. At least to somebody like me who - and I haven't been involved in these cases - a lot of what they say doesn't make any sense at all.

The government seems to assume that the person who is being deported will never speak to anybody. That he's going to be left in solitary confinement without any kind of contact with the world for the next 57 years. They say things like, well the terrorists will find out where this person entered the country and they will know that that's not a very good place to enter the country.

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[18]Neb. Press Ass'n v. Stuart, 427 U.S. 539 (1976).

Well he's going to tell somebody. He probably already has, I assume, unless these people are not able to communicate. He's going to be deported right?

PROF. COLE: They really go overboard. There's the argument that we have to keep them secret because otherwise people will find out how people enter the country and what ways of entering the country are effective or not.

Well people can find that out from all the other public deportation cases, right. You don't need to look at these 600 cases. You can look at the thousands of open, public deportation cases and find out which ways are good and which ways are bad.

And there are a couple of other factors. One factor which I think is very powerful at the end of the day, is that virtually all of the people who were identified as special interest detainees, suspected terrorists, have been cleared by the FBI of any involvement in any kind of terrorism.

That's the only reason that they had been deported. Because the government's policy has been, we won't deport you even if you agree to leave, even if you are ordered deported, we won't let you go until the FBI clears you.

So they were clearly sweeping very, very broadly. Most of the people that they arrested in fact, had nothing to do with terrorism. Then finally, this is not classified information. They have good authority to classify information. They have not sought to classify this stuff and they have not sought protective orders to bar the people who are in the proceedings from going out and reporting verbatim on what happened in the proceedings.

So you can undercut in many ways, this claim that this is such a grave threat that we can't allow any of this information to come out – by underscoring what we know from what has come out and by showing that they haven't even taken the steps available to them to insure that it will not come out.

MR. ABRAMS: But if you could will it, who would you want to say this? Not a civil liberties lawyer. You want Louie Freeh, you want a former FBI person, you want the former head of national security who did this or did that. You want someone with a very high level of credibility who cares, unlike civil liberties groups...

[Laughter]

...about national security and who has credibility with the Court to make the very arguments David was making.

THE BASIS FOR FINDING A RIGHT OF ACCESS TO ADMINISTRATIVE HEARINGS

MR. SIEGEL: We will talk in more detail about the specific national security arguments the government is making. But just to conclude the discussion about the second part of the First Amendment test, Floyd, to pick up on your point about Judge Becker's cynicism, one of the other things he seems to be cynically reacting to is a sense that there is no process a civil liberty advocate met that he/she never liked. That the process test is so self-serving and self-fulfilling that it always leads up to the conclusion that openness is always good. Therefore it's meaningless.

If we are advocating for a test that applies to all adjudicatory proceedings, or however we might define it, how willing do we need to be able to demonstrate that in fact our principal is truly limiting in some sense? That there might be some things that should be closed.

The only place where the Supreme Court has ever explicitly stated that openness is not helpful is a Grand Jury. But outside of a Grand Jury, how prepared do we need to be to be able to demonstrate that there is some limitation in this principle we are advocating?

MR. LEVINE: I think you have to be prepared with the pat expression, "that's not my case."

[Laughter]

But you have to be prepared to give something away. This is a somewhat famous story. The lawyer who argued both Press Enterprise cases is now a judge in California named Jim Ward. (Assoc. Justice, Cal Ct. App).

In the first Press Enterprise case, Justice O'Connor asked him if he was arguing that there was a First Amendment right to preliminary hearings. He said, "oh no, no. I am just here talking voir dire and voir dire is part of the criminal trial." Then he was back two years later arguing that there was a right of access to preliminary hearings. So Justice O'Connor asked, "is there a First Amendment right of access to plea bargaining?" He said, "that's not my case," and she said, "Mr. Ward, what's to prevent you from coming back in two years . . ."

[Laughter]

She laughed and he laughed. Nobody else knew why they were laughing.

MR. ABRAMS: I think we should remember in that respect that when we were doing prior restraint cases, were we, in a sense, giving away access? Not quite giving it away, but saying that's different, you know, some other time, prior restraint is special. So it was but you know, that's how one makes some incremental progress.

MR. SCHULZ: Talking about limiting principles, is there anything that we can import into the First Amendment access theories from the Supreme Court precedent dealing with due process?

As you know, there is a whole body of case law dealing with the development of the administrative state, where all sorts of issues were being raised. Things were litigated like what could Congress delegate to executive agencies? When could executive agencies do things that looked like the exercise of judicial power?

So there are cases about the scope of administrative authority – and I am over-generalizing here – where the courts said, we are going to allow a lot of this delegation to happen because we have some comfort in knowing that when things are put into administrative agencies, due process rights still exist. In other words, due process provides some constitutional protection as to how things get done.

A line of cases from the 50's and 60's provides a fairly detailed due process analysis that says the amount of process that is due in the administrative context depends on three factors: the nature of the proceeding, the nature of the right at stake and the public interest.[19]

So you have cases – not Supreme Court cases but lower court cases – saying that in certain types of administrative proceedings the "due process" clause requires a "public" proceeding. Doesn't this analysis help? The Sixth Amendment provides a right to a "public trial" that is personal to the defendant, and a similar due process right exists for participants in certain administrative proceedings. Can we rely on the line of cases defining due process rights to provide a limiting principle for First Amendment access rights in administrative proceedings?

This approach would focus on the nature of the administrative process and the nature of the rights at stake here, which is a liberty interest in the INS cases. It seems to me that taking this approach could also put the Court right into the quandary that Judge Becker faced, of dealing with the Maritime[20] case last term. Justice Thomas in

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[19]E.g., Hannah v. Larche, 363 U.S. 420 (1960), See Fitzgerald v. Hampton, 467 F.2d 755 (D.C. Cir. 1972) (and cases cited therein).

[20]Fed. Maritime Comm'n v. S.C. Ports Auth., 535 U.S. 743 (2002).

that case said that an administrative process looks like a trial, and smells like a trial so the founders must have thought that sovereign immunity would apply to the new type of proceedings.

Well, if you have a proceeding that looks like a trial, a significant liberty interest is at stake, and an impartial fact finder is proceeding by listening to witnesses subject to cross-examination, isn't this the type of proceeding where there must be some public right of access? Doesn't that give us a limiting principle — importing the analysis from the due process cases and getting away from the two-prong (history and logic) analysis?

MR. ABRAMS: Well is it a limiting principle or is it an alternative argument?

MR. SCHULZ: Well it's both limiting and expanding.

[Laughter]

What it says is, if you are going to focus on the nature of the process, it immediately gets you over the government's hurdle that this right only exists in Article III courts. It doesn't. It exists in any government proceeding where you have an impartial fact finder and all the panoply of evidentiary rules, whether it's administrative or perhaps even certain congressional investigations.

Is there any merit to this whole structure? It's expanding the right beyond the current precedent, but it's limiting – and maybe in ways we wouldn't like – in that it might say this First Amendment constitutional right does not apply to information generally, only to certain types of proceedings held by the government where certain interests are at stake.

Maybe it doesn't apply to documents and maybe it doesn't apply to access to prisons. So it might be very limiting in ways that down the road we wouldn't like.

MR. SMITH: I think this is an interesting area to explore. But one of the difficulties is, the due process clause regulates procedures in a lot more proceedings than we are ever going to suggest are covered by the right of access.

I mean every disability termination hearing, social security hearing, those sorts of things, there is a due process analysis that says you have to have this or that. Maybe you don't need to have an additional layer of due process but you are going to have certain due process rights that come into play and so, if you are going to have to

come up with a particular due process theory that says where this is present and not this, then you do have to have a way to argue the courts that there are limits.

MR. SCHULZ: Yes, but that may be the value of this approach. I think, and again I can't claim to have done exhaustive research, but if you look at the due process cases, where the courts find that due process requires a "public" proceeding is assuredly rare. It may buy into Judge Sirica's dissent noting, for example, that social security hearings really are different from deportation proceedings because they are not conducted like an adjudicatory proceeding.

So if you focus on the due process analysis, you may actually be narrowing the scope of the right in the administrative context in a reasonable way. It's a limiting principle. INS deportation hearings may be open, but social security hearings won't be because the process followed by the agency is different.

MR. ABRAMS: Why do you have to do it in such a rectangular sort of way with such - why do you have to have a level of clarity which answers all these doctrinal issues for the future, instead of literally piling on or working together the different doctrines including the very useful one that you have just identified as further bolstering the reason that this proceeding ought to be opened?

I don't think one has to have sort of a unified theory of what proceedings ought to be opened. I think we have to see what we can get first.

MR. LEVINE: I agree and that boils down at the end of the day to justice counting. You know, there are some justices on this Court, Justice Thomas being one of them, for whom history may well be the winning ticket. Especially given some of his really good First Amendment decisions like the McIntyre case.[21] To the extent that you can make an historical argument about adjudicatory proceedings before impartial decision makers, he might like that. But, there are other justices on the Court who, I suspect, wouldn't like it at all. This is a very different Court than the one that sat in 1986 and decided Press Enterprise II.

It's going to take some very serious thinking about how to count to five on this case in this Court.

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[21] McIntyre v. Ohio Elections Comm'n, 514 v.s. 334, 358 (Thomas, J., concurring).

PROF. COLE: On vote counting, you know the votes that are obviously critical are Kennedy and O'Connor. We will get some indication this term because another ACLU case challenging the mandatory detention of criminal aliens – which has been struck down by four circuits and the Supreme Court granted cert on. So we get some sense there.

But two years ago two immigration cases were before the court, both of which the immigrants won, one time getting Justice Kennedy and the other time getting Justice O'Connor. I was at both those arguments and it seems clear to me that both Kennedy and O'Connor were concerned by the fact that what was at issue, was detention in some sense.

In one case it was literally detention. It was the indefinite detention of aliens who were found deportable but can't be sent back because the country won't take them. In the other case, it was judicial review of deportation orders.[22] But deportation orders necessarily imply detention because in order to deport, you've got to take someone into custody.

The centrality of the importance of having oversight of detention, is I think, a very, very powerful argument and it's one that may well appeal to Justices Kennedy and O'Connor. I really like Floyd's suggestion about playing their plenary power language back at them by saying that precisely because these areas of immigration and even national security are areas where the courts can't play much of a role in terms of substantive review, it is all the more critical that we ensure that there are fair processes that allow the public to see what's going on - this is the best we can do, given how much leeway we've given them and we need to give them on the substance.

REBUTTING THE ARGUMENT THAT ACCESS RIGHTS EXIST ONLY IN ARTICLE III COURTS

MR. SIEGEL: While we are on the subject also of Justice counting. As we mentioned earlier, the government argued both in the Third and the Sixth Circuits that there should be a whole subset of proceedings just carved out of Richmond Newspapers. Specifically, they make a structural argument that Article 1 and Article 2 have specific access provisions – the State of Union address, statement of accounts, publication of legislative journals, which in the latter example even has its own specific secrecy provision. Article 3, they say, also has its own implicit access provision, through the Sixth Amendment. Therefore, they argue there is no other basis for access to executive branch proceedings.

[22] Zadvydas v. Davis, 533 U.S. 678 (2001) and St. Cyr.

That argument has not been very successful so far, but Paul, do you think that may appeal to some of the Supreme Court justices and what is the best way to attack it?

MR. SMITH: It seems to me that there is a very powerful response to that, given the history of creating a new executive branch administrative processes created over the last hundred years, if you just give the executive branch or the Congress the power to move things over to the Article 1 side, and suddenly they are outside of all these customary requirements, that's just way too dangerous.

So that I think is something that the center of the Court at least will find persuasive, against the argument that you were just outlining. Moreover, the argument sounds more like a debater's point kind of argument that will be used by the other side, whether they are the majority or the dissent.

This sort of notion where you identify six places where they address certain kinds of issues in the Constitution, and then infer that the Framers could not have meant to imply any other rights, I don't think it's as much an argument to persuade as it is an argument that you put into your opinion.

MR. SCHULZ: But, are there other ways? We were talking earlier about how we affirmatively could get outside the box of this "Article 3 only." Are there ways of attacking their argument and the internal logic of it?

Their idea is, since the Constitution itself provides access provisions in Article 1 and 2, the court should not imply other access that the framers left out. Does that hold up even as a logical argument?

MR. LEVINE: One way it doesn't hold up is that the premise of the Article 3 argument is, in significant part, the Sixth Amendment. Everyone seems to conveniently be forgetting about an adverse ruling called Gannett v. DePasquale,[23] where the Court started this whole line of cases off by holding there is no Sixth Amendment right to a public trial that inheres in anybody but the accused.

MR. ABRAMS: Isn't it inconsistent at its core with Richmond Newspapers? If the basis of that as you are suggesting is, is that notwithstanding De Pasquale and its Sixth Amendment ruling, there is a First Amendment right of access to "public court proceedings", I think it would be very hard for them to reconcile that, with the proposition that in a case involving Article 3 activities, there is no First Amendment right.

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[23] Gannett Co., Inc. V. DePasquale, 443 U.S. 368 (1979).

It seems to me a very painful argument for the government, very difficult one for them to maintain.

MR. GELERNT: And to the extent that the government is arguing that the right to attend criminal trials is based in part on the interaction between Article III and the Sixth Amendment, the government doesn't fully address the fact that Richmond Newspapers involved state court criminal trials.

MR. SCHULZ: Yes. There is another First Circuit case that Justice Breyer signed on to. He was in the majority in an appeal coming out of Puerto Rico that says, "We seriously question whether Richmond Newspapers and its progeny carry positive implications favoring rights of access outside of the criminal justice system."[24]

MR. ABRAMS: Well that's why you want to be in the Third Circuit.

[Laughter]

MR. SCHULZ: Okay, so no one buys this Article 3 only.

MR. LEVINE: I buy Paul's analysis that it will wind up in the opinion somewhere. But it won't be the motivation.

ADDRESSING NATIONAL SECURITY CONCERNS IN ACCESS CASES

MR. SIEGEL: Let's circle back to national security. I think some of you may have already answered this question implicitly. But do we believe that it is essential to take on the government's specific national security arguments on their merits? Is that a wise or necessary tactic in this case?

MR. ABRAMS: Well I think it's a very delicate task but a necessary one and I think counsel has to be very careful not to sound as if she is denying the reality of the national security crisis that afflicts us. So I think both in writing and argument it has to be made plain that counsel really accepts the notion and the client really accepts the notion of the enormous risks afoot and then go on to indicate why, consistent with national security, access should be granted.

But in response to the government's claim that as a result of the national security crisis, anything goes, I would be very careful not to A, ignore or B, minimize the national security implications of these cases.

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[24] El Dia, Inc. v. Hernandez-Colon, 963 F.2d 488 (1st Cir. 1992).

MR. GELERNT: I agree with that. We cannot talk straight access doctrine and must not only deal with national security as a legal matter but also with how the atmospherics of these cases will be affected by the government's national security assertions. How we deal with the government's national security claims, however, is not self-evident and is, I think, a delicate task.

In that regard, I would pick up on a point Paul was making in the beginning of the discussion about Judge Scirica's dissent in the Third Circuit case. Judge Scirica basically said that the central issue here is not secrecy, but who makes the determination whether a proceeding will be closed, since no one argues that Richmond Newspapers established anything other than a qualified right of access that can be overcome upon a proper, individualized showing in a given case. Indeed, Judge Scirica was willing to assume that all or most of the hearings might ultimately be closed. Nonetheless he did not want the Justice Department to have the power to close the proceedings unilaterally and categorically.

I think this is an important point because, in these cases, we are only arguing that a categorical directive is unconstitutional and that a case-by-case determination is required. Thus we should not necessarily be assuming a burden to show that none of the cases subject to the government's closure directive involve sensitive information, but only that the government can distinguish between those hearings that must be closed and those that can remain open.

MR. SMITH: It seems to me a related point is, to the extent that we can say the question at issue is how to deal with the national security concerns - I mean is the case by case good enough or does somehow the attorney general need this broad brush power to just do things without review, without any standards, without any process and just close lots and lots of cases.

The question is, which is enough? They then have to come back and make a point, which is sort of hinted at in the cases, which is that somehow, if we can't close 500 cases and we have to go in and do it case by case, we are only going to do it in about 50 cases. Those 50 cases, in turn, are going to be known out there in the world as the ones we really care about. So we have to basically abuse 450 other people in order to have this kind of camouflaged process. To the extent that they can be pushed toward that position, I think that's a helpful factor. That is to some extent what they say.

MS. HANDMAN: They do that both in the context of informants, the fact that some of these people may well be cooperating or informing. But if the government only releases the names of some of them, the ones who were not informants, then we would know who were the informants.

What they try and do, I wouldn't even say it is categorical. They argue the mosaic and the mosaic is what trumps the case by case. They are saying, look if we released all these names, you would have the whole picture. You would be able to see where we are going, where we are not going, what are dead ends, what are not dead ends, what we know, what we don't know.

That's not categorical really. That is just saying it applies – this logic and this interest applies to everyone and I think it is a hard one to take on. I mean case by case only goes so far in addressing that concern.

I come back basically to the detention argument, that if you have chosen not just to surveil people, not just to question people, but to deprive them of their liberty, you better make a really, really good showing that you can't reveal their names or you can't reveal the proceedings in which they are involved.

It can't just be speculative or theoretical. It has to be a stronger showing.

