THE YALE LAW JOURNAL FORUM

FEBRUARY 20, 2021

The Foreign Intelligence Surveillance Court and the Petition Clause: Rethinking the First Amendment Right of Access

Meenakshi Krishnan

ABSTRACT. In early 2020, the Foreign Intelligence Surveillance Court (FISC) — the secret federal court that reviews the legality of certain government surveillance programs — ruled that there is no First Amendment right of public access to its judicial opinions. Forty years ago in *Richmond Newspapers v. Virginia*, the Supreme Court first articulated the right of access and developed the experience and logic test to determine where the right applies. By anchoring the right in the freedoms of speech, press, and assembly, the Court overlooked that the right of access can — and should — vindicate another First Amendment right that makes democracy operational: the right to petition the government through lawsuits. This Essay argues that the right of access is not just a public right that ensures transparency, but also an individual right that gives meaning to the Petition Clause. Drawing primarily on the FISC access litigation, this Essay proposes adding a third, rights-oriented prong to the experience and logic test.

INTRODUCTION

On February 11, 2020, the Foreign Intelligence Surveillance Court (FISC) — the secret federal court that reviews the legality of certain government surveillance programs — ruled that there is no First Amendment right of public access to its judicial opinions.[1] Edward Snowden exposed many of these surveillance programs in 2013, prompting public-interest organizations to seek access to the long-secret opinions authorizing them.[2] By denying access to those opinions, the

1. *In re* Opinions & Orders of this Court Addressing Bulk Collection of Data Under Foreign Intelligence Surveillance Act, No. Misc. 13-08, 2020 WL 897659, at *6 (FISC Feb. 11, 2020).

2. *See* Motion of ACLU and MFIAC for the Release of Court Records, *In re* Opinions and Orders of this Court Containing Novel or Significant Interpretations of Law, No. Misc. 16-01 (FISC

ruling hinders litigants' ability to understand and legally challenge FISC-authorized government surveillance.

Forty years ago, the Supreme Court articulated that the First Amendment right of access protects the public's right to attend criminal trials.[3] Subsequently extending the right to other aspects of criminal proceedings,[4] the Court developed a two-pronged "experience and logic" test to determine where the access right attaches.[5] The experience prong examines whether "the place and process have historically been open to the press and general public,"[6] and the logic prong assesses whether "public access plays a significant positive role in the functioning of the particular process in question."[7] If the right attaches, openness can only be abridged by "an overriding interest" based on findings that closure is "essential to preserve higher values" and "narrowly tailored."[8] These cases remain the Supreme Court's last substantive word on the First Amendment access right.[9]

In the decades since, lower courts have further delineated the access right, both within and beyond criminal procedure. Although courts have reached some consensus—for example, the right extends to civil trials[10]—the experience and logic test has proven inconsistent in application and unpredictable in result. The test's practical dysfunctions are well documented,[11] but this Essay addresses a broader theoretical and normative gap between the conceptualization of the access right and the experience and logic test.

Oct. 18, 2016) [hereinafter 2016 Mot.]; Motion of ACLU and MFIAC for the Release of Court Records, *In re* Opinions & Orders of this Court Addressing Bulk Collection of Data, No. Misc. 13-08 (FISC Nov. 6, 2013) [hereinafter 2013 Mot.].

3. Richmond Newspapers v. Virginia, 448 U.S. 555, 580 (1980).

4. Press-Enter. Co. v. Superior Court (*Press-Enterprise II*), 478 U.S. 1, 10 (1986) (preliminary hearings); Press-Enter. Co. v. Superior Court (*Press-Enterprise I*), 464 U.S. 501, 510 (1984) (*voir dire*); Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606 (1982) (criminal trials).

5. *Press-Enterprise II*, 478 U.S. at 8-9.

6. *Id* at 8.

7. *Id*.

8. *Id.* at 9 (quoting *Press-Enterprise I*, 464 U.S. at 510).

9. In 1993, the Supreme Court reaffirmed the test and clarified that the experience prong looks to the history of openness in "that *type* or *kind* of hearing," not the "particular practice of any one jurisdiction." El Vocero de P.R. v. Puerto Rico, 508 U.S. 147, 150 (1993) (per curiam) (quoting Rivera-Puig v. Garcia-Rosario, 983 F.2d 311, 323 (1st Cir. 1992)).

10. *See, e.g.*, Rushford v. New Yorker Magazine, Inc., 846 F.2d 249, 253 (4th Cir. 1988); Westmoreland v. Columbia Broad. Sys., Inc., 752 F.2d 16, 23 (2d Cir. 1984).

11. *See, e.g.*, Dhiab v. Trump, 852 F.3d 1087, 1102-07 (D.C. Cir. 2017) (Williams, J., concurring); *see also id.* at 1107 (noting that under the experience and logic test, "we have little guidance from the Supreme Court, or indeed any other, as to how to make . . . choices").

The Supreme Court anchored the First Amendment right of access in the freedoms of speech, press, and assembly, as a means of facilitating informed communication, improving government processes, and ultimately, providing the transparency necessary for government oversight.[12] As the doctrine evolved, the right of access became almost entirely a third-party, operational right,[13] myopically focused on the history of a specific proceeding and whether access would improve its functioning. But the Court overlooked that the right of access can — and should — vindicate another First Amendment right that makes democracy operational: the individual right to petition the government through lawsuits.

Although scholars have argued that the Petition Clause independently guarantees individuals' ability to seek redress from the courts,[14] this Essay breaks new ground by contending that the Petition Clause should also motivate the distinct First Amendment right of access. By linking the Petition Clause and the right of access, the Essay argues that access should be reframed not just as a third-party right that sheds light on government proceedings, but also an individual right that serves as a necessary antecedent to securing the constitutional right to petition through lawsuits. Drawing primarily on the FISC access litigation, this Essay highlights that access to government-held information, like the FISC opinions, is often an essential prerequisite to vindicating the right to petition, just as it is to vindicating other First Amendment freedoms. In turn, safeguarding these rights serves the broader symbiosis between access and democratic functioning.

This Essay proceeds as follows. Part I traces the jurisprudential roots of access, arguing that it emerged as a structural right integral to the Speech, Press, and Assembly, but not Petition, clauses. Part II examines the FISC litigation and the ruling that denied access to the court's opinions, exploring how access to these opinions gives crucial meaning to the right to petition — more specifically, the right to challenge government surveillance in court. Finally, Part III proposes that the right of access should equally vindicate the right to petition by adding a third, rights-oriented prong to the experience and logic test.

---

12. *See infra* Part I.

13. *See, e.g.*, *Dhiab,* 852 F.3d at 1099 (Rogers, J., concurring) (observing that "the constitutional right of access belongs to third parties"); BH Media Grp., Inc. v. Clarke, 466 F.Supp.3d 653, 660 (E.D. Va. 2020) (noting that access doctrine considers "public, and hence media, access to proceedings").

14. *See* Carol Rice Andrews, *A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right*, 60 OHIO ST. L.J. 557, 625-68 (1999); Benjamin Plener Cover, *The First Amendment Right to a Remedy*, 50 U.C. DAVIS L. REV. 1741, 1805 (2017); James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government*, 91 NW. U.L. REV. 899, 899 (1997).

I. JURISPRUDENTIAL ROOTS OF THE FIRST AMENDMENT RIGHT OF ACCESS

In *Richmond Newspapers v. Virginia*, the Supreme Court recognized that the First Amendment safeguards public access to criminal trials.[15] *Richmond Newspapers* and its progeny[16] birthed two distinct views of access — those of Chief Justice Burger and Justice Brennan — which eventually were distilled into the experience and logic test.

Chief Justice Burger located the right of access in "the amalgam of the First Amendment guarantees of speech and press" and the "cognate" freedom of assembly.[17] Channeling Meiklejohnian speech theory,[18] Chief Justice Burger posited that a right of access "give[s] meaning" to those guarantees by "assuring freedom of communication on matters relating to the functioning of government."[19] For Chief Justice Burger, the right codified access to those proceedings with an "unbroken, uncontradicted history" of openness.[20] By emphasizing the relevance of a tradition of openness for present-day access, Chief Justice Burger set the stage for the experience prong.

For Justice Brennan, however, access served the First Amendment's broader "structural role" by creating an "informed" public debate and citizenry, and in turn, fostering democratic governance.[21] Because public scrutiny "enhances the quality and safeguards the integrity" of government processes, access plays a crucial role in the government's functioning "as a whole."[22] By tethering access to a

15. 448 U.S. 555, 580 (1980).

16. Press-Enter. Co. v. Super. Ct. (*Press-Enterprise II*), 478 U.S. 1 (1986); Press-Enter. Co. v. Super. Ct. (*Press-Enterprise I*), 464 U.S. 501 (1984); Globe Newspaper Co. v. Super. Ct., 457 U.S. 596 (1982).

17. *Richmond Newspapers*, 448 U.S. at 577, 578.

18. ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 26 (1965) ("What is essential is not that everyone shall speak, but that everything worth saying shall be said."). Under Meiklejohn's theory, the First Amendment protects the "communicative processes necessary" for self-government, and therefore "safeguard[s] collective processes of [democratic] decision making rather than individual rights." Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CALIF. L. REV. 2353, 2367 (2000). Similarly, for Chief Justice Burger, access helped ensure an informed public discourse, with the broader end of protecting informed self-governance.

19. *Richmond Newspapers*, 448 U.S. at 575.

20. *Id.* at 573.

21. *Id.* at 587 (Brennan, J., concurring).

22. Globe Newspaper Co. v. Super. Ct., 457 U.S. 596, 606 (1982).

utilitarian purpose — improving government processes – Justice Brennan's reasoning built the scaffolding for the logic prong.[23]

Ultimately, the Court stitched together Chief Justice Burger and Justice Brennan's rationales to develop the experience and logic test to determine whether access applies.[24] As explained above, courts consider the history of access to the proceeding, and whether access improves how the proceeding functions; if these prongs are satisfied, then the government must meet strict scrutiny to close off the proceeding from public view.[25]

Although the two Justices diverged on the objectives of access—to preserve a historical status quo (Burger) or to structurally facilitate a functional democracy (Brennan)[26] —they both viewed access as giving meaning to constitutional guarantees. Two principles emerge from the Court's access jurisprudence. First, in the Court's formulation, the access right inhered in the freedoms of speech, press, and assembly, and protected informed communication about government to serve broader structural purposes.[27] As Chief Justice Burger stated, the "rights *to speak* and *to publish*" would be eviscerated if access could be "foreclosed arbitrarily."[28] But notably absent from the cases is the fact that the right to petition may be similarly gutted if the government could arbitrarily restrict access.

Second, central to Justice Brennan's structural framework is the salutary role of access in government proceedings.[29] Although Chief Justice Burger's opinions lacked a robust structural vision, concurring Justices underscored the importance of Justice Brennan's conception of access as a democracy-enabling

---

23. *See* William J. Brennan, Jr., Associate J. of the U.S. Sup. Ct., Address at S.I. Newhouse Center for Law and Justice in Newark, N.J. (Oct. 17, 1979), *in* 32 RUTGERS L. REV. 173, 176-77 (1979) (describing Justice Brennan's structural view of the First Amendment).

24. Press-Enter. Co. v. Super. Ct. (*Press-Enterprise II*), 478 U.S. 1, 8 (1986).

25. *Id.*

26. For more on this difference, see Eugene Cerruti, *"Dancing in the Courthouse": The First Amendment Right of Access Opens a New Round*, 29 U. RICHMOND L. REV. 237, 274-80 (1995).

27. *See* David S. Ardia, *Court Transparency and the First Amendment*, 38 CARDOZO L. REV. 835, 881 (2017) (arguing that access "flows from the recognition that the First Amendment's speech and press protections are intended to ensure that Americans are capable of self-governance"); Amy Jordan, *The Right of Access: Is There a Better Fit than the First Amendment?*, 57 VAND. L. REV. 1349, 1357 n.54 (2004) (observing that "speech and . . . press [rights] are most relevant to the right of access").

28. Richmond Newspapers v. Virginia, 448 U.S. 555, 576-77 (1980) (emphasis added).

29. *See* William J. Brennan III, *Brennan on Brennan: The Justice's View on the Structural Role of the First Amendment*, 1994 N.J. LAW. 6, 8 (noting that Justice Brennan "viewed press access to governmental proceedings as beneficial to the proceedings themselves").

tool.[30] For Justice Stevens, "a claim to access cannot succeed unless access makes a positive contribution to [the] process of self-governance."[31] Framed this way, access protects informed communication and the integrity of government processes, but neglects whether these structural ends also require protecting the acquisition of information necessary to seek individual redress from the government.

By failing to account for the Petition Clause, the Court ignored a crucial component of democratic governance — the right to go to court — and overlooked that this right may be hampered by a lack of access to information, just like speech and assembly freedoms. The Petition Clause protects the "right of the people . . . to petition the Government for a redress of grievances."[32] In distinguishing the "cognate" rights of speech and petition, the Supreme Court has explained that while the right of speech nurtures the "public exchange of ideas" crucial to a "deliberative democracy," the right to petition permits citizens to express concerns to and seek redress from the government.[33] Among others, the Petition Clause provides a mechanism for challenging government violations in court,[34] and like other First Amendment freedoms, it represents a way to channel expressive freedoms into democratic accountability. By "facilitat[ing] the informed public participation that is a cornerstone of democratic society,"[35] lawsuits (at their ideal) hold governing institutions accountable, raise public awareness

30. Michael J. Hayes, Note, *What Ever Happened to "the Right to Know"?: Access to Government-Controlled Information Since* Richmond Newspapers, 73 VA. L. REV. 1111, 1117 (1987) (recognizing that Justice Brennan's concurrence "became the foundation for subsequent decisions in this area").