MR. MCCRAW: What is the answer to the assertion of those 450 are not being abused, that they are protected in other ways, they don't need this public scrutiny to remain protected, they have due process rights?

MR. SMITH: Well it is an interesting kind of due process, because it is the one kind of hearing where you have almost no judicial review really on the substance of what they decide. They can put you out of the country, you know, separate you from your family and your job and you have that one hearing, effectively, on the substantive issue.

To the extent that they are doing that in closed hearings, then I think the basic principle we have is that we have to have somebody there to keep an eye on what the government is doing when they are doing things with people's basic liberty interest.

So there is a substantial cost every time you close one of these things, which albeit is outweighed in some cases. But a broad brush approach is at least highly questionable.

MR. MCCRAW: It seems to me that if you look at this from a result-oriented perspective, and I think any of you who have ever argued these cases in any court know, it is result driven and Richmond allows you to do that. Whatever the judge wants to get to, Richmond can allow him or her to get there.

But it seems to me that if you started by asking yourself, what are the results that are going to appeal to them? One is, is that national security can be protected. Under whatever solution you have national security can be protected. Second, that individuals could be harmed, that whatever is there now, isn't enough. There is a real risk and a real harm and third that we are not going to gum up the process with our solution in such a way that it is either going to make the process unworkable or inadvertently harm national security.

I think focusing on those three results and then working back to the doctrine that gets you there, becomes an easier task.

MR. SIEGEL: Laura, the mosaic theory that you talked about is the argument that information, which in isolation may appear innocuous, may in fact be extremely useful if somebody has a broad picture of everything and can piece little things together.

But underlying it also seems to me, to essentially be an argument that the problem with case by case closure is we – meaning everybody, including the government, and individual immigration judges – don't even really know what might be helpful to terrorists.

Therefore, the better thing to do is to err on the side of safety and allow the people who probably know the best to make a broad brush decision as to what to close. Because the lower and lower you go down, the opinions of 500 immigration judges are even less likely to get at what really may be dangerous or not.

How do we take the argument that, we just don't know and so the better thing to do is to err on the side of safety?

MS. HANDMAN: I think that the fact that they have chosen to detain these people, tips that balance toward disclosure. That balance would normally, yes, if they weren't detaining them sure, we could afford that kind of speculation and err on the side of safety. But I think when they are detaining people and depriving them of their liberty, the public needs to know, has a right to know something about these important investigations done in their name.

But I think it is disingenuous to say, disclosure won't shed any light on the investigation. We all, press and public, would not be interested if it didn't shed some light. The fact is, the public has the right to know and judge: are these detentions worth the price – the price in liberty?

So I would argue that you cannot escape that fact of detention when you are calibrating the balance. While yes, we definitely have to protect national security, we need to have some evidence that disclosure will harm national security. So far, even though the government has released a lot of information, none of it seems to have been pieced together by Osama Bin Laden who now apparently is alive and sitting wherever he is. It doesn't seem so far at least to have resulted in any attacks in Cincinnati or Cleveland or an attack on so and so who is cooperating with the government. These people, for the most part, although originally picked up as terrorists, have been found to have nothing to do with terrorism.

PROF. COLE: As you say, two things on the mosaic. One is that it is obviously this kind of argument that you always win on. It reminds me of an argument that was made during the Japanese internment where people said, look there is no evidence that any Japanese people have actually engaged in any kind of espionage. The lieutenant general who is in charge of the internment program said – and I think Earl Warren then governor of California also argued – that this shows exactly how dangerous they are. The very fact that they haven't taken any action thus far, only underscores the danger that they present.

It seems to me when you put together the mosaic theory with the sleeper theory, which is, these people come here and do nothing wrong -- that would justify locking up anybody and keeping them and do so in secret. So there is kind of too much of a flavor to it.

But then secondly, I think it applies four square to the other half of the 9/11 detainees who have been charged criminally and whose names are public. So half the mosaic they have been willing to give out. They have made no effort to try to keep those names secret. They have been willing to disclose the identity of people who are charged criminally and yet al-Qaeda could do the same piecing together through that.

So they haven't even taken their concern seriously. Then coupled with the fact which I come back to, which you know, I noticed that Judge Becker didn't even mention, that they don't bar the alien or his attorney from providing the information that they are detained and all the evidence that the government has about them, to the public, also suggests that they are not really serious about this.

You have to be careful because you don't want to suggest that there are not national security concerns. But the fact that they are not taking all the steps they could to protect this and that they have let out a lot of this information undermines their case.

MR. SCHULZ: Does this suggest that there is really something else going on here, that the government is fighting access for some other reason?

PROF. COLE: Well my theory about that – I mean who knows – but I think they wanted to use immigration authority to detain people. The fact that someone has overstayed his visa generally doesn't authorize detaining the person. It authorizes deporting them if he's not eligible for some sort of benefit.

But it doesn't authorize detaining him unless he's also found to be either a threat to the community or risk of flight, just like denying bail in the criminal process. The government doesn't always win those cases. It can't always make that showing. In a lot of these cases it couldn't make that showing because it didn't have very good evidence that these people were dangerous, because of the fact they proved out not to be dangerous as the FBI has now told us.

But if you tell the judges these cases have to be closed. Everything about this is secret. You can't even list them on the public docket, you are sending a very strong message to the immigration judge, this is a dangerous case and whatever you do, don't release this individual.

So I think part of it was, it helps them. Then secondly, I think it helps in terms of the message they wanted to send the to the American public, which is, that we are doing something to protect you. We are catching the bad guys.

Ashcroft gets on and makes a public statement, suspected terrorists – know that if we find you have overstayed your visa, we are going to lock you up. Then they announce – we have locked up 1,147 people. You think wow, they have locked up 1,147 suspected terrorists.

Well if you actually have the evidence and it showed that in fact these individuals are now being written about in the New York Times magazine, you know, that there isn't anything really that suggested they are in fact dangerous, that would undermine that message.

So I think they were – and I don't think these were necessarily conscious – I am not suggesting that they are conscious motivations. But I think that they very likely played a role in their willingness to push this envelope.

I think they weren't willing to push the envelope in the criminal area, because the law is fairly well established that they can't do it there. Unless they can satisfy the strict scrutiny test, which they wouldn't be able to do.

THE IMPORTANCE OF PRESENTING ACCESS AS THE ANTIDOTE TO ABUSE

MR. ABRAMS: I suspect they were doing a reading they thought they could do. That would have a lot of public favor, as so phrased at least.

I think the – I come back to the affidavit issue. I mean, could you get some good stories to tell? You mentioned the New York Times Magazine. I mean five or ten affi – can you find ten people – this sounds very biblical now –

[Laughter]

Can you find ten people, not only who they could not prove were dangerous, but could you find ten people who went through closed hearings, who were genuinely innocent for whom there is no reason, looking back on it -- with hindsight, no reason to think had done anything wrong and were just picked up in a sweep or wrong guy or something like that and have them tell their stories and somehow try to make a case to the court that there is a real problem on our side of the line too? We know that they have a problem -- who knows, one or more of these people really may be genuinely dangerous and we can't prove it but we'll lock them up anyway -- but that's not a problem the courts should help them with. And our side ought to be able to say, look, we can show you. Here are some people, here are some innocent people who were mistreated when the presence of the press might have helped to avoid that.

MS. HANDMAN: We cited a number of articles that have already emerged on this score – people who have been detained as suspected of being involved in or having knowledge of terrorism, only to be subsequently cleared of any terrorism connection. The plaintiff's brief in the detainee case cites even more. So I think it is a story that has to be told.

PROF. COLE: I think it would be an amicus brief in its own right. They are not innocent in the sense that most of the people did have some immigration violation.

MS. HANDMAN: Right.

PROF. COLE: Most of the people were deported. But they are innocent of terrorism, which is what the alleged concern here is.

MR. ABRAMS: I want them a little more innocent than that.

[Laughter]

MS. HANDMAN: Well, there are some.

MR: COLE: There are some.

MS. HANDMAN: There are some and you know, they just by happenstance were using the Kinko's machine that some terrorists used.

PROF. COLE: That's right.

MS. HANDMAN: But of course they would argue, well, that shows that we are looking at Kinko machines.

MR. ABRAMS: They will argue for every one who was not convicted, look how fair we were. We gave them a hearing and they won, or we dropped the charges.

MR. LEVINE: Those stories are powerful. I read Laura's brief on the train on the way up this morning and it's very powerful. Nevertheless, I think we have to recognize, as we get ready to frame these arguments at the appropriate time, that they become a lot less powerful if there is another terrorist attack. A year and a half from now when this gets to the Supreme Court, if we are three years from 9/11 and nothing has happened, these arguments will resonate a lot better than if we have had another attack in the interim.

MR. SIEGEL: One final point on this issue. Laura, in the case involving detainees names in D.C., even Judge Kessler whose opinion was perhaps the most aggressive of any to date about taking on the specifics of the government's arguments, seemed to be concerned by the argument that some of these witnesses might have a heightened risk to their personal safety or be stigmatized.[25]

She thought that was a consideration that ought to have more bearing in this context than in others and therefore came up with this opt out procedure that could conceivably end up limiting access to most of the people involved. How do you think we can take that one on?

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[25] Ctr. For Nat'l Sec. Studies v. United States, 215 F.Supp. 2d 94 (D.D.C. 2002).

MS. HANDMAN: Well first of all, I would say none of the parties, neither the government nor the plaintiffs liked that opt out procedure. The government thinks that it is a futile gesture because all these people are now, you know, departed into the wilds of various countries and it is their burden to find them and get them to signed a document that says, they don't want their name released.

So it is more likely to result in the names being released then being withheld. We argue that not – obviously a case by case basis could be made that yes, this person's life is threatened. But in the bigger picture, you don't really have a right to have your name withheld if you are arrested.

We report all the time, everyone that is arrested in the normal course you know the perp walks and the whole nine yards. Justice Rehnquist even has said that there is no privacy interest in the fact that you have been arrested.[26]

So I think the answer is that, you know, while those interests can be accommodated on a case by case basis, there shouldn't be this broad opt out provision and indeed the plaintiffs have cross-appealed on that point.

The one category that we are all forgetting about are these material witnesses who are sitting somewhere in jail, not charged and some of them are Grand Jury witnesses and all of them are presumably, pursuant to court orders, saying that they can be sealed. Even the court orders, the government refused to give to Judge Kessler.

There is not a whole lot I think we can do, other than on a case by case basis to the extent we know about these material witness orders you know and go in at that point.

But I don't think you are going to get a judge to say, I am going to override these other judges who felt that these folks should be detained and their names kept secret.

ACCESS RIGHTS IN MATERIAL WITNESS CASES

MR. SIEGEL: Lets talk about the question of material witnesses. The material witness statute 18 U.S.C. § 3144 creates a process whereby the government can seek the arrest and temporary detention of a person for purposes of testifying before a Grand Jury.

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[26] L.A. Police Dep't v. United Reporting Pub. Corp., 528 U.S. 32 (1999).

There is an interesting recent dispute between two judges in the Southern District of New York about whether the statute in fact authorizes that.

But assuming that it does, there have been a few attempts in one or two cases, successful or partially successful and others futile, to seek access to some aspects of these material witness proceedings. My first question on material witnesses is, particularly given the nature of secrecy that surrounds them, we know so little bit about what we are even asking for access to.

What should we be asking for access to? Should we be asking to attend detention hearings of material witnesses when they are arrested? Should we be asking for transcripts of detention hearings? Should we be asking for briefs of arguments related to detention hearings?

David, you have been involved in these. Have any thoughts on that?

MR. MCCRAW: I will give the strategic answer. I think that it is a loser to ask for the many things you've listed, the transcripts and so forth. What I do think is the smart strategic move and a move that we have followed, is to ask for things that we think we are likely to get.

That's one of the two categories. In one of the Doe cases, there was legal argument over whether it was proper to hold a material witness when the only thing he could speak to, was someone's exercise of their First Amendment rights or - he attended a speech or heard someone speak.

Judge Mukasey released – redacted – the arguments in that case or the briefs in that case.[27] Then the other case that is probably more known is the case of Abdallah Higazy who gave a false confession about whether he had a radio transmitter – admitted to having a radio transmitter in the Millennium Hotel on September 11th. That proved to be untrue.[28]

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[27] In re Application of United States for a Material Witness Warrant, 213 F.Supp. 2d 287 (S.D.N.Y. 2002).

[28] In re Application of United States for a Material Witness Warrant, 214 F.Supp. 2d 356 (S.D.N.Y. 2002).

Judge Rakoff has been very concerned that this false testimony became the basis for his decision to hold Higazy longer. This morning we filed papers seeking the release of the government's investigation of how that false confession came to be.

Judge Rakoff in August, ordered the government – the government volunteered, he said I will take you up on your offer, now I order it – to do an investigation of how the FBI got the false confession and ordered it to be submitted by October 31st.

In September, the government wrote a letter saying, you don't have the power to do that but we said we would do it, so we are going to do it. He wrote back – he wrote an order that said, you didn't follow individual practice procedures. You sent a letter and I don't accept letters and, by the way, there was an order, please turn it in.

So that was turned in on October 31st and in his subsequent order of November 1st he invited the Times and others to weigh in on whether that should be released publicly.

It seems to me, that case is one of those cases where I believe we are likely to make some headway, in part, because of the judge involved. More specifically, it's easy to make the argument in that what we are talking about has nothing to do with Grand Jury secrecy, which is always the lynchpin in material witness cases.

Higazy never made it to the Grand Jury, never appeared before a Grand Jury. The final point I would make, though, is the government has now come back and said, oh, but the FBI examiner may be subject to a future Grand Jury investigation, so we can't release it.

I pointed out that after eleven months for something that had happened literally in the presence of the Justice Department, it should be ripe for presentment by now if it hasn't been already.

MR. SIEGEL: The government in these cases has taken the cases that came out of the D.C. Circuit and the Clinton/Lewinsky Grand Jury litigation, and read them to hold that any proceedings that can be called ancillary to a Grand Jury proceeding must be closed now and forever. They argue that's what the First Amendment permits. That's what Rule 6(e) of the rules of criminal procedure say and that's what this line of cases involving press access to Grand Jury proceedings has held. And because the material witnesses were originally arrested on grand jury warrants, they say everything about them is ancillary to a grand jury.

Is that over-reading those cases? Is there an argument that in fact there is some residuum of access that those cases permit, that has not been granted here?

MS. HANDMAN: In those cases of course, no one was in detention. At a certain point, the failure to charge can trigger a right of access. You talk about, what if the right of access is limited to proceedings. To my mind, if there is an effort to avoid charging and avoid triggering the proceedings and the attendant right of public access, that would be one ground for allowing access. It would justify access even in the absence of charges and even in the absence of an ongoing proceeding The argument is somewhat factually based. But it could justify access, assuming no grand jury issue in the case of material witnesses who are being held without charges.

MR. SIEGEL: That was the argument that seem to impress Judge Rakoff ultimately, the one case that has seemed to hold that there can be some right of access in this context.

MR. MCCRAW: Right. I think the Grand Jury piece is very difficult, because first the Supreme Court inevitably reminds you in Press Enterprise, Richmond over and over again, Grand Jury secrecy is necessary.

So the cases that we end up relying on generally involve factual situations that are very different from the Grand Jury material being turned over to the press. There are cases we were arguing in the David Chang case to get his 5K letter concerning Senator Torricelli and the cases we were relying on involve where information had been turned over by federal investigators to local police forces.[29]

The courts said, oh well, you know, it came from a separate investigation. Grand Jury secrecy wasn't involved. But they at least give you the hope of drawing that line between what is Grand Jury and what is independent of the Grand Jury. But I am not optimistic that if that really gets tested, in cases where the information parallels the Grand Jury and it's for public consumption, that we're going to win on those cases.

MR. SIEGEL: When one goes back to look at the Clinton investigation cases and some of the other recent ones that have come up in the Third Circuit and the Second Circuit involving ancillary Grand Jury proceedings, the initial push that the press was making was for actual contemporaneous access.

[29] United States v. Chang, 2002 WL 31108904 (3d Cir. 2002) (not published in Federal Reporter).

The press wanted to go to the proceedings where executive privilege was being claimed and see how the legal arguments were made. The holdings in those cases said you can't do that. We are not going to permit revolving door proceedings where when Grand Jury material is in, everybody comes out and five minutes later everybody comes back in, and so on.

But if you actually look at what happened in those cases, there was a fair amount of access that was ultimately permitted. There were transcripts that were released, redacted transcripts, there were pleadings that were released. In each one of those cases, the court seemed to say this is okay and we certainly think this satisfies whatever the press might conceivably be entitled to.

In the post 9-11 cases most people are not asking for contemporaneous access to these actual detention hearings.

Is there a basis to go back and say, wait a minute. In fact, everything related to a Grand Jury isn't shut off and the courts do have some obligation to determine what is really a matter occurring before the Grand Jury and what isn't? At least give us the residuum?

MR: LEVINE: I think you go after and take only what the cases that are on the books right now give you. You are right about some of the Lewinsky/Clinton Grand Jury stuff. We did get a fair amount out of that. We didn't get everything we wanted, but we got something and that provides, it seems to me, a baseline to go back in these cases and ask for what you got there. But, I wouldn't go much further than that because, if you try to push the envelope in this setting, you are going to get slapped back.

DO NATIONAL SECURITY CONCERNS CHANGE THE TEST FOR ACCESS ITSELF?

MR. SCHULZ: Let me ask a general question about the points we have been discussing. Professor Post at Boalt Hall, in another context, made the point that when we are dealing with the government's arguments about national security and the efforts to bend the rules in a lot of areas, we may be better off to cede some ground and say yes, national security is different and allow the rules to be different because it is national security, rather than to force the issue and get rules of general applicability that would be much less favorable than we would like, because national security is different.

Does that come into play here? Specifically, if you get over the hurdle in some of these cases that there is a First Amendment right, but you are into the strict scrutiny or the four factor test, is there anything we could say in national security cases about either the test applying differently or the nature of less restrictive alternatives?

What are we prepared to concede, or what could we offer to protect what the government legitimately needs to protect, without damaging the scope of the First Amendment right?

[Pause]

MR. SCHULZ: That was a good question.

[Laughter]

MR. LEVINE: It's a hard question – there is a pause because it is a hard question. I go back to the point I made earlier, and I think Floyd was getting at this too, which is that we have to think hard about these things because winning the particular case or attempting to win the particular case is not the only consideration. There is also the interest in putting the law in a position that we are comfortable with in the grander scheme of things.

In these access cases, I get very, very nervous about making arguments with respect to national security that give away something in the interest of winning the particular case that will come back to haunt us sometime soon in a prior restraint case. In every one of these access cases, especially the way the applicable tests have come to be articulated, we really risk jeopardizing the core, losing the core of the First Amendment, in arguing for these rights that are important, but which pale in comparison, at least in my opinion, to the right not to have a prior restraint.

MR. ABRAMS: I agree. I don't think that – I think it's one thing to say that as a practical matter because it's national security and we live today, that there is a significant likelihood of losing most cases involving access where there is even a plausible national security claim on the other side.

I think that leads to a practical solution, not always effective and not usually as effective of trying to deal with the national security claim in the different fashions we have talked about today, something to assuage the Court's concerns not about the reality of the national security situation, but about the lack of need as you were suggesting a moment ago.

Whether couched in strict scrutiny terms or not – again, I don't come as easily as some people, to dealing with this on doctrinal basis – is somewhat less significant to me than to others. We won Bartnicki with Lee's great argument there, in good part because the Court did not talk in the strict scrutiny language we are talking today about part one and part two of this test or that test.

I think that the same is true in this area. Yes, we have to assuage the Court's concern that anything we are doing is not going to open the flood gates to great national security harm. That is true regardless of how we happen to phrase it or where we happen to put it in our briefs.

But I don't think we want to say that there is a national security exception to the First Amendment for the reason Lee has already articulated both in prior restraint terms and compelled speech. Who knows the different areas in which national security can be a basis for saying all First Amendment bets are off?

I think we just have to take these cases as they come. I also share the view previously expressed that access cases are, by their nature, cases that tend not to approach the core of most First Amendment interests to the same degree as certain other cases. On the contrary, however, I think that almost any prior restraint loss and indeed any at all in the Supreme Court, would do enormous doctrinal harm and practical harm and ideological damage to First Amendment interests.

But that's not so with access cases. We could lose a few access cases in the Supreme Court, so long as we don't throw out Richmond Newspapers as the price of fighting these cases. That's the final note that I would add to what Lee said. The danger of some of these cases is that if the Court has to deal with them by limiting Richmond Newspapers it will do just that.

There are some fact situations which are disturbing enough that we cannot win, period. That's the starting and ending point and if the Supreme Court has to work it's way there, by saying, you don't understand Richmond Newspapers, that was a very narrow ruling, it violates the Tenth Amendment too.

[Laughter]

So I think we really do have to be careful about what we want to bring to the Supreme Court in this area of access/national security.

MR. LEVINE: If I could just add one postscript to that. If you want to look at what could happen, what could go wrong, take a look at the Eleventh Circuit decision on the Noriega case,[30] where all of a sudden access cases were cited for how you decide whether or not there is a sufficiently compelling interest to justify a prior restraint.

If that happened at the Supreme Court level, that would be a very bad thing.

MR. SCHULZ: OK, here's one that everyone can avoid it if they want. Picking up Lee's point about choosing the cases that go to the Court. If the Sixth Circuit should happen to reverse on reconsideration, does anyone think that the INS cases, the Creppy memo, should not be taken to the Supreme Court by the press? Is the risk greater than the reward of reversing the Third Circuit?

MR. ABRAMS: No. I don't think so. I think that's a good case and the issue is important enough on the one hand and the arguments substantial enough and there is enough that one can hold on to, even as the avalanche...

[Laughter]

...comes down the mountain, one can hold on to Richmond Newspapers and other First Amendment doctrine.

MR. SMITH: I would agree. It doesn't seem to me that there is all that much likelihood of huge pullback on Richmond Newspapers. It is so easy for them just to do something like what Judge Becker did [interposing]

MR. SCHULZ: Yes, what about the risk though, that you get a ruling that says, you know, the government is right. This is an Article III right, only applies to judicial proceedings not to documents, and that's all we have ever held in the past and that is all we will ever hold?

MR: COLE: You don't need to do that to get to these results. That suggests without any justification whatsoever, you can close all deportation proceedings. I don't think they are going to want to go there.

If they feel a need to close these proceedings, they can do it without doing a tremendous amount of damage. I don't think they are sort of ideologically committed to the most expansive view of secrecy that we can,

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[30]United States v. Noriega, 917 F.2d 1543 (11th Cir. 1990).

MR. SCHULZ: But do you think any of the current justices would find appealing, this kind of structural constitutional argument that the Solicitor General, or someone in his office has concocted? That you can't as a matter of constitutional law, imply a right where the framers created a right themselves?

MR. ABRAMS: I think you are worrying about the wrong thing. I think there are people on the Court who would find it appealing saying that national security trumps the First Amendment, period.

That's what gives me pause. At least at this time, in these circumstances, not making big distinctions between access and the First Amendment and the like. That's what I worry about – but if I had to make a judgment, I share David's. I don't think they will do that. I don't think they will – but there are people there who would.

MR. SMITH: It seems to me that this Court – you know it could be a different Court by the time you get there – but this Court is actually going to find appealing or at least the majority of them I think would find appealing the idea that they can throw a shot across the bow of the government that says, we are not going to just let you do whatever you want. We are going to make you make a kind of showing. We will understand that you can make that showing to your own judges in the Justice Department, who report to the Attorney General. But we are going to at least – we are going to stand up. We have a history of the Palmer raids and Korematsu[31] and everything and we are going to play our structural role too, which is to say, you shouldn't just be rounding everybody in the country who's got the wrong surname and not even be willing to have any kind of public scrutiny of this and there is a role for us in this process too.

I think there would probably be a majority for that on the current Court, since it is such an easy out for them to say, well, you have to go make your showing. They probably would be happy to do that.

MR. ABRAMS: I think that's a very optimistic view.

[Laughter]

MR. SIEGEL: Why don't we in the few minutes that we have remaining see if there are any questions that the audience would like to throw out to the panel?

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[31]Korematsu v. United States, 323 U.S. 214 (1944).

AUDIENCE MEMBER: David, what about the government's use of secret documents? We've talked about the proceedings themselves and the Seventh Circuit appellate argument in the Global Relief case[32] against the government and the panel expressed no concern about the in camera solutions to secret documents. Does anybody think that's an accurate reading of the issue?

MS. HANDMAN: Repeat the question.

PROF. COLE: Yes. In order to repeat the question I will explain the case.

[Laughter]

I mean the case is the government's freezing of assets of Global Relief Development Foundation, which is one of three Muslim charities who have had their assets frozen. They are frozen pursuant to an investigation that they might be violating the International Emergency Economic Powers Act. Under the Patriot Act, Congress gave the government the ability to rely on classified ex parte in camera submissions to a judge to defend the freezing of assets in cases like this and in Global Relief the government did that.

It presented evidence ex parte in camera and the Global Relief Development Foundation argued that violates due process. I mean it's not just closing the proceeding, it's denying the person the entity who's property rights are being taken, any ability to respond to the evidence upon which the decision is predicated.

I have dealt with that issue a lot in the immigration setting, where immigrants have been detained and in some instances deported or denied various benefits on the basis of secret evidence and we have virtually always been able to prevail on a due process argument without getting into access issues on you know, very straightforward due process argument that when the government is taking something valuable from you, you have the right to see the evidence that it is using against you in order to have a meaningful opportunity to respond.

It is troubling that in this area, and maybe it's because it is property rather than liberty, but still it is troubling to see courts being open to the notion – the district courts have been open to the notion – that the government can take property without having to disclose the basis upon which it is being taken.

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[32] Global Relief Found. v. O'Neill, 2002 WL 31890724 (7th Cir. 2002).

There have been no access claims in those cases, but it seems to me that if anything, the argument of the entity that they have a due process right to an opportunity to see adverse evidence in order to have a meaningful opportunity to defend themselves is strong, far stronger than an access claim.

So if you are not going to win on that argument, I don't think you are going to win on an access claim.

MR. SCHULZ: I agree. The problem is always of course in the access cases, we are used to getting redacted copies of all sorts of things where there is some interest asserted that the judge finds compelling. So it's sort of hard to make a First Amendment case I think.

Any last minute advice on how to get the INS case reversed in the Third Circuit?

PROF. COLE: I think the key is, picking up on Floyd's remarks about the Federalism case, the key is to get the Court to see that maybe States might be deported through secret proceedings.

[Laughter]

MR. SCHULZ: Well thank you all. This has been fun and informative.

[Applause]

ACCESS TO SPECIAL INTEREST DEPORTATION PROCEEDINGS

by Eve Burton*

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ACCESS TO SPECIAL INTEREST DEPORTATION PROCEEDINGS

Over the last year there has been an explosion of litigation pitting the press and public's right to know what the U.S. government is doing in the war against terrorism and the Bush Administration's desire to keep that information secret. Over a dozen cases have been filed involving deportation proceedings, questions of grand jury secrecy, review of judicial documents and discovery and the applicability of the Freedom of Information Act (FOIA) exemptions. The single largest category of national security related cases involve detention. When and for how long may the Government withhold the names of people detained? Where were people arrested? What is their nationality? Are they represented and what is the name of their lawyer? The legal basis for the challenges differed from case to case, but the battle was consistently over how much secrecy to afford the government. [1]

While the results have been mixed, the First Amendment arguments have lost to the national security concerns articulated by the government in more than 75% of the cases. Court rulings have tended to defer to the expertise of the political branches in determining which classes of individuals pose a threat and what information may be held secretly. [2] Few judges

[1] In a Texas case, the public sought access to information about individuals held in detention centers on the basis of the State Open Records statute and case law. *Schiller v. INS*, 205 F. Supp. 2d 648 (W.D. Tex. 2002). In California, religious leaders and lawyers argued for the information through a writ of *habeas corpus* to learn more about who was detained at Guantanamo Bay. *Coalition of Clergy v. Bush*, 189 F. Supp. 2d 1036 (C.D. Cal. 2002). In New Jersey, the ACLU sought to learn which prisoners held in a local jail were slated by the INS to be deported and challenged an INS regulation, which required the sealing of all INS records. *ACLU of New Jersey, Inc. v. County of Hudson*, 799 A.2d 629 (N.J. Super. 2002).

[2] In New Jersey, the Court held that it "would breach faith with overarching principles of our federalism if we were to see this case as an occasion for viewing the grant of authority to the [INS] Commissioner as anything but very broad." *ACLU of New Jersey,* 799 A.2d at 648-9. In holding that the new INS regulations preempted the New Jersey disclosure law, the Court cited to the U.S. Attorney General's "overriding responsibility to safeguard national security." *Id*. at 647. In California, the Court summarily disposed of the issue, holding that plaintiffs had no standing. *Coalition of Clergy v. Bush*, 189 F. Supp. 2d at 1039. Reasoning that no American court may excise jurisdiction over detainees held outside the sovereign territory of the U.S., the Court held "The responsibility for observance and enforcement of [due process] rights is upon political and military authorities" and not the courts. *Id*. at 1050.

have been willing to consider the actual or potential harm that might result if the particular information requested was made public.[3]

These cases, all in the lower courts, set the stage for two circuit courts to answer the larger more fundamental legal question about how much the public should know about the government's actions in a time of heightened concerns about national security. In *Detroit Free Press v. Ashcroft*, 303 F. 3d 681 (6th Cir. 2002), rehearing en banc denied (Jan. 22, 2003) and *North Jersey Media Group, Inc. v. Ashcroft*, 308 F. 3d. 198 (3d Cir. 2002), rehearing en banc denied (Dec. 2, 2002), the Sixth and Third Circuits were each asked to determine whether the First Amendment prohibits the government from closing all portions of an immigration proceeding where an individual is being deported from this country based on the government's classification of the individual as a terrorist. They reached opposite conclusions. To the Sixth Circuit, closing the proceedings in all cases with full deference to the government threatened fundamental liberty interests. The Third Circuit held that at this time in history the "eternal struggle between liberty and security" dictates that the government be given wide discretion to protect this country's national security concerns, even if that requires limiting the rights of the press and public to seek judicial review case by case when the government closes entirely immigration proceedings. *North Jersey Media* at 220.

[3] The only exception to this was the one case where the public won the right to know the names and number of people the government is detaining. In *Center for National Security Studies v. United States Department of Justice*, 2002 WL 173067 (D.D.C. August 2, 2002), the judge looked closely and meticulously at the actual harm the release of the information would create. The issue was whether the government was entitled to withhold the information about particular individuals detained on the basis of a FOIA exemption which allows secrecy if the release may deter detainees from cooperating. The government made a number of arguments. First, they claimed that if the public knew who was being held that so would terrorist organizations and that the detainees would be physically endangered and/or would no longer assist the INS with its investigations. Second, they presented their "mosaic theory" by which one piece of information, seemingly innocuous, when taken with other pieces of information might provide terrorists with a roadmap for destruction. While this case is discussed in greater detail in another article in the Bulletin, the Court found these arguments implausible and ruled that the government had failed to establish a "rational link" between the harms alleged and disclosure. The case has been stayed and is on appeal to the D.C. Circuit.

The government's application to the Sixth Circuit seeking rehearing an en banc was recently denied. With the Circuits split, there is a strong possibility that these cases will be headed for the U.S. Supreme Court.

The case in the Sixth Circuit began when two news organizations challenged an INS regulation called the Creppy Memo, which implemented additional security measures for immigration cases designated as "special interest." Attorney General John Ashcroft directed U.S. Chief Immigration Judge Michael Creppy to draft the regulations after a post-September 11 investigation identified aliens who "might have connections with, or possess information pertaining to, terrorist activities against the United States." *See* 308 F.3d 198, 202 (quoting Dale L. Watson, the FBI's Executive Assistant Director for Counterterrorism and Counterintelligence). Under the new INS regulation, "the courtroom must be closed for these cases — no visitors, no family, and no press." *Id*. at 203. It further contains restrictions that do not allow, "confirming or denying whether such a case is on the docket or scheduled for a hearing." *Id*. As the Third Circuit was later to write "The Directive contemplates a complete information blackout along both substantive and procedural dimensions" in all portions of the administrative proceeding. *Id.* at 203.

One of the first individuals to be considered by the government as a "special interest" case was Rabih Haddad, a Lebanese native, who had overstayed his visa. He was arrested and subjected to a deportation proceeding. He was in charge of fund-raising for a Muslim foundation, which the government suspected of providing terrorists overseas with resources. The *Detroit Free Press* knew about his arrest and moved to open the hearings.

The press advanced legal arguments in favor of open proceedings. Relying on *Richmond Newspapers Inc. v. Virginia*, 448 U.S. 555 (1980), and its progeny where the Supreme Court has long held that the First Amendment gives the press and public a presumptive right to attend and observe criminal trials and ancillary court proceedings, the *Detroit Free Press* argued that a

deportation hearing, while an administrative proceeding under the direction of the executive branch — in this case the INS — was akin to a court proceeding since it is an adversarial, adjudicative process, designed to expel non-citizens from the United States. Appellee Brief to Sixth Circuit at 39. They relied primarily on *Richmond*, where the Supreme Court identified a two-part "experience and logic" test to determine whether a First Amendment right applies to a particular proceeding.

In addressing the "experience" portion of the two-prong test, the *Detroit Free Press* argued that deportation proceedings have historically been open to the press and public, at least for as many years as the administrative state has been in existence. In this context, they argued that Congress has enacted statutes that close exclusion hearings (where an alien is excluded from U.S. before he legally sets foot in this country) but had never passed or modified any legislation to close deportation hearings (forcing an alien who has lived or visited legally in this country to depart). Since 1965, INS regulations relating to deportation proceedings have explicitly required that they be presumptively open. As the Sixth Circuit later held, since 1965 "Congress has revised the Immigration and National Act at least 53 times without indicating that the INS had judged their intent incorrectly" in allowing deportation proceeding to remain open. 303 F.3d at 701.

Taking up the "logic" prong, the press argued that the media was perhaps the only check and balance to ensuring that government does its job properly and that this checking function is as important as national security concerns.

Finally, the press reminded the court that even if a First Amendment right attached to deportation hearings that these cases still may be adjudicated in secrecy. The *Detroit Free Press* argued that administrative judges must determine on a case-by-case basis whether the security danger of open proceedings can only be cured by full closure and if there are other less drastic alternatives available to the government.