31. Press-Enter. Co. v. Superior Court (*Press-Enterprise I*), 464 U.S. 501, 518 (1984) (Stevens, J., concurring).

32. U.S. CONST. amend. I; *see* Andrews, *supra* note 14, at 557-58 & 558 n.4.

33. Borough of Duryea v. Guarnieri, 564 U.S. 379, 388 (2011) (citing Thomas v. Collins, 323 U.S. 516, 530 (1945)). *See generally* Julie M. Spanbauer, *The First Amendment Right to Petition Government for a Redress of Grievances: Cut from a Different Cloth*, 21 HASTINGS CONST. L.Q. 15, 34-39 (1993) (distinguishing the right to petition to the rights of speech and press).

34. *Borough of Duryea*, 564 U.S. at 387; *see also* Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 896-97 (1984) ("[T]he right of access to courts for redress of wrongs is an aspect of the First Amendment right to petition the government." (citing Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 741 (1983))); Cover, *supra* note 14, at 1745-46 (noting the universal recognition that lawsuits are petitions under the First Amendment). *But see Duryea*, 564 U.S. at 403 (Scalia, J., concurring in the judgment in part and dissenting in part) (finding it "doubtful" that a lawsuit is a "constitutionally protected 'Petition'").

35. *Borough of Duryea*, 564 U.S. at 397.

about potential and actual governmental abuses, enforce constitutional and statutory constraints, and may encourage others to seek similar redress.[36] Accordingly, for access to truly foster democratic governance, it is not enough to consider only speech, press, and assembly rights; we must also consider petition rights. Just as access enables the informed communication crucial to speech, press, and assembly, it should also facilitate the acquisition of information necessary to seek redress in court.

Over the decades, the experience and logic test has rightly come under fire for "focus[ing] on the wrong things,"[37] failing Justice Brennan's access structuralism, and instead becoming over-dependent on Chief Justice Burger's history-centric approach.[38] On one hand, the experience prong is overly restrictive.[39] When a particular proceeding does not have a long history of access, some courts attempt to draw analogies,[40] other courts have deemphasized history entirely,[41] and still others have categorically refused to grant access to certain government

---

36. *See* Judith Resnik, *The Contingency of Openness in Courts: Changing the Experiences and Logics of the Public's Role in Court-Based ADR*, 15 NEV. L.J. 1631, 1671-72 (2015) (observing that public courts "provide opportunities to practice the democratic norms of respectful engagement in conflicts about what justness requires"). It might be that lawsuits against private entities achieve these ends as well, but given that the First Amendment protects against *governmental* infringement of rights, this Essay focuses on suits against governmental actors.

37. Ardia, *supra* note 27, at 862. As Ardia argues, the experience and logic test ignores the proper role of transparency in our "constitutional structure," and thus is both "too broad and too narrow" to properly gauge whether access should exist. *Id.* Specifically, experience is a "poor guide" for determining where access should apply, and the logic prong as currently treated by courts "eschew[s] a broader structural perspective that considers how public access advances democratic self-government." *Id.* at 862, 865.

38. *See id.* at 856-71; Heidi Kitrosser, *Secrecy in the Immigration Courts and Beyond: Considering the Right to Know in the Administrative State*, 39 HARV. C.R.- C.L. L. REV. 95, 99 (2004); Raleigh Hannah Levine, *Toward a New Public Access Doctrine*, 27 CARDOZO L. REV. 1739, 1758-91 (2006).

39. *See* Ardia, *supra* note 27, at 864 ("When we make history determinative of future rights of access, we lock in a static set of practices that may have little to do with the First Amendment justification for public access in the first place."); *cf.* Hon Kimba M. Wood, *Reexamining the Access Doctrine*, 69 S. CAL. L. REV. 1105, 1112, 1109-16 (1996) ("[T]he history prong . . . sometimes impedes our ability to recognize that shifts in function among government bodies that occur over time can inadvertently result in a loss of public and press access to important governmental functions.").

40. *See, e.g.*, United States v. A.D. PG Publ'g Co., 28 F.3d 1353, 1358 (3d Cir. 1994) (comparing detention and delinquency proceedings to criminal proceedings generally).

41. *See* United States v. Simone, 14 F.3d 833, 838 (3d Cir. 1994) (finding that the experience prong "provides little guidance" in considering access to post-trial inquiries into jury misconduct).

proceedings or processes,[42] as we see in the FISC setting. The logic prong, on the other hand, suffers from the opposite problem—it is too indeterminate. Because access is almost always beneficial, the logic prong has become a "near nullity."[43] As a result, and as the FISC ruling indicates, the experience prong has adopted outsize importance, and courts often collapse the logic prong with the inquiry as to whether the government has an overriding interest in closure.

Due to these flaws, access cases tend to be unmoored from First Amendment values and prone to ad hoc rulings. Courts frequently reach opposite conclusions when applying the experience and logic test to identical proceedings, especially those outside the traditional judicial context.[44] But absent from this criticism is the fact that the doctrine ignores two points through its fixation on the role of access in safeguarding the speech, press, and assembly freedoms necessary for government oversight: first, the right to petition plays an equally important structural role in our democracy, and second, access is equally necessary to safeguard it. Drawing on the FISC example, the following Parts explore how access enables parties' right to petition by providing them with the necessary government-held information to do so.

II. FISC AND ACCESS: THE LIMITATIONS OF THE EXPERIENCE AND LOGIC TEST

The FISC's rejection of a right of access to certain of its opinions[45] highlights the limitations of the current experience and logic test, specifically, its neglect of a crucial justification for access: when acquiring government-held information is a necessary antecedent to vindicating the First Amendment right to petition.

42. *See, e.g.*, United States v. Index Newspapers LLC., 766 F.3d 1072, 1084 (9th Cir. 2014) (grand juries); *In re* Application of the N.Y. Times Co. to Unseal Wiretap & Search Warrant Materials, 577 F.3d 401, 410 & n.4 (2d Cir. 2009) (warrant proceedings).

43. Wood, *supra* note 39, at 1117.

44. *Compare* Detroit Free Press v. Ashcroft, 303 F.3d 681, 700 (6th Cir. 2002) (recognizing the First Amendment right of access to deportation proceedings), *with* N. Jersey Media Grp., Inc. v. Ashcroft, 308 F.3d 198, 220 (3d Cir. 2002) (concluding that there is no First Amendment right of access to deportation proceedings).

45. *In re* Opinions & Orders of this Court Addressing Bulk Collection of Data Under the Foreign Intelligence Surveillance Act, No. Misc. 13-08, 2020 WL 897659, at *6-16 (FISC Feb. 11, 2020), *appeal denied*, 957 F.3d 1344 (FISCR 2020) (per curiam).

A. The FISC and Access Litigation

Passed in 1978, the Foreign Intelligence Surveillance Act (FISA)[46] established the legal procedures for government surveillance of suspected foreign agents within the United States. As part of this framework, Congress established the FISC, a specialized federal district Article III court that operates entirely in secret.[47]

The FISC's mandate was initially narrow—"to hear applications for and grant orders approving electronic surveillance" of suspected foreign agents.[48] But Snowden's 2013 leaks revealed that, after 9/11, the FISC's responsibility significantly expanded to the systematic authorization and supervision of massive surveillance programs.[49] In this "entirely distinct function—that of 'rule maker'"—the FISC has weighed in on the legality of bulk-collection surveillance programs, including the bulk collection of citizens' internet metadata and phone records, as well as the warrantless collection of communications between citizens and others abroad.[50] Because of this docket expansion, the FISC now plays a programmatic role in determining the lawfulness of government surveillance.