The Attorney General's arguments were more far-reaching. The government wants to close the deportation proceedings to the public and press not only when national security is implicated, but also to limit significantly the general reach of the First Amendment in protecting the public's right to know what government is doing in areas far removed from terrorism. Relying on the text of the U.S. Constitution[4] and the interpretations of the Framing Fathers, the government urges that the public should have no right of access to any executive and legislative proceedings, except at the government's discretion.[5] As the government argues, based entirely on the language of the Constitution:

> The only constitutionalized access requirement vis-à-vis the Executive is that the President must 'from time to time give to the Congress Information of the State of the Union.' Moreover, the Constitution requires Congress to publish a 'regular Statement and Account of the Receipts and Expenditures of all public Money' and requires each House of Congress to publish a journal of proceedings from which it may withhold 'such Parts as may in its Judgment require Secrecy.' Other than those very limited requirements, the Constitutional leaves to the democratic processes the regulation of public access to the political branches.

Gov't Brief to the Third Circuit at 21-22.. In urging judicial support for this proposition, the government does not even mention national security.

The remaining arguments by the government are only slightly more predictable. They argue that even under the two-part *Richmond* test used to determine the scope of access rights to judicial proceedings, there would still be no right of access to deportation hearings. There is, the government argues, no historical basis for access compared to the public's long-standing access to criminal trials. As the government states "the Supreme Court has recognized one *limited exception*" in giving the public access to government information in the context of Article III criminal trial proceedings after chronicling a 1000-year history of public access to criminal trials in

[4] The specific provisions relied upon by the Government are U.S. Const Art. II, section 3; U.S. Const. Art. I, section 5; U.S. Const. Art. I, section 9, clause 7.

[5] The government relies on cases such as *Houchins v. KQED, Inc*, 438 U.S. 1, 14 (1978) where the press was denied access to a prison, which was under the control of the executive branch.

Anglo-American law. Gov't Brief to Third Circuit at 19-20. A main reason for that right, according to the government, was its basis in the "Sixth Amendment guarantee of a public trial to criminal defendants" and that public access "inheres in the very nature of a criminal trial under our system of justice." *See Richmond*, 448 U.S. at 574-73. There is no equivalent right, they argue, in the context of an administrative deportation proceeding that is directed by the Executive Branch of government under Article II of the Constitution. For this proposition, the government cites to Thomas Jefferson who refused to turn over Executive Branch records requested by Chief Justice Marshall and his explanation that "executive proceedings, with limited exceptions, should remain known to their executive function only....[who] must be the sole judge of which of them the public interests will permit publication." *Capital Cities Media v. Chester*, 797 F.2d 1164,1170 (3rd Cir. 1986). Citing further authority, the government relies on Federalist No. 70 at 472 where Alexander Hamilton identified "secrecy" as a principal virtue of the unitary executive.

Applying the logic prong of the *Richmond* test the government turns its argument to terrorism. Closure is needed in every case that the government classifies as "special interest" because information about these individuals being made public could provide other terrorists with information that would permit them to obstruct or evade the government's investigation. The government has developed a "mosaic theory" that it articulates in more than a dozen cases which urges that a case-by-case closure will not protect the governments interests since the disclosure of even detainees identities could reveal investigative patterns. *See Detroit Free Press*, 303 F. 3d at 703. The government argues that immigration judges are not able to reliably protect information that is seemingly innocuous, but "significant when combined with other available information bearing on the scope and direction of the government's investigation of terrorism." (Gov't Brief to Third Circuit, p. 17)[6]

[6] The scope of the government's argument is best understood with a short discussion of the ways in which terrorist suspects are handled in his country. First, the most extreme set of legal weapons the

The Sixth Circuit in *Detroit Free Press* was the first appellate court to respond to the Attorney General's arguments and to those advanced by the ACLU, on behalf of the press.[7] The Court adopted fully the *Richmond* analysis and found that it applied in the administrative proceeding context. In a ringing endorsement of the public's right to know about government activities, the Court rejected the government's definition of historical access and focused overwhelmingly on the "logic" prong of the U.S. Supreme Court's access test. The Court held that the Executive Branch

> seeks the power to secretly deport a class if it unilaterally calls them 'special interest' cases. The Executive Branch seeks to uproot people's lives, outside the public eye, and behind a closed door. Democracies die behind closed doors... When government begins closing its doors, it selectively controls information rightfully belonging to the people. Selective information is misinformation.
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> *Detroit Free Press,* 303 F. 3d at 683.

government has are the material witness warrants statute. 18 U.S.C. § 3144. With little justification or no public legal proceeding, the Justice Department can arrest and detain suspects in large numbers and hold them for a reasonable amount of time (See the accompanying article by Nathan Siegel, *Material Witness and the Abuse of Grand Jury Secrecy* discussing these types of cases). These arrestees are typically the individuals the government thinks are most dangerous. Many will never be deported because the government fears they will develop terrorist cells and cause greater harm to the U.S. Evaluating the deportation hearings in this context shows that special interest immigrants are often small fish with little important information. Typically, they are deported after a proceeding. The only question is whether there is a national security concern that mandates full secrecy for all these cases merely because of a government classification and with no ability of the press or public to challenge on a case-by-case basis the justification.

[7] It is interesting to note that the ACLU and advocacy groups have been the primary counsel representing and/or arguing on behalf of the press. In the Sixth Circuit the ACLU was the primary counsel, but the *Detroit Free Press* did have its own counsel who was able to participate in the oral argument. In the Third Circuit, the ACLU argued entirely on behalf of the press. While the ACLU has done a good job and has picked up the ball where we let it go, its interests are not entirely the same as the press and public interest. What is noteworthy is there is no other instance in recent history that I am aware of where the press has left, almost entirely, the protection of its rights to an advocacy organization such as the ACLU, especially in a case that will determine the First Amendment legal landscape for decades to come.

In response to the government's mosaic theory arguments the Court wrote:

> While we sympathize and share the government's fear that dangerous information might be disclosed in some of these hearings, we feel that the ordinary process of determining whether closure is warranted on a case-by-case basis sufficiently addresses their concerns. Using this stricter standard doesn't mean that information helpful to terrorists will be disclosed, only that the government must be more targeted and precise in its approach.
> *Id.* at 692.

A few months later, the Third Circuit, considering the same issue and identical arguments by each of the parties reached the opposite conclusion.[8] It held that there was no need to determine the precise contours of the First Amendment and its applicability to the Administrative State. It was enough, the Court reasoned, in the aftermath of September 11th that in applying the history and logic prong of the *Richmond* test that there was no First Amendment right to observe deportation hearings of "special interest" individuals. The Court challenged the press in its "history" argument concluding that there was not a long-standing tradition of public access to administration proceedings as there is for public access to judicial proceedings. The Administrative State in this country was too new to have a history attached that could be compared to that of public criminal trials where the public had the right to observe the proceedings over the last 1000 years.

The Court's analysis of the "logic" prong was the most interesting in that it departed from long standing legal tradition. Courts nationwide have always used the "logic" prong of *Richmond* to grant the public and press access to information. The analysis in most rulings has been that the checking function of the press in reporting on government was desirable and one of the important underlying principles of this country's form of government. In *North Jersey Media Group*, the Third Circuit concluded that it was in the public's best interest *not* to know what was happening in the closed proceedings due to the national security concerns. Chief Judge Becker

[8] In this case, there were no individual detained plaintiffs. The ACLU was challenging the constitutionality of the Creppy Memo.

writing for the majority was quite clear that the lower court and the Sixth Circuit had erred by failing to consider the public good of closure as an integral part of the "logic" prong.

CONCLUSION

Perhaps one of the most significant results of these cases is that neither court adopted the government's main argument. At its core, the government's premise is a limiting principle regarding constitutional rights generally, relying on the original intent of the Framers and is not limited to the national security context. They have argued in over a dozen cases that there is no constitutional right of access to administrative proceedings or to any other government business, with the limited exception of Article III criminal trials. This theory is crafted around a narrow reading of the U.S. Constitution and an effort to turn back or limit the rights of the press and public to any information under the authority of the Executive Branch. The Sixth Circuit fully rejected any effort to limit *Richmond*. While the Third Circuit was less categorical in rejecting the government's argument, the Court took notice. Chief Judge Becker acknowledged that his Court was bound by Third Circuit law, which has generally granted the press and public broad rights of access under *Richmond*, even in the non-Article III context. He viewed the government's disregard for that precedent, as the Attorney General's effort to prepare the case and the record, for "higher authorities." Chief Judge Becker was clearly referring to the U.S. Supreme Court.

The last chapter of this issue and these cases has yet to be written. If the next step is the U.S. Supreme Court, both sides face uncertainties and need to proceed carefully. The government will need to temper its original intent constitutional arguments in the context of the First Amendment and resist its tendency, as seen in its lower court briefs, to seek too much under the national security blanket which is not directly related to "terrorism" and protecting our

country. Conversely, the press needs to remain focused on the strong and legitimate public concern over terrorism and a predisposition not to take any risk in the name of civil liberties and the First Amendment. It is this sentiment that was articulated by Chief Judge Becker and the Third Circuit.

The First Amendment bar has the opportunity to articulate a reasonable approach to the U.S. Supreme Court about how to consider access rights to these Article II cases. The first concession might be that "special interest" cases are different than general immigration cases and that it may be reasonable that many proceedings involving theses individuals the government classifies as dangerous should be closed to the press and public. Yet, the argument must be forcefully delivered that even if most proceedings are closed, the legal standard should not be changed. Rather, the Court should require immigration judges to look case-by-case at the government's justification. While that may be tedious for the government and resource intensive for the press, it is the right mandate for a country that has a respect for both national security and the right of the press and public to know about its government's activities. Further, this approach adopts portions of the reasoning from both the Third and Sixth Circuits. The government and the press may consider this a result a defeat. Perhaps that's the best indication that such a result would be defendable and appropriate for the public good.

MATERIAL WITNESSES AND THE ABUSE OF GRAND JURY SECRECY

by Nathan Siegel*

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MATERIAL WITNESSES AND THE ABUSE OF GRAND JURY SECRECY

"There is no realistic possibility that the media will be unaware of grand jury proceedings in a high profile case. History defies any such claim."

In re: Sealed Case, 199 F.3d 522, 527 (D.C. Cir. 2000)

How quickly history changes. Just a year before the September 11, 2001 terrorist attacks, the nation's most prestigious federal court of appeals ridiculed the notion that courts should place a notice of hearings related to a grand jury investigation on the public docket to make it easier for the press to seek access to them. The Court thought the idea a complete waste of time and resources, because it seemed inconceivable that the press would not know when and where a grand jury was investigating high-profile matters like the Clinton-Lewinsky scandal that produced this opinion.

Barely a year later, federal authorities responding to the attacks began to arrest and detain over a thousand persons, primarily immigrants of Middle Eastern descent, in near-total secrecy. As discussed elsewhere in this *Bulletin*, most people were detained pursuant to the deportation process of the Immigration and Naturalization Service (INS) or arrested on criminal charges unrelated to terrorism. A smaller number were arrested and detained through the use of grand jury material witness warrants.[1] The material witnesses may be the persons authorities considered the most suspicious, as well as citizens not subject to detention through immigration proceedings. The material witness warrants were issued pursuant to a federal statute that permits authorities to arrest a witness to compel his or her appearance in a federal criminal proceeding in circumstances where a subpoena will likely be ignored.[2]

[1] *The Washington Post*, November 24, 2002 at A1; *New York Times*, October 30, 2001 at B1.
[2] 18 U.S.C. § 3144.

Although the September 11 investigation surely qualifies as a "high-profile" case, no public access to *any* information about material witnesses was provided. While persistent newsgathering has produced some information about some of these cases, to this day the press and public have no information at all about some of them – including the identities of some of the persons arrested and what happened to them. Nor is the press fully aware of what grand jury proceedings were the purported bases for their detention.

The Department of Justice has consistently maintained that secrecy is required by the Federal Rules of Criminal Procedure, because all proceedings related to grand jury material witnesses are protected by the rules of grand jury secrecy.[3] Thus, the government does not merely argue that national security requires exceptional secrecy in these particular cases. Rather, it maintains that access to any information related to material witnesses in a grand jury matter is barred regardless of the nature of the case.

This article will examine whether the secrecy surrounding the material witnesses is legally justified. Part I will begin by briefly summarizing the material witness process at issue, to put the dispute over access in context. Part II will then summarize the government's argument for secrecy.

Part III will discuss the merits of the secrecy policy. Initially, the article will discuss the significance of the apparent fact that most of the material witnesses, though arrested pursuant to grand jury warrants, never actually testified before a grand jury. It will conclude that while the testimonial status of a witness is relevant to the question of access, it may not be dispositive in all cases.

However, regardless of a witness's status, the government's position substantially exaggerates the degree of secrecy that normally inheres in any proceeding that relates to a grand

[3] *New York Times*, October 30, 2001 at B1.

jury investigation, but does not actually occur in front of a grand jury. Existing precedent clearly precludes access to any actual grand jury testimony, and it might support the closure of actual detention or other hearings involving material witnesses when they occur. However, it also supports after-the-fact access to any transcripts of and pleadings filed in connections with those hearings, redacted to only contain information that was never actually presented to a grand jury, such as legal argument.

However, this article will then argue that access to material witness proceedings should be *more expansive* than in the typical grand jury-related proceedings upon which the government's argument relies. The norms of grand jury secrecy presume that the grand jury exercises a purely investigative function. However, to the extent proceedings related to a grand jury matter are not purely investigative and result in the actual, immediate deprivation of a witness' liberty, those norms do not and should not apply.

Proceedings that directly threaten liberty – whether or not those proceedings relate to a grand jury – meet the two-part test established by *Richmond Newspapers v. Virginia*[4] and its progeny for a presumption of access. Material witness proceedings in the grand jury context are relatively recent phenomena, but in the past many have been held in open court, particularly in high-profile cases. More importantly, other more established ancillary grand jury proceedings that can result in pre-indictment deprivation of liberty have traditionally been held in open court, in whole or in part. Moreover, courts have explicitly recognized that this tradition of openness is necessary to deter the abuse of grand jury secrecy to effect arbitrary deprivations of liberty.

Finally, Part IV concludes by outlining a proposed model for how access to material witness proceedings might practically work, balancing the competing interests of grand jury secrecy and public access.

[4] 448 U.S. 55 (1980)

I. Who Are Material Witnesses?

A. The Federal Material Witness Statute

Understanding material witness proceedings is essential to formulating a strategy to seek access to them. The federal material witness statute permits the arrest of persons whose testimony is "material in a criminal proceeding" where "it may become impracticable to secure the presence of the person by subpoena."[5] The plain intent of the statute appears to be to permit arrests and detention to be a mechanism of last resort to compel testimony by frightened or recalcitrant witnesses, as long as detention is limited to the time necessary to obtain their testimony. However, the statute is far from clear as to what constitute appropriate grounds for arrests, what types of proceedings may be the basis for arrest, and what standards govern the detention of witnesses.

Once arrested, persons are entitled to an immediate, adversarial hearing and must be "treat[ed] in accordance with the provisions of section 3142 of this title."[6] Section 3142, however, is the statute that governs pre-trial bail and detention for persons already indicted. That statute never mentions material witnesses, and contains a wide variety of substantive standards for detention dependent upon such factors as the nature of the crime committed and the risk a defendant will flee or endanger others. It is far from clear whether or how those standards apply to material witnesses not charged with a crime, or whether the statute merely incorporates the procedural aspects of pre-trial detention hearings.

Ordinarily, the material witness statute on its face seems to discourage lengthy detention. Rather, it only permits detention for "a reasonable period of time" if their testimony "may be adequately secured by deposition."[7] However, Rule 15(a) of the Federal Rules of

[5] 18 U.S.C. § 3144
[6] *Id.*, referring to 18 U.S.C. § 3142.
[7] 18 U.S.C. § 3144.

Criminal Procedure, which governs the use of depositions in criminal proceedings, seems to contain a slightly different standard. It places the burden of seeking a deposition on the material witness, and places no limit on the court's discretion to deny the request. Perhaps as a result, existing practice seems to vary widely. Some courts frown on the use of depositions as a substitute for live material witness testimony, particularly where the defendant seeks the testimony.[8] Others encourage it.[9]

The statute also contains an important exception: detention may be continued, regardless of the viability of a deposition, "if further detention is necessary to prevent a failure of justice."[10] The "failure of justice" standard is inherently vague, and federal prosecutors and judges may well be relying on this exception to detain witnesses suspected of knowledge related to terrorism. Moreover, that standard is not contained in Section 3142, the statute that supposedly governs detention. The distinction raises more questions about how the two statutes relate to each other, and what standards therefore govern detention of material witnesses.

There is surprisingly little case law interpreting the material witness statute. Moreover, most of the case law that exists concerns whether a witness's testimony is material, whether a subpoena would likely be effective,[11] or whether a deposition will suffice.[12] These cases do not address many of the critical issues raised by the post-September 11 investigation, such as how long detention may be permitted when no trial is actually pending.