---

46. Foreign Intelligence Surveillance Act (FISA) of 1978, Pub. L. No. 95-511, 92 Stat. 1783.

47. 50 U.S.C. § 1803(a)(1) (2018); *see* Jack Boeglin & Julius Taranto, Comment, *Stare Decisis and Secret Law: On Precedent and Publication in the Foreign Intelligence Surveillance Court*, 124 YALE L.J. 2189, 2191 (2015); Nola K. Breglio, Note, *Leaving FISA Behind: The Need To Return to Warrantless Foreign Intelligence Surveillance*, 113 YALE L.J. 179, 188 (2003).

48. 50 U.S.C. § 1803(a)(1) (2018).

49. *See* United States v. Moalin, 973 F.3d 977, 989 (9th Cir. 2020) (describing the FISC's crucial role in authorizing the NSA's metadata-collection program, and noting that "Snowden's disclosure of the metadata program prompted significant public debate over the appropriate scope of government surveillance"); *see also* Jonathan Manes, *Secret Law*, 106 GEO. L.J. 803, 806 (2018) (recognizing that the NSA's "mass telephone call tracking program . . . was based upon novel, aggressive, and secret statutory interpretations issued by the [FISC] starting in 2006," as was a bulk email-tracking program); Barton Gellman, Aaron Blake & Greg Miller, *Edward Snowden Comes Forward as Source of NSA Leaks*, WASH. POST (June 9, 2013), https://www.washingtonpost.com/politics/intelligence-leaders-push-back-on-leakers-media/2013/06/09/fff80160-d122-11e2-a73e-826d299ff459_story.html [https://perma.cc/8JRX-C6N5] (identifying Snowden as the source of the National Security Association (NSA) leaks); Elizabeth Goitein, *The New Era of Secret Law*, BRENNAN CTR. FOR JUST. 58 (2016), https://www.brennancenter.org/sites/default/files/publications/The_New_Era_of_Secret_Law.pdf [https://perma.cc/PCT8-T72X] (describing the Snowden revelations in detail); Glenn Greenwald, *NSA Collecting Phone Records of Millions of Verizon Customers Daily*, GUARDIAN (June 6, 2013, 6:05 AM EDT), https://www.theguardian.com/world/2013/jun/06/nsa-phone-records-verizon-court-order [https://perma.cc/N9D6-VF87] (describing and linking to the relevant Foreign Intelligence Surveillance Court (FISC) order).

50. Emily Berman, *The Two Faces of the Foreign Intelligence Surveillance Court*, 91 IND. L.J. 1191, 1193, 1198 (2016).

Due to this novel role, the FISC's opinions have tremendous significance. In light of unprecedented surveillance technologies, the government has increasingly sought review before the FISC to probe its surveillance authority. In response, the FISC has issued cutting-edge and complex constitutional rulings, decided matters of statutory construction, and addressed crucial issues of government power, all of which affect the rights of millions.[51] For example, the court has interpreted Fourth Amendment precedent in holding that the collection of bulk telephone metadata was not a "search."[52] The court has also concluded that a government's investigation was not conducted "solely" based on First Amendment-protected activities,[53] which would have run afoul of the FISA. Rulings such as these, and many more, have helped define the contours of key constitutional rights in the digital-surveillance age.[54] Importantly, these opinions have precedential value, both for the FISC and government agencies conducting surveillance.[55]

Despite the significance and stare decisis status[56] of the FISC opinions, they have remained secret for most of the court's history.[57] The court has "no . . . tradition of openness," has "never held a public hearing," and although it has issued

---

51. Brief for Professor Laura K. Donohue as Amicus Curiae at 6, *In re* Certification of Questions of Law, No. FISCR 18-01, 2018 WL 2709456 (FISCR Mar. 16, 2018).

52. Memorandum Opinion and Primary Order at 3-4, *In re* Application of the Federal Bureau of Investigation for an Order Requiring Production of Tangible Things from [Redacted by Court], No. BR 13-158, 2013 WL 12335411 (FISC Dec. 18, 2013).

53. *In re* Application of the Federal Bureau of Investigation for an Order Requiring Production of Tangible Things from [Redacted by Court], No. BR 13-25, 2013 WL 9838183, at *1 (FISC Feb. 19, 2013).

54. For an index of publicly available opinions as of 2016, see *FISA Court Opinions Index*, BRENNAN CTR. FOR JUST., https://www.brennancenter.org/sites/default/files/FISC%20Opinions%20Index%208.5.16.pdf [https://perma.cc/RU5E-NLXU]. *See also* Daphna Renan, *The Fourth Amendment as Administrative Governance*, 68 STAN. L. REV. 1039, 1104 (2016) (noting that the FISC has done "crucial work" on Fourth Amendment reasonableness standards but without the "structural conditions" that legitimize "agency lawmaking").

55. The FISC has cited its own opinions even when those decisions remain classified. Brief for Professor Laura K. Donohue, *supra* note 51, at 7; *see also* Boeglin & Taranto, *supra* note 47, at 2197. The government has cited sealed FISC opinions in support of its position that the Federal Bureau of Investigation (FBI) satisfied its burden to demonstrate a warrant's relevance to an ongoing investigation. Defendants' Memorandum of Law at 16, ACLU v. Clapper, 959 F. Supp. 2d 724 (S.D.N.Y. 2013) (No. 61).

56. *See generally* Boeglin & Taranto, *supra* note 47, at 2197 ("The NSA and FBI are aware of and reliant on prior dispositions of the FISA courts that the American public can neither know about nor rely upon.").

57. *See* Breglio, *supra* note 47, at 189 ("Appealing a FISC surveillance order is virtually impossible in the current system since a defendant might never know such an order had existed in his case or what proof the government had submitted in support of it."). The FISC currently permits the disclosure of records to surveillance targets only in very limited circumstances.

thousands of rulings it had, as of 2007, released only two of those to the public.[58] In 2015 after the public backlash to the Snowden revelations, Congress required the executive branch to declassify FISC opinions that include a "significant [legal] construction or interpretation," including novel ones, and release those opinions "to the greatest extent practicable."[59] However, this transparency remains constrained, both because declassification rests solely within executive discretion,[60] and because the government maintains that the declassification provision does not apply retroactively.[61]

In the wake of Snowden's disclosures, the American Civil Liberties Union (ACLU) and Yale Law School's Media Freedom and Information Access Clinic, later joined by the Knight First Amendment Institute at Columbia University, filed two motions asserting a First Amendment right of access to FISC opinions. One 2013 motion sought access to "opinions addressing the legal basis for the

See 50 U.S.C. §§ 1806(f), 1825(g), 1845(f)(2), 1881e(b). However, as scholars and advocates have noted, in the past these "mechanisms have gone largely under-(if not un-)utilized." Stephen I. Vladeck, *The FISA Court and Article III*, 72 WASH. & LEE L. REV. 1161, 1170-71 (2015); *see also* Ashley Gorski, Patrick C. Toomey & Kate Ruane, *The Future of U.S. Foreign Intelligence Surveillance*, JUST SECURITY (Nov. 11, 2020), https://www.justsecurity.org/73321/the-future-of-u-s-foreign-intelligence-surveillance [https://perma.cc/CQ9W-TZJC] ("[T]he government has a history of failing to comply with [the] notice provision, and there are serious concerns that it continues to define 'derived' narrowly to avoid providing notice of surveillance to defendants, thereby thwarting any potential challenge."). The notice provisions also do not ensure that the FISC will release any relevant opinions—and the legal reasoning relied upon therein—related to the broad authorization of surveillance, thus further crimping potential judicial challenges.

58. *In re* Motion for Release of Court Records, 526 F. Supp. 2d 484, 492 (FISC Dec. 11, 2007).

59. 2015 USA FREEDOM Act, 50 U.S.C. § 1872(a) (2018).

60. *See generally* JARED P. COLE, CONG. RESEARCH SERV., R43404, DISCLOSURE OF FISA OPINIONS—SELECT LEGAL ISSUES (2014), https://fas.org/sgp/crs/secrecy/R43404.pdf [https://perma.cc/X8FP-ZQCE]. For examples of FISC opinions that have been declassified and often heavily redacted by the Office of the Director of National Intelligence (ODNI), see, for example, *In re* Carter W. Page, Nos. 16-1182, 17-52, 17-375, 17-679 (FISC June 25, 2020), which authorized for public release on September 11, 2020; *In re* [Redacted by ODNI], No. 19-218 (FISC Mar. 5, 2020), https://www.intelligence.gov/assets/documents/702%20Documents/declassified/FISC%20Opin%20re%20Technical%20Facilities%20Use%209.23.20%20release_OCR.pdf [https://perma.cc/57UZ-33FE], which authorized for public release on September 23, 2020; and [Redacted by ODNI], No. [Redacted by ODNI] (FISC Dec. 6, 2019), https://www.intelligence.gov/assets/documents/702%20Documents/declassified/2019_702_Cert_FISC_Opinion_06Dec19_OCR.pdf [https://perma.cc/MY8N-26HL], which authorized for public release on September 4, 2020.

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

'bulk collection' of data" under the FISA.[62] A 2016 motion sought opinions "containing novel or significant interpretations of law" issued between 9/11 and the 2015 passage of the USA FREEDOM Act.[63]

Applying the experience and logic test, the organizations framed the FISC opinions as quintessential Article III judicial opinions at the heart of access doctrine. On the experience prong, the organizations cited the "nearly unbroken tradition" of public access to judicial rulings and opinions interpreting the Constitution and the laws."[64] Though the FISC opinions were sealed, the organizations argued that the court should focus on the "type" of governmental record at issue – here, a judicial opinion.[65] On the logic prong, the organizations argued that access facilitated the functioning of the FISA system by, for example, promoting public confidence in the FISC, improving democratic oversight, and permitting courts to engage with the FISC's constitutional and statutory determinations.[66]

B. The FISC Ruling

Nearly seven years after the original motion,[67] the FISC ruled that with respect to the 2013 motion, there is no First Amendment right of access to opinions "addressing the legal basis for the 'bulk collection' of data."[68] Eschewing a structural lens, the court framed the FISC not as an Article III court, but rather a sui

---

62. 2013 Mot., *supra* note 2, at 1.

63. 2016 Mot., *supra* note 2, at 1.

64. *Id.* at 11.

65. *Id.* at 10.

66. *Id.* at 17-20.

67. The motion was tied up in procedural litigation for several years, focused on whether the movants had standing to seek disclosure of the FISC opinions. The Foreign Intelligence Surveillance Court of Review (FISCR) eventually held that the movants had standing, allowing the merits-access issue to proceed. *In re* Certification of Questions of Law to the Foreign Intelligence Surveillance Court of Review, No. FISCR 18-01, 2018 WL 2709456 (FISCR Mar. 16, 2018).

68. *In re* Opinions & Orders of this Court Addressing Bulk Collection of Data Under the Foreign Intelligence Surveillance Act, No. Misc. 13-08, 2020 WL 897659, at *1 (FISC Feb. 11, 2020). The movants subsequently appealed this ruling to the FISCR, which held that it lacked jurisdiction to review the movants' First-Amendment claim, with respect to the *2013 motion*. *In Re* Opinions & Orders by the FISC Addressing Bulk Collection of Data Under the Foreign Intelligence Surveillance Act, 957 F.3d 1344 (FISCR 2020). Separately, on September 15, 2020, with respect to the *2016 motion*, the FISC contradicted its own precedent and held that, based on the FISCR's April 2020 ruling, the FISC lacked jurisdiction to consider First-Amendment right-of-access claims in the first instance. *In Re* Opinions & Orders of this Court Containing Novel or Significant Interpretations of Law, No. Misc. 16-01, 2020 WL 5637419, at *1 (FISC Sept. 15, 2020), *aff'd*, *In re* Opinions & Orders of FISC Containing Novel or Significant Interpretations of Law, No. Misc. 20-02, 2020 WL 6888073 (FISCR Nov. 19, 2020). It is unclear

generis secret court.[69] Under this analytical lens, the FISC opinions were not general judicial opinions, but rather the sealed records of an idiosyncratic court. Under that "limited" application of the experience and logic test, the FISC considered irrelevant well-established precedents regarding access to judicial opinions.[70]

On the experience prong, the court concluded that because the FISC was established as a secret court—and never publicly released its opinions—it did not have a tradition of openness.[71] On the logic prong, the court easily dismissed the organizations' structural arguments, as those benefits of access "generally accrue from public access to other types of judicial opinions."[72] Instead, citing an earlier FISC opinion predating the Snowden leaks, the court focused on the potential harms of access, including surveillance-method identification, compromise of confidential sources, and disclosure of intelligence gathering.[73] Because public access would not aid the FISC's functioning, the First Amendment right of access did not attach.[74]

The FISC's ruling indicates how the experience and logic test fails the right of access. First, the ruling exposes the poor fit between the experience prong and novel proceedings, especially those secret from their inception. Taking this approach to its logical end, courts can effectively "inoculate" themselves from access claims by repeatedly holding secret proceedings.[75] It also displays how a

how this ruling will affect the February 2020 ruling on the *2013 motion*, or future access motions for FISC records, as neither the FISC nor the FISCR have held whether another federal district court maintains jurisdiction over such claims. The FISC has already denied other pending access motions brought by other parties based on this same reasoning. *See In Re* Motion for Publication of Records, No. 19-01, 2020 WL 5637506 (FISC Sept. 15, 2020); *In Re* Motion of ProPublica, Inc. for the Release of Court Records, No. 13-09, 2020 WL 5637412 (FISC Sept. 15, 2020). As of this writing, the litigants have not appealed the FISCR's affirmance of the FISC's jurisdictional holding.

69. *In re* Opinions & Orders of this Court, No. Misc. 13-08, 2020 WL 897659, at *1.

70. *Id.* at *9.