The material witness statute provides even less guidance to courts presiding over material witness proceedings related to grand jury testimony. The statute appears to have been drafted

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[8] *See, e.g., Aguilar-Ayala v. Ruiz*, 973 F.2d 441 (5th Cir. 1992); *United States v. Huang*, 827 F.Supp. 945 (S.D.N.Y. 1993).

[9] *See. e.g., Torres-Ruiz v. United States Dist. Court*, 120 F.3d 933 (9th Cir. 1997); *United States v. Rivera,* 859 F.2d 1204 (4th Cir. 1988).

[10] 18 U.S.C. § 3144.

[11] *See, e.g., Arnsberg v. United States,* 757 F.2d 971 (9th Cir. 1985).

[12] See footnote 8, *supra.*

primarily with testimony at trials or pre-trial hearings in mind. It never explicitly mentions grand jury proceedings, and the deposition process referenced is not utilized in grand jury investigations. Moreover, Section 3142, the detention statute incorporated by the material witness statute, also never mentions grand jury proceedings. It only concerns pre-trial detention once a suspect has been criminally charged.[13]

Prior to September 11, the relevant case law also did not discuss how the relevant substantive standards should apply to grand jury witnesses. As discussed in more detail elsewhere in this article, historically material witnesses were only arrested in connection with trials. Arresting grand jury witnesses appears to be a recent phenomenon, and was apparently first tried by federal law enforcement in the late 1960s. In *Bacon v. United States*[14] a person arrested as a material witness challenged that practice, arguing that the statute as it then exited did not apply to grand jury witnesses. The Ninth Circuit rejected the claim, but did not consider how the substantive standards of the statute should be applied in the grand jury context.

After *Bacon*, the application of the statute to grand jury material witnesses does not appear to have generated much controversy.[15] There is even evidence that material witness statutes have in rare circumstances been used to detain a single witness for significant periods of time.[16] However, there is no evidence a material witness statute has ever been systematically used by federal or state authorities to effect the kind of large-scale administrative detentions that occurred after September 11, 2001.

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[13] 18 U.S.C. § 3142.

[14] 449 F.2d 933 (9th Cir. 1971).

[15] *See, e.g., United States v. Oliver*, 683 F.2d 224 (7th Cir. 1982); *United States v. Guillette,* 404 F.Supp. 1360 (D.Conn. 1975).

[16] *See, e.g., United States v. Huang*, 827 F.Supp. 945 (S.D.N.Y. 1993) (trial witnesses detained for two or three months); *People ex. Rel. Nuccio v. Eight Dist. Prison Warden*, 45 N.Y.S.2d 230 (N.Y. Sup. Bronx Co. 1943) (grand jury material witness held for 55 days).

Because the relevant statutes and case law lack clear guidelines for grand jury material witnesses, trial court judges enjoy a great deal of *de facto* discretion when applying them in that context. After September 11, federal law enforcement authorities, presumably with the consent of federal trial courts, utilized that discretion to effect the administrative detention of allegedly suspicious persons on an unprecedented scale.

B. Material Witnesses after September 11

In the weeks and months following the terrorist attacks, at least several dozen persons were arrested and detained as material witnesses for weeks or months, and some are apparently still in detention today. From the inception of the investigation, the press, public, and Congress were denied access to any information about this group of detainees. The Justice Department has consistently maintained to both the press[17] and the courts[18] that grand jury secrecy rules preclude it from providing any information about the material witnesses. The government has typically only confirmed the prior arrest of a material witness in a few cases where, some time later, a witness was charged with a crime. For example, James Ujaama was arrested and detained on July 22, 2002, then publicly charged with facilitating Al-Qaeda terrorism about five weeks later.[19] Jose Padilla was arrested in Chicago on May 8, 2002 as a material witness. The following month, Attorney General John Ashcroft disclosed the arrest and declared Padilla an "enemy combatant" who allegedly conspired to plan a "dirty bomb" terrorist attack.[20]

Nevertheless, usually many months after the fact, journalists have been able to piece together some information about many of the material witnesses. A recent investigation by

[17] *New York Times,* October 30, 2001 at B1.

[18] *Center for Nat'l Security Studies v. U.S. Dep't of Justice*, 215 F.Supp.2d 94, 106 (D.D.C. 2002); *In re Application of the United States for Material Witness Warrant for Material Witness No. 38*, 214 F.Supp.2d 356, 363-65 (S.D.N.Y. 2002).

[19] *Rocky Mountain News,* October 4, 2002 at 27A.

[20] *The New York Times*, June 11, 2002 at A1.

Washington Post journalists, based largely on interviews with defense counsel, identified at least 44 material witness arrests related to the September 11 investigation. There may well be more. Of the 44 arrests the *Post* identified, it learned the names of 38 of the witnesses. Seven were United States citizens. 29 had been released as of November, 2002, while the others remained in custody either as material witnesses or persons charged with crimes or immigration violations. The *Post* could establish that only 14 witnesses had actually testified before a grand jury. 19 had definitely never testified.

The more aggressive use of the statute after September 11 has sparked considerable debate over whether the statute is being properly used.[21] A few witnesses have challenged their detention by reviving the legal question whether the federal material witness statute even applies to grand jury investigations. To date, two judges in the United States Court for the Southern District of New York, where most of the material witnesses were processed, have reached sharply conflicting conclusions on that issue.[22]

Other critics of the government's policy have argued that even if the process may in theory be applied to grand jury investigations, it may not be employed to effect the kind of lengthy detentions that have apparently taken place. Nor, they argue, may it be used for witnesses who never testify. A bill recently introduced by Senator Patrick Leahy seeks to address some of these criticisms by amending the material witness statute in two key respects.[23] It makes clear that the statute applies to grand jury witnesses, as most courts have at least implicitly concluded. However, it eliminates preventing a "failure of justice" as a basis for

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[21] *See, e.g.,* S. Studnicki & J. Apol, *Witness Detention and Intimidation*, 76 St. John's L. Rev. 483 (2002).

[22] *United States v. Awadallah*, 202 F.Supp.2d 55 (S.D.N.Y. 2002) (material witness statute does not apply to grand juries and would be unconstitutional if it did); *In re The Application Of the United States for a Material Witness Warrant, Pursuant To 18 U.S.C. § 3144, for John Doe*, 213 F.Supp.2d 287 (S.D.N.Y. 2002) (disagreeing with *Awadallah).*

[23] S. 22, 107th Congress, 2d Session.

continued detention, which may be the primary legal basis for most of the recent detentions.

However, the controversy over whether the material witness process is being misused is likely to be of little more than academic interest to advocates of public access. The appropriate scope of the statute relates only to rights personal to the witness. Third parties would presumably lack standing to raise alleged violations of such rights.

However, the lack of statutory and other standards defining the nature and scope of grand jury material witness proceedings also affects the issue of access. Just as the relevant statutes and case law do not mention grand juries, the relevant rules of criminal procedure and case law defining the scope of grand jury secrecy do not explicitly mention material witnesses. As a result, prior to September 11 no statute, rule or case explicitly addressed how, if at all, rules governing grand jury secrecy should apply to detention hearings and other proceedings concerning material witnesses. As a result, federal trial courts enjoyed *de facto* discretion to seal these proceedings in their entirety. Federal prosecutors and the courts utilized that discretion to implement a no-access policy.

Since the terrorist attacks, a few public interest groups and members of the news media have tried to seek some formal access to information about a few specific witnesses. In one instance, now on appeal, some access to information relating to allegations that a particular witness, Abdullah Higazy, was mistreated by the FBI was permitted.[24] In another, two different federal district judges denied access to material witness records concerning James Ujaama, even though he was ultimately charged with conspiring to commit terrorist acts.[25]

In addition, several organizations are seeking access to composite information about all post-9/11 detainees, including the material witnesses. Their efforts were partially successful at

[24] *In re Application of the United States for Material Witness Warrant for Material Witness No. 38*, 214 F.Supp.2d 356 (S.D.N.Y. 2002).

[25] *In re James Ujaama*, Misc. No. MC-02-36 (E.D. Va.); *In re James Ujaama*, Misc. No. 02-Y-152 (D. Col, July 26, 2002.).

the trial level[26], and the government's appeal is now *sub judice* in the D.C. Circuit.[27] As these scattered and often conflicting results demonstrate, whether any public access rights inhere in grand jury material witness proceedings remains a largely open question.

II. The Government's Case for Secrecy

As a preliminary matter, it should be noted that the government has consistently maintained that the absence of affirmative public access is not tantamount to secrecy. The government points out that under grand jury secrecy rules, the witnesses and their counsel, if any, are free to speak to the press and public. Whether this contention is true in every case is impossible to verify, since the no-access policy prevents any determination of whether broader gag orders have been issued in individual cases. Some defense counsel contacted by the press have maintained they have been placed under gag orders.[28]

Turning to the issue of affirmative access, the government's primary legal argument for closure is not based on the unique circumstances of mass terrorism. Rather, the government argues broadly that grand jury secrecy rules require that all grand jury-related material witness proceedings be *per se* sealed.[29] When the press first began to learn of material witness arrests shortly after September 11, Chief Judge Michael B. Mukasey of the U.S. District Court for the Southern District of New York ratified this position, telling reporters that "any proceedings with respect to a material witness is a proceeding **ancillary** to a **grand jury** proceeding and therefore is sealed."[30]

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[26] *Center for Nat'l Security Studies v. U.S. Dep't of Justice*, 215 F.Supp.2d 94, 106 (D.D.C. 2002).

[27] Nos. 02-5254 & 02-5300, United States Court of Appeals for the District of Columbia Circuit.

[28] *The Washington Post*, November 24, 2002 at A1.

[29] *Center for Nat'l Security Studies v. U.S. Dep't of Justice*, 215 F.Supp.2d 94, 106 (D.D.C. 2002); Letter of United States Attorney James B. Cobey to The Honorable Jed S. Rakoff, July 23, 2002 (the author maintains a copy).

[30] *New York Law Journal*, September 18, 2001 at p.1.

The government's legal argument begins with the factual premise that all of the material witnesses were detained in connection with a grand jury investigation. It then argues that Rule 6(e) of the Federal Rules of Criminal Procedure, which governs grand jury secrecy, proscribes access. The relevant provisions of that Rule are:

> (5) **Closed Hearing**. Subject to any right to an open hearing in contempt proceedings, the court shall order a hearing on matters affecting a grand jury proceeding to be closed to the extent and for such time as is necessary to prevent disclosure of matters occurring before a grand jury.
>
> (6) **Sealed Records.** Records, order and subpoenas related to grand jury proceedings shall be kept under seal to the extent and for such time as is necessary to prevent disclosure of matters occurring before a grand jury.[31]

The government contends that the material witness cases are all matters "affecting" or "related to" a grand jury proceeding. Typically, it calls them proceedings "ancillary" to a grand jury matter[32], adopting terminology recently coined by the D.C. Circuit to describe motions to quash grand jury subpoenas and other proceedings arising out of the Independent Counsel's investigation of former President Clinton.[33] According to the government, a group of recent cases addressing access to ancillary grand jury proceedings, including the Clinton-Lewinsky cases, conclusively establish that neither the First Amendment or the common law provide any right of access at all. Rather, those cases hold that Rule 6(e) presumptively requires that all ancillary grand jury proceedings, and records related to them, be sealed.[34] Curiously, though the government maintains that these material witness proceedings must automatically be sealed, it

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[31] *Fed, R. Crim. Pr.* 6(e)(5) & (6).

[32] *E.g.* Cobey Letter, July 23, 2002; *Consolidated Response of the United States to the Applications and Motions of the Denver Post Corp.*, Case No. 02-MC-36-A (E.D. Va).

[33] *In re: Sealed Case*, 199 F.3d 522, 523 (D.C. Cir. 2000); *In re: Motions of Dow Jones & Co.*, 142 F.3d 496, 500 (D.C. Cir. 1998).

[34] *See Impounded; Newark Morning Ledger Co*., 260 F.3d 217 (3d Cir. 2001); *In re: Sealed Case*, 199 F.3d 522, 523 (D.C. Cir. 2000); *In re: Motions of Dow Jones & Co.*, 142 F.3d 496, 500 (D.C. Cir. 1998); *United States v. Smith*, 123 F.3d 140, 150 (3rd Cir. 1997); *In re Grand Jury Subpoena*, 103 F.3d 234, 238 (2d Cir. 1996); *In re Subpoena to Testify Before Grand Jury Directed to Custodian of Records*, 864 F.2d 1559 (11th Cir. 1989).

also claims that it has obtained specific sealing orders in these cases.

The argument for material witness secrecy thus follows the same pattern as the government's argument for closing immigration hearings arising out of its September 11 investigation. In both instances, the government's primary legal argument is not tied to any heightened threat to national security posed by terrorists, or even to facts specific to material witness or deportation proceedings. Rather, the government argues that both proceedings are merely one example of a larger category of proceedings that may be closed.

In the deportation hearing cases, the government argues that all administrative proceedings conducted by the Executive Branch may be closed at its discretion.[35] In material witness cases, the broader category is all ancillary grand jury proceedings, of which material witness proceedings are merely one example. At the broadest level of generality, the primary difference between the two sets of cases is that while the government argues administrative hearings *may* be closed at the executive branch's sole discretion, it maintains that all ancillary grand jury proceedings *must* be closed by federal courts.

The reality that material witness proceedings take place outside the executive branch also points to another important difference between the two proceedings for purposes of access. Because the executive branch conducts immigration proceedings, it has sought to designate an entire category of cases as "special interest" proceedings to be sealed. Therefore, the primary issue presented by the deportation cases is whether that entire category may be unilaterally sealed by the government, or whether closure must be evaluated on a case-by-case basis.

However, since material witness proceedings are conducted by federal courts, the government could not unilaterally seek to seal an entire category of allegedly "terrorism-related"

[35] *New Jersey Media Group v. Ashcroft, 308 F.3d 198 (3d Cir. 2002), Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002).

cases merely be designating them as such. By necessity, if some access to material witness proceedings is at least legally possible in theory, access disputes would have to proceed on a case-by-case basis because no single federal judge controls all of them.

As a result, the broad question whether of access is even potentially available in theory takes on more significance in material witness cases than in the deportation cases. As the result to date in *New Jersey Media Group v. Ashcroft*[36] demonstrates, even if advocates of access win the broader issue of access to administrative proceedings, they still risk across-the-board denial of access to all administrative cases the government claims relate to its terrorism investigations. However, if access petitioners overcome the first hurdle in material witness cases, the process of case-by-case adjudication that will necessarily result will likely be more favorable to access.

A case-by-case approach more naturally focuses attention on whether the facts of a particular case pose a threat to national security. Many probably do not. The litigation to date over access to deportation proceedings is a good example. In the litigation in Third Circuit, the petitioners unsuccessfully challenged the government's closure policy on its face. Because *New Jersey Media Group* concerned access to a category of over five hundred cases, the Court never had to consider whether the facts of any particular case might contradict the government's claims about risks to national security.

By contrast, the Sixth Circuit in *Detroit Free Press* drew the opposite conclusion in a case which began with a request for access to a specific proceeding, whose facts seemed to undermine the government's general claims.[37] Perhaps recognizing that case-by-case adjudication would inherently be less advantageous to its position, the government's legal arguments in material witness cases to date appear to rely almost exclusively on its broad theory

[36] 308 F.3d 198 (3d Cir. 2002).
[37] *Haddad v. Ashcroft*, 221 F.Supp.2d 799 (E.D. Mich. 2002).

that all ancillary grand jury proceedings must be closed. Therefore, this article will focus on the merits of that contention.

III. The Case for Limited Access to Grand Jury Material Witness Proceedings

A. Are Material Witnesses Being "Secretly" Detained?

The Justice Department and its critics have hotly debated whether both the material witnesses and immigration detainees are truly being held in "secret," because the government claims that the detainees themselves are free to talk about what happens to them. Ironically, absent some access, it is impossible to even verify that claim. Some attorneys have apparently told journalists they are not free to talk. Absent access to the record, their accounts are impossible to verify.

Indeed, the fact that it is impossible to verify the government's claim about self-reporting illustrates why the debate over "secrecy" is an exercise in semantics. Plainly, the government believes that its policy will significantly limit public knowledge about these proceedings, or it would not insist on it in the first place. The government's belief is undoubtedly correct, for several reasons.

First, persons held in an inherently coercive environment – particularly immigrants from countries with a history of abusive criminal justice systems – are not likely to contact reporters to criticize their captors. Second, even where self-reporting by one party to an adversarial proceeding occurs, inherently it does not provide meaningful access, any more than one team's account of a baseball game would. Without some independent access to the facts, there is no way to verify any single account by any party or even the court. As long as the proceedings themselves are conducted in total secrecy, the public has no ability to independently determine what happened, let alone whether the government and the courts are acting fairly or arbitrarily.

Yet the ability to make that determination is precisely why access to judicial proceedings normally is presumed.

B. Are the Material Witness Cases Really Related to Grand Jury Proceedings?

Several petitioners for access to information about material witnesses have had some initial success side-stepping the government's legal arguments by challenging their underlying factual premise. There appears to be substantial evidence that most of the material witnesses never testified before a grand jury.[38] Rather, in many cases a grand jury investigation was probably used as a pretext to detain suspicious persons without charge. If a witness was never presented to a grand jury, the argument goes, any proceedings related to her were not ancillary grand jury proceedings and are therefore not subject to Rule 6(e).