71. *Id.* at *10-13.

72. *Id.* at *13.

73. *Id.* at *14 (citing *In re* Motion for Release of Court Records, 526 F. Supp. 2d 484, 494 (FISC 2007)).

74. *Id.* at *16 (citing *In re* Certification of Questions of Law to FISCR, No. 18-01, 2018 WL 2709456 at *3 (FISCR Mar. 16 2018)).

75. Ardia, *supra* note 27, at 862-63; *see also* Del. Coal. for Open Gov't v. Strine, 733 F.3d 510, 515 (3d Cir. 2013) ("Uncritical acceptance of state definitions of proceedings would allow governments to prevent the public from accessing a proceeding simply by renaming it."); N.Y. Civil Liberties Union v. N.Y. City Transit Auth., 684 F.3d 286, 299 (2d Cir. 2012) (noting that "legislatures could easily avoid constitutional strictures [of access] by moving an old governmental function to a new institutional location").

history of openness serves as a poor proxy for gauging the information's role in promoting an informed citizenry and democratic governance.[76]

Second, the ruling reveals how the relative meaninglessness of the logic prong has distorted access into a workmanlike tool for improving government proceedings, rather than a structural means of facilitating transparency. Because access theoretically improves almost any proceeding,[77] courts like the FISC no longer rely on the logic prong as a useful index of where access should apply. In that void, courts now use the logic inquiry to decide whether access functionally serves a government process. But in a secret forum like the FISC, an analysis framed this way invariably and disproportionately focuses on how access may potentially harm the proceeding's operations. This approach effectively collapses the logic prong with the fact-based harms inquiry that is supposed to *follow* a right-of-access determination. Such an analysis transforms the right of access from a public good into a deferential tool that ignores whether access empowers public information-seeking.[78]

Finally, the narrow framing of the logic prong ignores whether access affects individual rights. Although the organizations argued in part that the FISC opinions bear on individuals' constitutional and statutory rights, the FISC ruling did not consider, for example, whether access to its opinions might be a necessary precursor to vindicating those rights in court. In the next Part, I argue that the right-of-access inquiry should be broadened to assess whether access is necessary to vindicate a neglected First Amendment right—the right to petition—that serves democratic ends.

III. RETHINKING ACCESS TO INCORPORATE THE PETITION CLAUSE

The FISC ruling indicates how the right of access, as it has been conceptualized and implemented by the courts, disregards situations in which access to government-held information is necessary to vindicate the right to petition the government, and therefore ensure that the government is honoring constitutional and statutory constraints.

---

76. Hayes, *supra* note 30, at 1132 ("Indeed, information related to many of the most important public issues has historically been closed.").

77. *See* Times Mirror Co. v. United States, 873 F.2d 1210, 1213 (9th Cir. 1989) ("Every judicial proceeding, indeed every governmental process, arguably benefits from public scrutiny to some degree. . . ."); Ardia, *supra* note 27, at 865-66 ("[P]ublic access will almost certainly enhance the perception of fairness, discourage perjury, and reduce the influence of bias and partiality in nearly every court proceeding.").

78. Hayes, *supra* note 30, at 1136 ("[W]hat is important is [the] more general effect [of access] on increasing citizens' understanding of the issues they must decide, and of the workings of the government they must control.").

Although the Petition Clause protects an essential right in a democratic society, it has largely been neglected by scholars and the courts, outside of certain contexts.[79] Despite this disregard, the historical roots of the Petition Clause "long antedate the Constitution" and serve an "important aspect of self-government."[80] Where the First Amendment speech, press, and assembly rights protect an individual's ability to, for example, publish a stinging op-ed critical of government corruption, take to the streets to protest racism and police brutality, or form a climate change activism organization, the right to petition protects a distinct expressive right—an individual's ability to directly communicate grievances to the government, which can take many forms, including lawsuits.[81] As the Supreme Court recognized in *Borough of Duryea*, the Petition Clause overlaps with other First Amendment freedoms but also stands apart from it.[82] Thus, just as the *Richmond* Court viewed the First Amendment right of access as facilitating democratic self-governance by giving meaning to the freedoms of speech, press, and assembly, it should promote the distinct rights enshrined in the Petition Clause. If individuals are systematically blocked from the courts due to a lack of access to information, then the right of access is not fulfilling its purpose or potential. Together, the vindication of these individual rights serves as a crucial building block for a structural First Amendment.

In the FISC context, because many of the opinions containing legal analysis of surveillance programs remain redacted or secret, parties "cannot access the

---

79. *See generally* RONALD J. KROTOSZYNSKI, JR., RECLAIMING THE PETITION CLAUSE: SEDITIOUS LIBEL, "OFFENSIVE" PROTEST, AND THE RIGHT TO PETITION THE GOVERNMENT FOR REDRESS OF GRIEVANCES (2012) (advocating greater judicial attention to the history of the Petition Clause and the values it advances); Aaron H. Caplan, *Review Essay—The First Amendment's Forgotten Clauses*, 63 J. LEGAL EDUC. 532, 543-49 (2014) (summarizing Krotoszynski Jr.'s arguments and arguing for the revival of the Petition Clause); Stephen A. Higginson, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 YALE L. J. 142, 165-66 (1986) (arguing that the original meaning of the Petition Clause was "subsumed" into free expression by antebellum Congresses to protect slavery); Norman B. Smith, *"Shall Make No Law Abridging . . .": An Analysis of the Neglected, but Nearly Absolute, Right of Petition*, 54 U. CIN. L. REV. 1153, 1196 (1986) ("Petitioning historically and textually is a separable right from speech and press and the interests served by petitioning go to the very heart of the principle of popular sovereignty."). The Petition Clause has played an important role in the context of the *Noerr-Pennington* doctrine, which provides court-created immunity against antitrust liability for activity implicating the petition right. *See* Cal. Motor Transp. Co. v. Trucking Unlimited., 404 U.S. 508, 510-12 (1972).

80. McDonald v. Smith, 472 U.S. 479, 482-83 (1985).

81. For an excavation of the Petition Clause, including its other historical purposes such as legislative lobbying, see Maggie McKinley, *Petitioning and the Making of the Administrative State*, 127 YALE L. J. 1538 (2018); and Maggie McKinley, *Lobbying and the Petition Clause*, 68 STAN L. REV. 1131 (2016).

82. Borough of Duryea v. Guarnieri, 564 U.S. 379, 388 (2011) (denying an "essential equivalence" between the Speech and Petition Clauses).

law"[83] necessary to establish standing to bring a lawsuit challenging surveillance. To establish standing, litigants must demonstrate an "injury in fact" that is "fairly traceable" to the challenged conduct.[84] In the surveillance context, the Supreme Court has held that litigants challenging future FISA surveillance lacked standing because the injury was "speculative," litigants lack "actual knowledge" of the government's surveillance practices, and can only conjecture as to whether the FISC will authorize such surveillance under statute and the Constitution.[85] Put simply, litigants seeking to challenge surveillance could not do so without knowing the scope of approved surveillance programs, which they cannot know without access to the FISC opinions. Under current standing doctrine, the "secrecy" attached to the FISC essentially precludes the type of court challenges that elsewhere allowed the Supreme Court to pronounce "clear statement[s] on broad Fourth Amendment [and other constitutional] principles."[86]

Or consider a different setting. In light of recent botched executions using suspect lethal injection drugs, parties have challenged state laws shielding key information about those executions.[87] News organizations have advocated that the First Amendment right of access to executions encompasses the right to access the source and quality of lethal injection drugs, executioner qualifications, and execution chamber sounds.[88] These claims focus on the public's need for this

---

83. Laura Donohue, a court-appointed amicus in the FISC litigation, briefly argued that the Petition Clause independently ensured access to the FISC opinions. Brief for Professor Laura K. Donohue at 20-22, *supra* note 51.

84. Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547 (2016).

85. Clapper v. Amnesty Int'l USA, 568 U.S. 398, 411 (2013).

86. David G. Delaney, *Widening the Aperture on Fourth Amendment Interests: A Comment on Orin Kerr's* The Fourth Amendment and the Global Internet, 68 STAN. L. REV. ONLINE 9, 13 (2015); *see also Standing, Surveillance, and Technology Companies*, 131 HARV. L. REV. 1742 (2018) (explaining that standing has "proven to be especially thorny in the surveillance context").

87. *See, e.g.*, Tom Dart, *Arizona Inmate Joseph Wood Was Injected 15 Times with Execution Drugs*, GUARDIAN (Aug. 2, 2014), https://www.theguardian.com/world/2014/aug/02/arizona-inmate-injected-15-times-execution-drugs-joseph-wood [https://perma.cc/MVR3-2SFB]. *See generally* Noah Caldwell, Ailsa Chang & Jolie Myers, *Gasping for Air: Autopsies Reveal Troubling Effects of Lethal Injection*, NAT'L PUB. RADIO (Sept. 21, 2020), https://www.npr.org/2020/09/21/793177589/gasping-for-air-autopsies-reveal-troubling-effects-of-lethal-injection [https://perma.cc/CM33-CUBS] (finding signs of pulmonary edema in 84% of reviewed autopsies following lethal injection, which according to one anatomical pathologist, would cause "severe respiratory distress with associated sensations of drowning, asphyxiation, panic and terror"); Jeffrey E. Stern, *The Cruel and Unusual Execution of Clayton Lockett*, ATLANTIC (June 2015), https://www.theatlantic.com/magazine/archive/2015/06/execution-clayton-lockett/392069 [https://perma.cc/EH47-W7U4] (describing Oklahoma's botched lethal injection execution of Clayton Lockett).

88. *See* Media Grp., Inc. v. Clarke, No. 3:19-cv-692, 2020 WL 3078382 (E.D. Va. June 10, 2020); Guardian News & Media LLC v. Ryan, 225 F. Supp. 3d 859 (D. Ariz. 2016); Guardian News &

information to meaningfully understand executions. But they do not press another key need for it: enabling death-row prisoners to bring Eighth Amendment method-of-execution claims. Such claims require prisoners to establish that certain lethal injection drugs present a risk that is "sure or very likely to cause serious illness and needless suffering" and espouse "sufficiently imminent dangers."[89]

Instead, death-row prisoners have brought those claims[90] under a distinct line of access-to-courts cases based on due process.[91] Those cases focus on the formal procedures necessary to ensure that prisoners may "present claimed violations of fundamental constitutional rights to the courts."[92] Because of this formalistic framing, the Supreme Court has held that right does not "enable the prisoner to *discover* grievances, and to *litigate effectively* once in court."[93] Unfairly broadening this language, courts have rejected death-row prisoners' claims that states violate their due process-based right of access to the courts by shielding information about lethal-injection drugs.[94]

Importantly, however, these claims have not been brought as First Amendment-based right of access cases, because the experience and logic test does not account for—and the Supreme Court has never considered—whether that right separately motivates the acquisition of information necessary to vindicate the First Amendment right to petition. But if the experience and logic test included a third, rights-based prong—whether the information is necessary to vindicate a party's rights in court—death-row prisoners seeking access to information about lethal-injection drugs to determine whether they are subject to unconstitutional executions[95] and litigants seeking FISC opinions to determine the scope of potentially unlawful surveillance could both establish their respective rights of access.

Media LLC v. Mo. Dep't of Corr., No. 14AC-CC00251, 2016 WL 11655986, at *1 (Mo. Cir. Sept. 21, 2016).

89. Glossip v. Gross, 576 U.S. 863, 875, 877 (2015).

90. *See, e.g.*, First Amendment Coal. of Ariz., Inc. v. Ryan, 938 F.3d 1069 (9th Cir. 2019); Wellons v. Comm'r, Ga. Dep't of Corr., 754 F.3d 1260 (11th Cir. 2014).

91. *See, e.g.*, Lewis v. Casey, 518 U.S. 343 (1996); Bounds v. Smith, 430 U.S. 817 (1977).

92. *Lewis*, 518 U.S., at 351 (quoting *Bounds*, 430 U.S. at 825).

93. *Lewis*, 518 U.S., at 354.

94. *See, e.g.*, Phillips v. DeWine, 841 F.3d 405, 420 (6th Cir. 2016); Zink v. Lombardi, 783 F.3d 1089, 1108 (8th Cir. 2015); *Wellons*, 754 F.3d at 1267. Note that the Ninth Circuit in *First Amendment Coalition* rejected this argument supposedly based on the prisoners' "First Amendment right of access to the courts"; however, it cited *due process* precedents. 938 F.3d at 1081.

95. *First Amendment Coalition*, 938 F.3d at 1084 (Berzon, J., concurring in part and dissenting in part) (emphasizing that the prisoners "*have* identified an underlying [Eighth Amendment] claim . . . that their impending executions threaten a serious 'risk of severe pain'").

Instead of scrapping the experience and logic test entirely, as some scholars have suggested,[96] I suggest a potentially more feasible intermediate proposal: incorporating a third "rights" prong that considers whether the access sought to government proceedings or processes is necessary to vindicate a party's right to petition. Under such a reformulated test, none of the prongs would be dispositive, and parties need not rely on the "rights" prong if their claim does not implicate the right to petition. For example, members of the press would still be able to bring a public-access claim, even if the information sought did not implicate their own individual rights.[97] But if the "rights" prong is to be relied upon, then parties would need to identify the setting in which the government is exercising its power (for example, FISC proceedings, or executions), as well as a colorable underlying constitutional or statutory claim for which they need the government-held information to pursue (for example, Fourth Amendment or FISA violations, or Eighth Amendment violations).

This revised access test would have two advantages. First, it would broaden the right of access beyond its traditional conception as a third-party right protective only of speech, press, and assembly freedoms. Instead, as this Essay has argued, access is both an individual and a public good: just as access protects the public's systemic awareness of a government process or proceeding, it should also safeguard an individual's ability to seek redress based on that information. This is especially true in contexts like the FISC, where the experience and logic test alone is not well suited to establish access on behalf of third parties, but where access is no less important to ensuring government transparency. If the court broadens its lens to consider an additional dimension — does the sought-after information separately vindicate the right to petition? — access could be obtained with respect to secretive government processes where transparency is acutely needed for oversight, such as FISC proceedings or executions.