To date two federal judges, without much analysis, found this argument persuasive.[39] It remains to be seen how this argument will fare in the appellate courts. The government maintains that even if a witness does not actually testify, the mere fact that he was called is a "matter occurring before a grand jury" and renders all proceedings related to him ancillary grand jury proceedings.[40] However, the fact that the government has apparently also sought specific court orders sealing these cases, which would be unnecessary according to its own legal theory, may indicate that the government fears its position will not prevail.

A relatively recent line of cases concerning access to affidavits filed in support of search warrants supports the argument for access to material witnesses who never testified. In those cases, the press sought access to materials filed in support of applications for search warrants,

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[38] *The Washington Post*, November 24, 2002 at A1.

[39] *Center for Nat'l Security Studies v. U.S. Dep't of Justice*, 215 F.Supp.2d 94, 107 (D.D.C. 2002); *In re Application of the United States for Material Witness Warrant for Material Witness No. 38*, 214 F.Supp.2d 356, 363 (S.D.N.Y. 2002).

[40] *Id.*; Brief for Appellant in *Center for Nat'l Security Studies v. U.S. Dep't of Justice,* No. 02-5254 (United States Court of Appeals for the District of Columbia Circuit).

after the warrants were executed. The government frequently argued that because search warrant proceedings often arise out of or are related to grand jury proceedings, records related to them should be presumptively sealed.[41]

Though courts have usually recognized that search warrant and grand jury proceedings are often closely related, the vast majority have refused to embrace a *per se* closure rule for search warrants. Most have held that while the First Amendment does not necessarily provide a right of access, the common law does because search warrant affidavits are judicial records that are required to be filed with the clerk by Rule 41(g) of the Federal Rules of Criminal Procedure. Therefore, courts have typically required the government to make a specific showing that an on-going investigation will in fact be harmed by disclosure. Though the government has often been able to make such a showing,[42] courts are less likely to approve closure where a grand jury never actually considered any evidence derived from a search, or the target of the search is no longer considered a suspect.[43] The same standard should apply to material witnesses.

However, proponents of access would be well-advised not to focus solely on the presence or absence of actual grand jury testimony as the trigger for access, for several reasons. First, since some material witnesses apparently did testify, the argument arguably concedes that any access to those proceedings may be foreclosed. Moreover, since the absence of access makes it impossible to conclusively verify which witnesses testified and which did not, it may be a risky proposition to relay solely on this argument in any particular case. In fact, the argument

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[41] *See, e.g. Times Mirror Co. v. United States*, 873 F.2d 1210 (9th Cir. 1989); *In re Search Warrant for Second Floor Bedroom*, 489 F.Supp. 207 (D.R.I. 1980).

[42] *See. e.g.*, *In the Matter of Eye Care Physicians of America,* 100 F.3d 514 (7th Cir. 1996); *In re Search Warrant for Secretarial Area Outside Office of Gunn*, 855 F.2d 569 (8th Cir. 1988); *In re Search of Office Suites for World & Islamic Studies Enterp.,* 925 F.Supp 738 (M.D. Fl. 1996).

[43] *In re Search Warrants Issued August 29, 1995*, 889 F.Supp. 296 (S.D. Ohio 1995); *In re Search Warrant for Second Floor Bedroom*, 489 F.Supp. 207 (D.R.I. 1980).

provides an incentive for the government to bring material witnesses before a grand jury without asking them very much, merely for the purpose of foreclosing access.

Moreover, on the level of pure formalism the government's argument may have some appeal. In the abstract, it is possible to envision scenarios where grand juries might choose to subpoena documents or even witnesses, but ultimately decide not to review materials or hear testimony. Indeed, it is not uncommon for civil litigants to subpoena documents that go unreviewed or note depositions that are ultimately cancelled. Yet, in the abstract, one could argue that public access to this information might, in some instances, reveal something about the direction of a grand jury's investigation. Though courts have implicitly rejected the same argument when made in connection with records related to search warrant proceedings, they may be more inclined to sanction broader secrecy arguments after September 11.

Thus, even where a witness did not testify, petitioners for access to information about material witnesses should be prepared to directly challenge the government's case for secrecy on its merits. In this regard, parties seeking access to information about material witnesses face substantial doctrinal and atmospheric obstacles even beyond those present in other proceedings arising out of September 11.

Even before the current national security crisis, courts tend to be especially sympathetic to arguments for grand jury secrecy. Experience demonstrates they are more prone to accept categorical denials of access than in virtually any other context. Indeed, the United States Supreme Court in particular continues to paint an almost mythical portrait of the federal grand jury that bears little relation to how it actually functions. While at common law the grand jury may have at times been an effective barrier to overzealous state prosecution, for more than a century numerous commentators have observed that grand juries now function as little more than

rubber stamps for prosecutorial decisions. Yet the Court continues to describe the grand jury as "an investigative body acting independently of either prosecuting attorney or judge," whose mission is to clear the innocent, no less than to bring to trial those who may be guilty."[44] Even though the rationale for grand jury secrecy has also evolved over time[45], challenges to it are often perceived as a veiled attack on the institution itself.

Thus, any party seeking access to material arguably related to grand jury proceedings must convince a court that its request would not undermine either the grand jury's function or the traditional rules of secrecy under which it operates. In the case of the material witnesses, a strong case can be made that it is the government's current policy that distorts the traditional ground rules for grand juries, in two ways. First, existing grand jury secrecy doctrine developed before September 11 should permit some access to any ancillary proceeding, to the extent that it contains information not intended for the grand jury itself. Second, because material witness proceedings may result in physical detention of witnesses, more openness should be required than in ancillary proceedings that only relate to a grand jury's investigatory function. These issues are analyzed in more detail below.

C. Secrecy in "Ancillary" Grand Jury Proceedings is not Absolute

Two sets of questions should shape any inquiry into access to a material witness proceeding. First, without considering the specific context of material witness cases, how much access, if any, is normally permitted in any ancillary grand jury proceeding? Second, should material witness cases be treated the same as other ancillary proceedings, or is there something that distinguishes them?

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[44] *United States v. Dionisio*, 410 U.S. 1, 16-17 (1973), *quoting Stirone v. United States*, 361 U.S. 212, 218 (1960). *See also United States v. Williams*, 504 U.S. 36, 47 (1989)

[45] Originally, grand juries did not deliberate in secret. Secrecy was probably introduced in the 17th century to ensure that grand juries could operate in total confidence, free from interference by prosecutors. Today, though the actual deliberations of a grand jury are closed to all, grand jury secrecy primarily protects the confidentiality of the state's investigative process. *See Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 218-19 (1981).

Turning to the first question, the government's argument that all aspects of any proceeding "ancillary" to a grand jury investigation must be permanently sealed in its entirety distorts the rules of grand jury secrecy, both in theory and in practice. As discussed in detail below, both the plain text of Rule 6(e) and the case law applying it envisions limited access to ancillary grand jury proceedings. Access has not traditionally been barred, but has rather been limited in both time and scope.

There is no longer any serious debate that the public is not entitled to access to proceedings that actually occur inside the grand jury room. However, ancillary grand jury proceedings differ from the actual work of the grand jury itself in one important respect. While ancillary proceedings may in part involve the same facts or investigative strategies discussed in the grand jury room, they also often address issues that are wholly distinct from an underlying grand jury investigation. Courts supervising grand jury proceedings frequently address broader issues like the scope of a legal privilege, interpretation of laws, or allegations of prosecutorial misconduct outside the grand jury room.

While access to grand jury information itself is not permitted, access to broader issues addressed in ancillary proceedings typically is. However, because it is often impractical to make on-the-spot distinctions between these two categories, courts have fashioned a sort of compromise. Unlike most criminal proceedings, access to ancillary proceedings need not be contemporaneous. Rather, hearings and records may be sealed temporarily, but only for so long as is reasonably necessary to release transcripts and judicial records with actual grand jury information redacted. If properly applied to material witness proceedings, existing access doctrine should yield a significant amount of public information in particular cases. This doctrine is discussed in more detail below.

1. Federal Rule of Criminal Procedure 6(e) Does Not Preclude All Access to Ancillary Grand Jury Proceedings

Even before considering whether the First Amendment or common law might provide some independent basis for access to ancillary proceedings, the plain text of the relevant rules of grand jury secrecy does not support the government's position. Rule 6(e)(2)(B) of the Federal Rules of Criminal Procedure bars grand jurors, government attorneys and support staff from disclosing any "matter occurring before a grand jury." These "matters" include information like actual witness testimony, witness identities, and grand jury deliberations.[46] Most courts have also held that once a matter occurring before a grand jury indisputably becomes public knowledge it no longer is subject to Rule 6(e).[47] However, to the extent the public learns about grand jury information solely through unauthorized leaks, Rule 6(e) may still sometimes be applied to bar formal access to court records or proceedings.[48]

However, the plain text of Rule 6(e) also reflects the recognition that grand jury investigations may give rise to a variety of ancillary proceedings which may involve matters that do not occur before a grand jury. Thus, Rule 6(e)(5) distinguishes between a "hearing on matters *affecting* a jury proceeding" and actual "matters occurring before a grand jury." Examples of the former suggested by the drafters of Rule 6(e) include hearings on motions to quash grand jury subpoenas and requests for witness immunity.[49] Actual witness identities or other grand jury material may often be disclosed at such hearings. At the same time, matters like the scope of a legal privilege that have nothing to do with the facts of an underlying grand jury investigation are also frequently raised.

[46] *Senate of Puerto Rico v. Department of Justice*, 823 F.2d 574 (D.C. Cir. 1987).
[47] *In re North*, 16 F.3d 1234, 1245 (D.C. Cir. 1994).
[48] *Id.*; *United States v. Smith,* 123 F.3d 140, 154-55 (3d Cir. 1997).
[49] Advisory Committee Notes to F. R. Crim. P. 6(e) at 32-33 (West 1996).

Thus, Rule 6(e) (5) requires that ancillary hearings be closed only "to the extent necessary" to prevent disclosure of actual grand jury matters. To the extent a particular hearing would not disclose grand jury matters, Rule 6(e)(5) on its face does not require that it be closed. Rule 6(e)(6) makes a similar distinction with regard to judicial records relating to ancillary grand jury proceedings. It requires that judicial records be sealed "to the extent and for such time as is necessary" to prevent disclosure of actual grand jury matters.

The text of Rule 6(e) seems ambiguous in one important respect. It is not entirely clear whether the drafters only intended to define what must be secret, or whether in doing so they also intended to require that everything else be presumptively public Thus the Rule is ambiguous as to whether it affirmatively *requires* a court to provide some access to hearings or records that do not disclose "matters occurring before a grand jury," or whether it merely states the negative proposition that secrecy is not mandatory. The Advisory Committee notes suggest the latter, but for reasons useful to proponents of access. They indicate that when these provisions were added to Rule 6(e) in the early 1980s, the drafters were aware of emerging access rights arising out of cases like *Richmond Newspapers*, and recognized that they might extend to pre-trial criminal proceedings.[50] As a result, Rule 6(e) appears to have been drafted to protect actual grand jury material, assuming that some First Amendment or common law right of access to ancillary grand jury proceedings might exist. Subsequent to those amendments to Rule 6(e), the U.S. Supreme Court held that First Amendment access rights can potentially inhere in pre-trial proceedings.[51]

In short, the plain text of Rule 6(e) only requires that actual grand jury materials disclosed during ancillary grand jury proceedings by shielded from public access. It does not

[50] *Id*.
[51] *Press Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986).

establish or even endorse any *per se* rule that such proceedings must always be entirely secret. On the contrary, it appears to recognize that some access rights may inhere in ancillary proceedings.

2. The Case Law Applying Rule 6(e) Permits Some Access to Ancillary Grand Jury Proceedings

To date, four federal circuits have explicitly addressed the scope of access to ancillary grand jury proceedings. None have explicitly resolved the question whether some access to ancillary grand jury proceedings is *required* – either by Rule 6(e), the First Amendment, or the common law. However, most have approved of limited access, and implied that access is not purely a matter of judicial discretion.

Virtually all courts considering access to ancillary grand jury proceedings accept the proposition that neither the First Amendment qualified right of access to criminal proceedings first recognized in *Richmond Newspapers Co. v. Virginia*[52] nor the common law right recognized in *Nixon v. Warner Communications*[53] provide any basis for access to actual "matters occurring before a grand jury" as defined by Rule 6(e)[54] In *Press Enterprise Co. v. Superior Court* (*Press Enterprise II)* the Supreme Court singled out the grand jury as an example of an institution that does not meet the test of "experience and logic" that creates a presumption of access to any particular proceeding: grand jury proceedings have historically been secret and secrecy promotes the institution's essential function.[55] Thus, it is well-settled that the press and public have no First Amendment or common-law right to attend grand jury deliberations or testimony, review materials subpoenaed by a grand jury, or have access to any other "matter occurring before a grand jury."

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[52] 448 U.S. 55 (1980).
[53] 435 U.S. 589 (1978).
[54] *See, e.g. In re Subpoena to Testify Before Grand Jury Directed to Custodian of Records*, 864 F.2d 1559, 1561-62 (11th Cir. 1989).
[55] 478 U.S. at 8-9.

However, most courts have recognized what is implicit in Rule 6(e): not all matters raised in ancillary grand jury proceedings are necessarily "matters occurring before a grand jury." Indeed, most courts recognize this fact implicitly because they frequently issue judicial opinions describing and resolving legal issues raised in ancillary proceedings, often without discussing actual grand jury information. Two federal courts of appeals have addressed this issue explicitly in the context of petitions for access. Both concluded that in principle the public has some right of access to the nonsecret portions of an ancillary proceeding. The primary issue the two circuits struggled with is how to distinguish between the secret and nonsecret portions of a proceeding.

When members of press first began to seek some access to ancillary grand jury proceedings, they typically sought the right to physically attend the proceedings.[56] After being consistently rebuffed, petitioners for access began to concede that actual grand jury material may be sealed, but suggested that judges should close only those portions of a hearing that implicate secret material. In *In re Dow Jones Co.*[57] and *United States v. Smith*[58], both the D.C. and the Third Circuits rejected that proposed solution as an impractical recipe for farcical, revolving-door hearings that would constantly have to be closed and then re-opened. As a result, both courts held Rule 6(e) implicitly requires that c*ontemporaneou*s, *physical* access to ancillary grand jury proceedings be presumptively barred. Because any other rule would likely result in the inadvertent disclosure of grand jury material, both circuits hold that the First Amendment provides no independent basis for contemporaneous access.

[56] *See, e.g., In re Grand Jury Subpoena John Doe No. 4,* 103 F.3d 234 (2d Cir. 1996); *In re Grand Jury*, 528 So.2d 51 (Fl. App. 2d Dist. 1988).

[57] 142 F.3d 496 (D.C. Cir. 1997).

[58] 123 F.3d 140 (3d Cir. 1997).

The government now maintains that *Dow Jones* and *Smith* bar any access at all to grand jury ancillary proceedings. In fact, both cases found that while access to ancillary proceedings must be delayed to protect grand jury material, access should not be denied. Thus, in both *Smith*[59] and more recently in *Impounded: Newark Morning Ledger Co*[60] the Third Circuit held that the subsequent release of hearing transcripts and records redacted to exclude actual grand jury material satisfied "any right of access that the newspapers may have to the nonsecret aspects of the proceedings."[61] *Dow Jones* reached the same conclusion concerning access to the myriad motions to quash subpoenas and other litigation ancillary to the Independent Counsel's investigation of President Clinton.[62] Though *Dow Jones* rejected any right of contemporaneous access, it ordered the district court to either release redacted transcripts and records after hearings were concluded, or explain why she had not. Ultimately, a significant number of redacted materials were released.

Thus, existing precedent simply does not support the government's contention that any form of access to all ancillary grand jury proceedings, including any involving material witnesses, is precluded as a matter of law by Rule 6(e). At most, the case law contemplates that hearings related to material witnesses will likely be closed while they are in progress, and does not require a court to release any redacted material if no one asks for it. However, if asked, any information that would not reveal "matters occurring before a grand jury" should be released, within a reasonable time after-the-fact.

If *Dow Jones, Smith* and *Newark Morning Ledger* were applied to material witness proceedings, the result should be access to some aspects of many of these proceedings. For

[59] 123 F.3d at 150.
[60] 260 F.3d 217 (3d Cir. 2001).
[61] *Id.* at 154; *Newark*, 260 F.3d at 225.
[62] *In re: Motions of Dow Jones & Co.*, 142 F.3d 496 (D.C. Cir. 1998).

example, records revealing how long a witness was detained should be accessible. Perhaps most importantly, existing access doctrine should force courts to disclose how they are interpreting the material witness statute to permit long-term detention, particularly for witnesses who never ultimately testify.

The statute potentially applies to any criminal proceeding, and any standards used to interpret it exist independent from the facts of any particular grand jury investigation. The sheer number of material witnesses involved, together with the controversy surrounding their detention, suggests that the statute has probably received the most sustained judicial attention in the past eighteen months since it was enacted in 1966. Therefore, the September 11 proceedings have potential consequences far beyond investigations of terrorism.