Second, this reformulation would help balance the access test. We may be stuck with the experience and logic test until the Supreme Court chooses to revisit it. But under that test, a claim for access to a relatively new proceeding, or a proceeding with a mixed history of secrecy and openness, is often doomed under the experience prong, unless the court is skeptical that a history of openness is

96. Ardia, *supra* note 27, at 907 (arguing that there should be a presumptive right of access to "all court proceedings and filed records that are material to a court's exercise of its adjudicatory power"); Kitrosser, *supra* note 38, at 130-34 (concluding that access denials to adjudicative proceedings are presumptively inappropriate); Levine, *supra* note 38, at 1793 (arguing that courts should apply strict scrutiny across the board anytime the government closes or seals presumptively open proceedings and documents).

97. Admittedly, the myriad flaws of the experience and logic test may still hinder such third-party claims, as access jurisprudence amply demonstrates, but reformulating the access test in its entirety is beyond the scope of this Essay.

determinative.[98] And the logic prong is of little help, as too often the court focuses on a narrow inquiry—whether access improves the functioning of *this* proceeding—an inquiry that the government may too easily rebut with vague and conclusory claims. By adding a rights prong, the access test would mitigate the outsized importance of the experience prong and diminish the deleterious effects of the logic prong's indeterminacy.

That the Supreme Court has generally held that the First Amendment does not "mandate" a right of access to government information is one possible objection to this reformulated access test.[99] However, by requiring litigants to assert a colorable underlying claim for which they need the government-held information, and by anchoring the test in another First Amendment right, the test avoids resulting in a free-for-all for government information, and thus steers clear of a *Houchins* problem.

Another objection may be that reformulating the access test in this way would require giving more heft to the Petition Clause than has been traditionally granted.[100] In particular, it would require a court to consider that individuals do not just have an abstract right to petition, but a *meaningful* one. But this may not be that much of a stretch. For one, access doctrine already depends on the Supreme Court's recognition that the First Amendment protects not just communication, but "*informed*" communication."[101] Because First Amendment freedoms are coequal, that same logic should apply to the Petition Clause. Second, although the precise contours of the Petition Clause remain uncharted, the Court has already recognized that the Clause may have more depth than credited. For example, the Court has previously stressed the remedial importance of litigation, particularly for minorities,[102] and has identified that the Petition Clause represents not just a "technical ability to lodge a complaint," but also a "practical opportunity 'to vindicate [] legal rights.'"[103] More recently, in *Borough of Duryea*,

98. *See, e.g.*, N.Y. Civil Liberties Union v. N.Y. City Transit Auth., 684 F.3d 286, 299 (2d Cir. 2012) (recognizing that administrative "adjudication is a relatively new phenomenon" but new institutions are not "exempt . . . from the purview of old rules"); United States v. Simone, 14 F.3d 833, 838 (3d Cir. 1994).

99. *See, e.g.*, Houchins v. KQED, Inc., 438 U.S. 1, 15 (1978).

100. *See* Fidlar Techs. v. LPS Real Estate Data Sols., Inc., No. 4:13-cv-4021-SLD-JAG, 2013 WL 5973938, at *17 (C.D. Ill. Nov. 8, 2013) ("[I]t is worth noting that relatively few courts and academic commentators have addressed the meaning of the Petition Clause.").

101. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 587 (Brennan, J., concurring) (emphasis added).

102. NAACP v. Button, 371 U.S. 415, 430 (1963) ("[U]nder the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances.").

103. Cover, *supra* note 14, at 1794 (quoting Bhd. of R.R. Trainmen v. Va. *ex rel.* Va. State Bar, 377 U.S. 1, 8 (1964) (recognizing that competent counsel is essential to the right to petition)).

Justice Kennedy suggested that "[t]here may arise cases where the special concerns of the Petition Clause would provide a sound basis for a distinct analysis; and if that is so, the rules and principles that define the two rights [to petition and speak] might differ."[104] This pronouncement nods to the fact that in future, the Court may more fully articulate the scope of the Petition Clause, which could further shape this proposed reformulation.

All this said, it is not controversial to say that the current access test is broken. It fails to shed light on important government proceedings, like those of the FISC, provides little guidance for courts, and conceptually ignores that the access test should equally facilitate the Petition Clause and other First Amendment freedoms. This Essay marks just one proposal in rethinking how access may better fulfill its promise to vindicate both individual rights and public rights, and thus, to serve as a better guardian of democratic governance.

CONCLUSION

The rights enshrined in the First Amendment build upon one another, "form[ing] a set of concentric circles with the democratic citizen at the focus."[105] As others have evocatively conveyed, these circles "reprise[] the life cycle of a democratic idea," moving from interior expression to the Petition Clause's protection of direct interaction with the government.[106] The First Amendment right of access protects expressive rights at each of these stages, thereby safeguarding the broader end of government transparency. In the same way that courts have long viewed the right of access as giving meaning to the freedoms of speech, press, and assembly, which in turn promote democratic self-governance, this Essay has argued that the right of access should similarly make effective the right of petition—another essential brick in the foundation of a structural First Amendment. By incorporating a third, rights-based prong into the experience and logic test, the First Amendment right of access test may not be wholly cured, but it may better fulfill its broader purpose: safeguarding the collection of information necessary to ensure that the government abides by the law.

Admittedly, in a different Petition Clause context, the Court has also held that the right does not "require government policymakers to listen or respond to communications of members of the public on public issues." Minn. Bd. for Cmty. Colls. v. Knight, 465 U.S. 271, 288 (1984). But not requiring the government to respond to a petition is conceptually different than providing the informational infrastructure necessary to make the petition in the first place.

104. Borough of Duryea v. Guarnieri, 564 U.S. 379, 389 (2011).

105. Brief of Amici Curiae American Civil Liberties Union & Brennan Center for Justice in Support of Appellants at *20, Vieth v. Jubelirer, 541 U.S. 267 (2004) (No. 02-1580), 2003 WL 22069782.

106. *Id.*

Meenakshi Krishnan (J.D. Yale Law School, 2018) is an associate in the media law and First Amendment practice at Davis Wright Tremaine LLP. Prior to joining DWT, she was a 2019-20 legal fellow at the Knight First Amendment Institute at Columbia University. As a member of Yale Law School's Media Freedom and Information Access Clinic, she worked on several cases described in this Essay: the FISC access litigation (at the standing stage before the FISCR); Guardian News & Media LLC v. Ryan; *and* Guardian News & Media LLC v. Missouri Department of Corrections. *She is deeply grateful for invaluable and generous feedback on drafts of this Essay from Katy Glenn Bass, Hannah Bloch-Wehba, Carrie DeCell, Lakshmi Krishnan, John Langford, and David Schulz. Finally, enormous thanks to Sierra Stubbs, Ke (Katie) Ning, Bianca Herlitz-Ferguson, Alexander Nabavi-Noori, Simone Seiver, Alex Zhang, and the editors of the* Yale Law Journal *for their meticulous and thoughtful editing.*