For example, when James Ujaama was arrested as a material witness, reporters believed that he challenged his detention by alleging the statute violated the Fourth Amendment.[63] The mere assertion of that claim presumably required the government to articulate a position about what powers it believes it has to detain persons without charge, a position of obvious significance to the public. The resolution of that claim presumably required a judicial analysis of Fourth Amendment doctrine and the text, history, and purpose of the material witness statute that could apply to any person arrested in connection with any criminal proceeding. There is no persuasive justification for keeping an entire body of criminal law shielded from public knowledge.

Thus, material witness proceedings present precisely the scenario where limited access is normally required, since in part they may implicate purely legal issues. Indeed, in this respect material witness proceedings are very similar to the motions proceedings at issue in *Dow Jones*. To resolve motions to quash grand jury subpoenas, the district court had to articulate the

[63] *Reply of the Denver Post Publishing Company*, Case No. MC-02-36 (E.D. Va.).

appropriate standards for executive privilege and other privileges in order to apply them to the facts of the Clinton-Lewinsky investigation. Just as *Dow Jones* required access to those legal arguments and rulings with grand jury information redacted, it should require the same limited access to material witness proceedings.

However, though the *Dow Jones* analysis should permit access to some important aspects of these proceedings, a significant amount of information of great interest to the press and public would probably remain sealed under *Dow Jones*. Most importantly, witness identities would likely remain secret because that fact is usually treated as a "matter occurring before a grand jury." Thus, access to information like witness identities would only be possible if courts were to agree that the rules of grand jury secrecy typically applied to ancillary proceedings should not be applied to material witness proceedings. That question is addressed below.

D. Grand Jury Secrecy Must Be Limited Where Deprivation of Liberty is at Stake

There is a critical distinction between the material witness cases and the more typical ancillary grand jury proceedings considered in *Dow Jones* and *Smith*. Unlike the typical ancillary proceeding, material witness proceedings result in persons being jailed. As employed post-9/11, they have produced longer jail terms and more deprivation of liberty than many criminal proceedings resulting in actual convictions.

As discussed above, courts have consistently found that the public has no First Amendment or common law right of access to "matters occurring before a grand jury" because both prongs of the two-part *Richmond Newspapers* "experience and logic" test are not satisfied. However, that conclusion is not warranted when the same analysis is applied specifically to material witness proceedings. There appears to be no history of closed material witness proceedings even remotely comparable to other, more typical grand jury proceedings.

Moreover, history reveals that public access is normally permitted to other, analogous ancillary grand jury proceedings that threaten a witness's immediate liberty. Finally, courts have explicitly recognized that where the interest in grand jury secrecy clashes with the principle that liberty should not deprived in secret, secrecy must yield to some extent to protect the fundamental fairness of proceedings depriving persons of their liberty. Thus, a strong case can be made when the *Richmond Newspapers* two-part test is applied to material witness proceedings, it should result in greater access. Both prongs of that test are discussed in detail below.

1. The *Richmond Newspapers* History Test

a. Grand jury material witness proceedings did not exist at common law

Any analysis of the history relevant to grand jury material witness proceedings should begin by recognizing that the modern-day practice of detaining grand jury material witnesses appears to be a departure from Anglo-American legal tradition. Generally, English common-law tradition came to view secret arrests as repugnant by the seventeenth century[64], and the Framers considered them to be one of the most significant injustices they were trying to prevent.[65] While the use of physical compulsion to procure material witness testimony at *trials* dates back to the sixteenth century,[66] historically a grand jury's power appears to have been limited to issuing subpoenas and seeking punishment for contempt if they were ignored. While there is still debate over the scope of the current federal material witness statute, there is no dispute that it did not even arguably apply to grand jury proceedings for most of American

[64] Leonard W. Levy, *Origins of the Fifth Amendment* 34 (2d Ed. 1986); 1 Blackstone, *Commentaries* 136.

[65] A. Hamilton, *Federalist No. 84* at 577 (J. Cooke ed. 1961).

[66] Stacey M. Studnicki, *Material Witness Detention: Justice Served or Denied?,* 40 Wayne L. Rev. 1533, 1534-36 (1994).

history, until either 1948 or 1966.[67]

Between 1789 and 1948, the federal statute explicitly only applied to trial testimony.[68] Arrests of material witnesses to obtain trial testimony pursuant to that statute do not appear to have been conducted in secret.[69] In 1948, the federal material witness statute was repealed and replaced by Rule 46(b) (at the time) of the Federal Rules of Criminal Procedure.[70] Unlike the statute it replaced, Rule 46(b) applied to "any criminal proceeding," but it only permitted the detention of a witness if he or she refused to provide bail.[71] However, this author has not identified any reported examples of grand jury material witness arrests solely under the authority of Rule 46(b), and it seems doubtful that the 1948 rule was intended to apply to grand jury witnesses.[72]

The predecessor version of the current statute was enacted as part of the Bail Reform Act of 1966, and the current version was enacted when the Bail Reform Act was amended in 1984.[73] The first reported case identified by the author in which a grand jury material witness was arrested by federal authorities is *Bacon v.United States* in the early 1970s.[74] Thus, the modern practice of arresting grand jury material witnesses within the federal criminal justice system only appears to have started after the 1966 statute was enacted.

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[67] Some courts later argued that the Federal Rules of Criminal Procedure authorized the detention of grand jury material witnesses beginning in 1948, albeit only if they refused to post bail. However, given that the relevant Rule in force at the time (Rule 46(b) was merely intended to supercede, but not change, the federal material witness statute repealed in 1948, that conclusion seems questionable.

[68] *United States v. Awadallah*, 202 F.Supp.2d 55, 75 n. 25 (S.D.N.Y. 2002). The version of the statute repealed in 1948 applied to "the trial of any criminal proceeding." 28 U.S.C. § 659, *quoted in Bacon v. United States*, 449 F.2d 933, 938 n. 5 (9th Cir. 1971).

[69] *See, e.g., Barry v. United States,* 279 U.S. 597 (1929); *United States v. Lloyd*, 26 F.Cas. 984 (D.S.N.Y. 1860).

[70] *Bacon v. United States*, 449 F.2d 933, 938 (9th Cir. 1971).

[71] *Id*.

[72] After a new federal material witness statute was enacted in 1966, the Ninth Circuit in *Bacon* concluded that Rule 46(b) as enacted in 1948 had extended the power to arrest material witnesses to grand jury proceedings. However, *Bacon's* conclusion seems inconsistent with the view expressed elsewhere in the opinion that Rule 46(b) was not intended to substantively change the pre-1948 statute, which did not extend to grand juries. 449 F.2d at 938.

[73] 18 U.S.C.A. § 3144.

[74] 449 F.2d 938 (9th Cir. 1971).

At some point some states also began to arrest material grand jury witnesses. Indeed, threatening to arrest someone suspected of involvement in a recent crime as a material witness to induce them to talk has become a staple of criminal investigations depicted in popular culture. Though the historical evidence is far from clear, that practice appears to have formally started in the first half of the twentieth century, a little earlier than in the federal system. Evidence of that practice is apparent both from reported state court decisions[75] and petitions for *habeas corpus* filed in federal courts by grand jury witnesses detained in state prisons.[76] However, some states did not approve the practice until very recently. For example, New Jersey's material witness statute did not clearly extend to grand juries until 1994.[77]

Thus, while the core functions of a grand jury have been conducted in secret for almost five hundred years, there is no comparable history for grand jury material witness proceedings. On the contrary, closing such proceedings would seem to represent a departure from the far more established norm that arrests and detention should not proceed in secret.

b. Grand jury material witness proceedings are not consistently closed today

The very recent history of grand jury material witness proceedings themselves suggests that they are often treated differently than other more traditional grand jury functions. The use of the grand jury material witness process to aggressively investigate terrorism is not unique to post-September 11 law enforcement, though it has never before been employed on such a large scale. However, a policy of total secrecy related to material witnesses has never been the consistent norm.

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[75] *See, e.g., People v. Stevens,* 5 Cal. 2d 92 (1935); *Bernoff v. Amoroso*, 65 N.Y.S.2d 810 (N.Y. Co. Sup. 1946).

[76] *See, e.g., Glinton v. Denno*, 309 F.2d 543 (2d Cir. 1962).

[77] *N.J. Stat. Ann.* 2C:104-1 (West 1994). *See also, State v. Misik*, 569 A.2d 894 (N.J. Law. Div., Bergen Co. 1989) (holding that prior version of state material witness statute required a pending criminal proceeding against the accused).

For example, after a bomb in an Oklahoma City federal building killed 169 persons in April, 1995, law enforcement authorities quickly arrested Timothy McVeigh and Terry Nichols. Nichols was initially arrested pursuant to a material witness warrant arising out of the grand jury investigation of the bombing. Evidently eager to re-assure an anxious public that the case had been quickly solved, federal authorities publicly announced his arrest and detention.[78] Contemporaneous press reports contain no mention of any suggestion that grand jury secrecy rules applied to the arrest process and detention proceeding, and Nichols' motion to quash the warrant was the subject of published judicial opinions and orders.[79]

And in a more recent post-September 11 case of domestic terror, grand jury material witness warrants were used to arrest two persons in connection with the deadly "sniper" attacks that claimed thirteen victims in the Washington, D.C area. One of the two alleged snipers, John Lee Malvo, was initially arrested pursuant to a federal material witness warrant.[80] Though his subsequent detention hearing was closed because he is a juvenile, both the warrant and his arrest were publicly proclaimed.

A few days later, authorities in Flint, Michigan also arrested Nathaniel Osbourne, an owner of the vehicle used in the shooting spree, pursuant to another grand jury material witness warrant.[81] Osbourne's detention hearing was held in open court before a federal magistrate and was described in press reports throughout the world.[82] Again, those reports contained no suggestion that anyone even raised the possibility that grand jury secrecy rules might apply to Malvo or Osbourne's cases.

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[78] *The Washington Post*, April 23, 1995 at A1.
[79] *Material Witness Warrant Terry Lynn Nichols*, 77 F.3d 1277 (10th Cir. 1996).
[80] *The Washington Post*, October 25, 2002 at A1.
[81] *San Francisco Chronicle*, October 27, 2002 at A1.
[82] *See, e.g., Detroit Free Press,* October 28, 2002 at 1A.

Other recent examples of high-profile cases utililizing grand jury material witness warrants include the investigation of the fire at the Branch Davidian compound in Waco, Texas,[83] the bombing of United States embassies in Africa and other Al Qaeda-related terrorism cases[84], and the prosecution of BCCI. In many of these cases, government authorities provided some public information about them. For example, in early 2000 authorities announced that they had detained Yusef Karroum near the Canadian border as part of its investigation into terrorist plots to attack celebrations of the Millennium.[85] Even after September 11, the government has arguably breached its own interpretation of grand jury secrecy. For example, the government ultimately disclosed that Jose Padilla was a material witness.

On other occasions, secrecy was maintained. For example, when several New York-area newspapers sought access to sealed proceedings related to the arrest of two witnesses apparently suspected of involvement in Islamist terrorism, U.S. Magistrate Judge Michael H. Dolinger refused any access, consenting only to include the existence of the cases on the court's public docket as "United States v. Doe."[86]

Thus, the recent history of high-profile proceedings involving material witnesses suggests that there is no consistent practice of total secrecy. Indeed, the absence of any formal judicial precedent regarding access to material witness cases may be in part explained because some information has often been released in the cases most likely to attract press attention.[87] The evidence suggests that government authorities have not hesitated to publicize information

[83] *The Washington Post*, January 15, 1992 at A7
[84] *In re Grand Jury Subpoena of Ihab Ali*, N.Y.L.J., August 12, 1999
[85] *Newsweek*, Feb. 7, 2000.
[86] These cases are described in A. Liptak, 9 *J.L. & Pol'y* 21, 32-36 (2000).
[87] Another factor contributing to the dearth of precedent may also be that in the typical case, material witnesses are only detained for very short periods of time. Most either testify quickly and are released, or like Terry Nichols are formally charged shortly after their arrest. As a result, the particulars of what happens in the short time that a person is held as a material grand jury witness are less likely to be of significant interest to the press.

about material witnesses to re-assure an anxious public or trumpet law enforcement successes. On the other hand, grand jury secrecy rules are often selectively invoked when law enforcement authorities prefer to conceal the existence of material witness proceedings. That reality suggests that secrecy in this context is not being utilized to protect the integrity of the grand jury process, but rather to serve other, unrelated interests.

The fact that grand jury material witness proceedings are a very recent phenomenon, combined with the absence of any consistent practice of closure, should weigh in favor of access. If the only evidence relevant to the *Richmond Newspapers* test is the narrow history of a particular proceeding considered in the abstract, the test would be meaningless. The government could bar access to historically open types of proceedings merely by creating new administrative proceedings, or by using traditional proceedings in a novel way. The latter appears to be what happened with grand jury material witnesses proceedings. Historically, all proceedings involving incarceration, including material witness proceedings, were open. Having imported material witness proceedings into the grand jury context, the government now seeks to mechanically impose traditional principles of grand jury secrecy that were not developed with material witness proceedings in mind.

Nevertheless, lower courts have sometimes taken a very narrow view of the *Richmond Newspapers* history test. When the D.C. Circuit recently considered whether the press should have contemporaneous access to motions to quash grand jury subpoenas issued by the Independent Counsel, there was substantial evidence that similar proceedings were not uniformly closed by tradition, particularly in high-profile cases.[88] For example, the battle over the Watergate special prosecutor's grand jury subpoena for the Nixon White House tapes was conducted in open court before both Judge Sirica in the trial court and the United States Supreme

[88] *In re Motions of Dow Jones & Co.*, 142 F.3d 496, 502-03 (D.C. Cir. 1998).

Court.[89] Nevertheless, the Court did not find that such practices, even within its own courts, weighed in favor of access to any information revealed during motions proceedings that had or might potentially find its way to a grand jury.[90]

Similarly, the Third Circuit in *New Jersey Media Group*[91] affirmed the closure of deportation proceedings even though the historical evidence, taken in a light most favorable to the government, demonstrated that similar hearings were open much more often than not. Both courts seem to suggest that the *Richmond Newspapers* "history" test requires a clear history of uninterrupted access to the particular proceeding at issue. That conclusion seems inconsistent with *Press Enterprise II*, which required presumptive access to pre-trial preliminary hearings even though they did not exist before the nineteenth century and some inconsistency in past practice existed.[92] However, unless the Supreme Court clarifies the appropriate standard, advocates of access should not rely solely on the history of the particular proceedings at issue, if it is at all ambiguous.

c. Other ancillary grand jury proceedings that potentially deprive a witness of liberty have historically permitted greater access

Where a proceeding is of relatively recent vintage – as appears to be the case with grand jury material witness arrests – a more effective way to apply the *Richmond Newspapers* "history" test may be to identify other, analogous proceedings with a longer tradition. This method addresses the problems raised by both the government and its critics over the proper application of the history test. It does not automatically permit what may be a recent, ad-hoc practice of discretionary access to establish a tradition. On the other hand, it prevents the government from barring access merely by creating new proceedings.

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[89] *United States v. Nixon,* 418 U.S. 683 (1974); *United States v. Mitchell*, 377 F.Supp. 1326 (D.D.C. 1974).

[90] *Dow Jones*, 142 F.3d at 503.

[91] 308 F.3d 198 (3d Cir. 2002).

[92] 478 U.S. at 10-11.

Once this method is applied, it becomes evident that there is a critical distinction between the history related to material witness proceedings and the tradition relevant to other, more typical ancillary grand jury proceedings like motions to quash subpoenas. Material witness proceedings can result in the immediate deprivation of a witness's liberty. There are several other examples of ancillary grand jury proceedings that also create a heightened risk to a witness's liberty. Historical evidence suggests that those proceedings have typically been open, at least to a significant extent.

First, grand jury proceedings occasionally produce charges of criminal or civil contempt against recalcitrant witnesses who disobey court orders to answer questions or produce materials. Recognizing that ancillary contempt proceedings have historically been open, the U.S. Supreme Court has consistently held that at least the final adjudicative stage of such proceedings must presumptively be public.[93] Though the presentation of such direct grand jury matters as the question a witness refused to answer may be sealed, guilt must be pronounced and sentence passed in open court.[94]

Second, in state courts, the Uniform Act to Secure the Attendance of Witnesses often results in ancillary grand jury proceedings that are similar to material witness proceedings in federal courts. The Uniform Act was originally drafted in 1931 and has since been adopted by almost every state. It establishes a process whereby a court in one state may seek to subpoena or arrest a resident of another state to testify in any criminal proceeding, including grand jury proceedings.[95] The Uniform Act is, in many respects, the functional state equivalent of the federal material witness statute and other federal rules related to witness compulsion, because it

[93] *Levine v. United States*, 362 U.S. 610, 618 (1960). *See also In re Oliver*, 333 U.S. 257, 264-65 (1948).

[94] *Id.*; *See also Impounded; Newark Morning Ledger Co*., 260 F.3d 217 (3d Cir. 2001).

[95] *Uniform Act to Secure Attendance of Witnesses* § 2.

creates a mechanism for inter-state service of process that federal criminal courts and grand juries enjoy by right.

To utilize the Act, a judge from the state requesting testimony ("the requesting state") must send a request to a court in the state where the witness resides ("the sending state"), certifying that the evidence requested is "material and necessary" to a pending proceeding.[96] The court in the sending state must then hold an adversarial hearing to determine whether a subpoena should be issued. The court in the sending state may also order the witness to be arrested and taken into custody to effect his or testimony, in lieu of a subpoena. Because a witness may be compelled to travel some distance and remain there for some time, several courts have noted that the Act imposes a more "drastic infringement upon the liberty of a witness" than conventional state court subpoenas.[97]

State grand juries regularly use the Uniform Act procedure, and most states grand juries operate under secrecy rules similar to Rule 6(e). Because many states require the requesting state to provide facts establishing why the requested evidence is "material and necessary," requests for grand jury testimony frequently detail information that would normally be secret – such as the target of the investigation, the factual basis for investigation, and witness identities. Yet the Uniform Act contains no provision for heightened secrecy when grand jury evidence is at issue. And as numerous published decisions revealing the details of pending grand jury

[96] *Id.*

[97] *People v. Marcy*, 283 N.W.2d 754, 756 (Mich. App. 1979); *People v. McCartney*, 381 N.Y.S.2d 855, 345 N.E.2d 326, 329 (Ct. App. 1976).

investigations demonstrate[98], it appears to be the uniform practice of all states to conduct hearings on out-of-state requests in open court. In one instance, Massachusetts approved the use of *in camera* affidavits to protect some details of the requesting state's grand jury investigation.[99] Yet even in that case, the Massachusetts hearing itself was conducted in public.

Thus, historical experience – the first prong of the *Richmond Newspapers* test for a presumption of access – demonstrates that the public has traditionally had greater access to ancillary grand jury proceedings that potentially threaten the liberty of a witness than other types of ancillary proceedings. Proceedings related to contempt, out-of-state subpoenas, and material witnesses bear striking similarities. History suggests all three require greater openness than other ancillary grand jury matters.

2. The *Richmond Newspapers* "Logic" Test

A tradition of greater openness in ancillary proceedings that threaten liberty is no mere historical accident. Rather, as many courts have explicitly recognized, more access has been maintained because it is essential to the proper functioning of these proceedings. Thus, material witness proceedings also satisfy the second prong of the *Richmond Newspapers* test, which asks "whether public access plays a significant positive role in the functioning of the particular process in question."[100]

Access facilitates the functioning of most trial and pre-trial judicial proceedings primarily because public scrutiny reduces the risk that tribunals will act arbitrarily. However,

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[98] *See, e.g., Wolleson v. State*, 529 S.E.2d 630 (Ga. App. 2000); *Codey ex. rel New Jersey v. Capital Cities American Broadcasting Corp.,* 605 N.Y.S.2d 661 (Ct. App. 1993); *In re Stoddard*, 470 A.2d 1185 (Vt. 1983); *Vannier v. Superior Court, 32* Cal. 3d 163 (1982); *In re Petition of State's Attn'y, Cook County,*425 A.2d 588 (Conn. 1979); *Ex parte Armes*, 582 S.W.2d 424 (Tex. Crim. App. 1979); *People v. Marcy*, 283 N.W.2d 754, 756 (Mich. App. 1979); *Appel v. State*, 220 A.2d 301 (Md. 1966); *United States ex. rel. Pennsylvania v. McDevitt*, 195 A.2d 740 (D.C. 1963); *In re Superstein*, 104 A.2d 842 (N.J. Super. Ct. 1954).

[99] *In re Rhode Island Grand Jury Subpoena*, 605 N.E.2d 840 (Mass. 1993).

[100] *Press Enterprise Co. v. Superior Court*, 478 U.S. 1, 8 (1986).

grand jury proceedings are normally an exception to that rule. The Supreme Court has repeatedly emphasized that secrecy is essential to a grand jury's unique function. As a result, normally access to matters occurring before the grand jury is proscribed, including grand jury information disclosed in the course of ancillary proceedings.

However, the logic that typically supports grand jury secrecy makes less sense when applied to material witness proceedings, for two reasons. First, the logic supporting grand jury secrecy presumes that the grand jury's function is purely *investigative* rather than punitive. Material witness proceedings, however, can result in actual deprivation of liberty to the same degree as many criminal trials. Where total deprivation of liberty is at stake, greater public scrutiny is necessary to ensure fair proceedings. Moreover, many of the most important reasons supporting the normal policy of grand jury secrecy relate to facilitating anonymous witness cooperation. Those reasons are less relevant where uncooperative witnesses are physically compelled to testify by imprisonment.

a. Public scrutiny is necessary to promote fairness in any proceeding that can lead to total deprivation of liberty

Implicit in the logic supporting grand jury secrecy is the assumption that a grand jury functions as a purely "*investigatory* body"[101] whose role is merely "accusatory," rather than "adjudicatory."[102] The reasons for grand jury secrecy are similar to the rationale for some degree of secrecy in any investigative process. Witnesses are more likely to provide information, investigative theories can be more readily tested and discarded and persons who are investigated but ultimately exonerated are less likely to suffer public disgrace.[103]

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[101] *United States v. Williams,* 504 U.S. 36, 49 (1989); *In re Groban*, 352 U.S. 330, 333 (1957).
[102] *Williams,* 504 U.S. at 51.
[103] *See Douglas Oil Co. v. Petrol Stops Northwest*, 411 U.S. 211. 218-19 (1979).

Indeed, access is merely one element of a set of procedures that enhance the fairness of criminal adjudicatory proceedings but are normally absent from grand jury proceedings. Some examples of others include the right to be free from double jeopardy,[104] to have counsel present,[105] to testify in one's defense and to have exculpatory evidence presented.[106] The minimal protections for witnesses that do exist in the grand jury process, like the right to invoke the Fifth Amendment privilege, are similar to the protections that apply to most investigatory bodies.[107]

Courts have freely acknowledged that, from the point of view of a witness or target of a grand jury investigation, more stringent standards might sometimes produce a more 'balanced' inquiry.[108] However, because the grand jury's role is merely to "make an enquiry or accusation" to determine whether a charge may be brought, the process is explicitly one-sided and basic standards of adjudicatory fairness are absent.[109] Because no ultimate punitive consequences flow from a grand jury's actions, any benefit that might result from a more balanced assessment of all potentially relevant facts is outweighed by the advantages of investigatory confidentiality. Ultimately, a full, fair trial process exists to ferret out any unjustified indictments and ensure they do not become the basis for conviction and punishment.

However, material witness proceedings are much more similar to accusatory, adjudicatory criminal proceedings than purely investigative inquiries. To detain a material witness, prosecutors may have to allege that a witness presents a flight risk and that a "failure of

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[104] *United States v. Thompson*, 251 U.S. 407 (1920). Double jeopardy in the grand jury context means that one grand jury's refusal to return an indictment does not prevent a second grand jury from investigating the same matter and returning an indictment,

[105] *In re Groban*, 352 U.S. 330, 333 (1957).

[106] *United States v. Williams,* 504 U.S. 36 (1989).

[107] *Groban*, 352 U.S. at 333.

[108] *Id.* at 52.

[109] *Id*. at 51.

justice" might result if the witness is not incarcerated.[110] A judge in theory must make factual findings to justify detention, using the identical procedures used to evaluate pre-trial detention after an indictment has been returned.[111] Most importantly, unlike purely investigative inquiries, material witness proceedings invoke the power of the state to actually incarcerate people.

Thus, material witness proceedings are really more like criminal adjudicatory proceedings than disputes that arise in the normal course of an investigative process. The very premise of the First Amendment right of access is that public scrutiny is essential to insuring the fairness of adjudicatory proceedings. Indeed, courts have consistently found that the pre-trial detention hearings upon which material witness proceedings are modeled must be open to the public because "the decision to hold a person presumed innocent of any crime without bail is one of major importance to the administration of justice."[112] Though legal standards governing the detention of witnesses exist in theory, without public access courts have less incentive to carefully consider what they mean or even consider them at all.

Thus, the balance of interests presented by material witness proceedings is fundamentally different than typical grand jury proceedings, including ancillary proceedings that only implicate investigative activities. While the power to arrest and seek to incarcerate persons in secret might in theory have investigative utility, it effects a deprivation of liberty that is fundamentally different from normal investigative tools like subpoenas or interrogation. Public trials can cure the consequences of unfair indictments or charges. There is no recourse for a material witness unfairly incarcerated. Because material witness proceedings involve the final deprivation of liberty, more public scrutiny is necessary to ensure that the process is not abused.

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[110] 18 U.S.C. § 3144.

[111] 18 U.S.C. § 3142.

[112] *Seattle Times Co. v. United States. Dist. Court*, 845 F.2d 1513 (9th Cir. 1988). *See also, In re Globe Nespaper Co.*, 729 F.2d 47 (1St. Cir. 1984); *United States v. Chagra*, 701 F.2d 354 (5th Cir. 1983).

In the context of other ancillary grand jury proceedings that involve deprivation of liberty, courts have consistently recognized that the normal balance of interests that supports grand jury secrecy changes when liberty is at stake. In the context of contempt proceedings arising out of a grand jury investigation, the U.S. Supreme Court explicitly recognized that, "Since such a summary adjudication of contempt occurs in the midst of a grand jury proceeding, a clash may arise between the interest, sanctioned by history and statute, in preserving the secrecy of grand jury proceedings, and the interest, deriving from the Due Process Clause, in preserving the public nature of court proceedings."[113] For example, witness identities are often considered secret grand jury material. Obviously, any public adjudication of contempt charges would at a minimum reveal the identity of the accused grand jury witness.

However, because contempt proceedings potentially deprive the witness of his or her liberty, the Court has consistently held that the interests of grand jury secrecy must, to some extent, yield to the interests served by public adjudication. The Court's rationale speaks so directly to the questions raised by secret material witness proceedings that it is worth repeating in some detail:

> Many reasons have been advanced to support grand jury secrecy [cites omitted]. But those reasons have never been thought to justify secrecy in the trial of an accused charged with violation of law for which he may be fined or sent to jail. Grand juries investigate . . . . They do not try and they do not convict . . . . Even when witnesses before grand juries refuse to answer proper questions, the grand juries do not adjudge the witnesses guilty of contempt of court in secret or in public or at all. Witnesses who refuse to testify before grand juries are tried on contempt charges before judges sitting in open court."[114]

In analogous proceedings under the Uniform Act to Secure the Attendance of Witnesses, state courts appear to have presumed that those proceedings should be public, without explicitly addressing the issue. That practice itself strongly supports a presumption of access. Moreover,

[113] *Levine v. United States*, 362 U.S. 610, 618 (1960).
[114] *In re Oliver*, 333 U.S. 257, 264-65 (1948).

the one court the author has identified that did address the logic supporting that practice reached conclusions very similar to the U.S. Supreme Court's analysis of contempt proceedings. In *In re Groth* [115] an Illinois appellate court considered arguments that the state requesting a subpoena should not have to provide any facts supporting its request, because the secrecy of its grand jury process could be compromised. *Groth* acknowledged that grand jury secrecy might be affected. Nevertheless, it concluded that, "In such a case . . . the certifying court must decide whether to expose the hand of the grand jury in this limited way and, in so doing, have the benefit of the statute in compelling the attendance of an out-of-state witness, or to maintain the secrecy of the grand jury's intentions."[116]

Thus, courts have consistently found that any potential harm to the investigative process is outweighed by the benefits of more public scrutiny of ancillary grand jury proceedings when deprivation of liberty is directly at stake. To date, those decisions have all been based on the personal due process rights of a witness, rather than public access rights based on the First Amendment. However, as *Richmond* Newspapers and its progeny implicitly recognized, the same considerations of fundamental fairness support both sets of rights, since public access primarily serves to promote fair adjudication. Indeed, the drafters of Rule 6(e) explicitly recognized the possibility that the First Amendment right recognized in *Richmond Newspapers* might apply to contempt proceedings that are ancillary to a grand jury investigation.[117] The same logic applies to material witness proceedings.

Taken to its logical extreme, if grand jury secrecy is as absolute as the government claims, a grand jury could torture and even summarily execute a witness under seal, since such activity would surely be a "matter occurring before the grand jury." Closure would be

[115] 208 N.E.2d 581 (Ill. App. 1965).
[116] *Id.* at 585-86.
[117] Advisory Committee Notes to F. R. Crim. P. (6)(e)(5) at 33 (West 1996).

obligatory unless or until some subsequent criminal or civil proceeding arose out of those actions, since that is the only exception Rule 6(e) recognizes to grand jury secrecy.[118] That conclusion surely defies logic. Total closure of material witness proceedings is inconsistent with the well-established democratic norm that secret incarceration is an inherent and unacceptable threat to liberty.

b. Grand jury secrecy is less important when witnesses are incarcerated

The case for access to material witness proceedings is also enhanced by considering the other side of the equation: whether access will likely harm the grand jury's investigative function. In *Douglas Oil Co. v. Petrol Stops Northwest*[119], the Supreme Court identified four primary interests served by grand jury secrecy. All four interests presume that secrecy makes it possible for witnesses to cooperate with a grand jury investigation in complete anonymity. Secrecy, the theory goes, encourages witnesses to come forward and testify frankly, without fear of retribution. Secrecy also prevents the target of an investigation from learning about it and fleeing, and protects persons suspected but ultimately exonerated from unfair stigmatization.

Those presumptions make less sense when material witnesses are incarcerated. Material witness proceedings are invoked precisely because voluntary cooperation was ruled out. Moreover, the very act of arresting and incarcerating a witness is likely to tip off others to the existence of an investigation. People cannot simply disappear for weeks or months without others knowing or suspecting something is amiss; not merely family, friends, and business associates, but also any suspected criminal associates.

[118] Rule 6(e)(2) permits grand jury information to be disclosed in a subsequent "judicial proceeding", in limited circumstances.

[119] 441 U.S. 211, 218-19 (1979)

Indeed, it is doubtful that a prosecutor would seek to incarcerate a material witness if maintaining the secrecy of the target was essential. And because others close to a witness will likely be aware of his or her incarceration, material witnesses suffer substantial stigmatization in any event. Indeed, once a person has been incarcerated, it will likely prove difficult to exonerate them in the minds of others regardless of the outcome of an investigation. Thus, greater public access to material witness proceedings is less likely to compromise a grand jury's function than access to other grand jury matters.

IV. A Proposal for Access to Grand Jury Material Witness Proceedings

Both prongs of the logic that support the secrecy of most "matters occurring before a grand jury" point to a different result in material witness proceedings. While the benefits of public scrutiny are not so significant when a grand jury acts in a purely investigative capacity, they are essential when a grand jury seeks to incarcerate someone. Moreover, the nature of material witness proceedings make it less likely that more public access will compromise the underlying investigation.

However, it would be folly to deny that in a particular case some aspects of a grand jury investigation could be affected by complete access to an ancillary material witness proceeding. For example, if the testimony of other witnesses or sources was used to justify detention, those persons could be exposed. Whether such a risk might exist in any particular proceeding would depend on its facts.

Thus, while the *Richmond Newspapers* test supports greater access to material witness proceedings than most other ancillary grand jury proceedings, it does not necessarily always support the same degree of access as exists in criminal trials. History demonstrates that in other analogous contexts, courts have often sought to strike a balance between protecting grand jury

secrecy and minimizing the potential for abusive deprivation of liberty. Logic supports that result for ancillary material witness proceedings as well.

Contempt proceedings provide a useful model for access to grand jury material witness proceedings. In *Levine v. United States*,[120] the Supreme Court held that due process requires that the final adjudicative portions of a contempt proceeding – where guilt is pronounced and sentence determined – be open. Those portions of the proceedings that concern the actual questions posed before a grand jury the witness refused to answer, or materials subpoenaed but not produced, may be sealed. That balance protects grand jury secrecy to some extent, while preventing truly secret conviction and detention.

The same logic should apply to material witness proceedings. When a court holds a hearing to determine whether a material witness should be detained, a portion of the hearing may relate to actual grand jury matters that relate to the need for the witness's testimony and incarceration. If that is the case, those portions of a detention hearing might often be closed, with the potential for access later to portions of the record that did not implicate grand jury issues. However, at a minimum any decision to incarcerate a material witness should be announced in public, along with the length of incarceration and, where possible, some explanation of why the witness needs to be incarcerated to facilitate her testimony. Access should also be granted to any legal argument and decisions, either during the hearing itself, or if that is impractical through redacted materials released upon request afterwards.

This model would not guarantee that the material witness process will never be abused. Judges and prosecutors could in theory detain witnesses with no actual intention of presenting them to a grand jury, but seal substantial portions of detention proceedings by claiming they involve grand jury matters. Without access in the first place, it is often difficult to detect such

[120] 362 U.S. 610 (1960).

abuse. Nevertheless, requiring the equivalent of public "sentencing" of material witnesses would provide the public with far more contemporaneous information than the status quo, and thus a stronger foundation for detecting abuse.

Of course, even if courts adopted this proposed model for access to material witness proceedings, it would not guarantee access to every proceeding arising out of the investigation into September 11 or other acts of terror. First Amendment access rights are not absolute, and may be overcome by sufficiently compelling interests favoring closure. As the petitioners in the *Detroit Free Press* and *New Jersey Media Group* cases concerning access to immigration hearings have consistently recognized, it is always possible that the government could demonstrate in a particular case that national security is sufficiently at risk to justify a departure from the general rule. However, it is doubtful such a showing could be made in every case the government claims relates to terrorism. More importantly, a presumption of some access would virtually guarantee that secret detentions could not be transformed from an extraordinary weapon against extraordinary terror into a routine method of law enforcement.