WHY THE TRADITIONAL FIRST AMENDMENT RIGHT TO A PUBLIC TRIAL CANNOT BE APPLIED TO MILITARY TRIBUNALS

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I. INTRODUCTION

Free speech—its legality, constitutionality, and necessity have often been the subject of heated arguments. Among the debates that surround this subject, few are as intense as the debate that rages over the media’s First Amendment right of access to the courtroom. The “cameras in the courtroom” debate first arose in 1950,1 when the Supreme Court decided Richmond Newspapers, Inc. v. Virginia.2 The doctrine was later solidified in Press-Enterprise Co. v. Superior Court,3 and its application must now be considered in a new context—the seemingly infamous and often-debated military tribunal.5

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1 Maryland v. Balt. Radio Show, 338 U.S. 912, 920 (1950) (Frankfurter, J., dissenting from denial of certiorari) (“One of the demands of a democratic society is that the public should know what goes on in courts by being told by the press what happens there, to the end that the public may judge whether our system of criminal justice is fair and right.”).


3 Press-Enter. Co. v. Superior Court (Press-Enterprise II), 478 U.S. 1 (1986). The Press-Enterprise II test allows proceedings to be closed to the public, if a strict scrutiny test is satisfied. Id. at 13–14. The concern of the test is to assure fairness to the parties involved. Id. at 7. The first part of the test is to determine whether there is a “historical right of access to the proceedings.” Id. at 9. Next, the Court balances the interests advanced by closure with the interests advanced by allowing the media and general public to attend the trial. Id. at 8. If the proceeding is one that passes both tests, then a qualified right of access attaches and only interests of closure that satisfy the strict scrutiny test will be permitted. Id. at 9–10.

4 See William Safire, Seizing Dictatorial Power, N.Y. TIMES, Nov. 15, 2001, at A31
There are many unresolved issues involving the press’s and the public’s right of access to military tribunals, including: What access, if any, do reporters have to these proceedings? As most persons prosecuted under these proceedings are non-citizens, does the First Amendment even apply, or should it? Does the government really expect the American people to allow these so-called “secret courts” to exist and to try persons accused of crimes? Why do we not treat non-citizen enemy combatants in a time of war just as we treat criminal defendants in peacetime and simply allow them a public trial by jury like ordinary citizens?

This Comment will first summarize the law regarding military tribunals and the media’s First Amendment access to criminal proceedings conducted before such tribunals. It will then examine the traditional tests military courts use for allowing media access to the courtroom in courts-martial and civilian judicial proceedings. This section will also examine the similarities and differences between these proceedings and the modern military tribunal. Third, this Comment will discuss, in the context of war, the presumption of full access that federal and state courts offer to the media and public in regular criminal proceedings. This presumption is not merely unworkable when applied to the trial of non-citizen enemy combatants, but it also potentially damaging to the interests of national security and to the safety of others directly involved in the proceedings, such as the judges and jurors. Ultimately, it will conclude that a military tribunal is so unlike a modern criminal trial that restricting First Amendment access to both the press and the public is justified.

This Comment does not focus on the legality of the establishment of military tribunals and will take no position on whether proceedings by a military tribunal are a legitimate tool of justice. Rather, this Comment seeks only to answer one question: “Does the media enjoy a First Amendment right of access to military tribunals?”


6 For the purposes of this Comment “military tribunal” will be defined under Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism, 32 C.F.R. pt. 9 (2004) [hereinafter DOD Order]. This directive was issued in accordance with instructions and permission of the President of the United States. See Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 3 C.F.R. § 918 (2002) [hereinafter Military Order]. This definition will be the only one discussed here, as discussion of alternate proposals and
II. THE AUTHORITY TO CONVENE MILITARY TRIBUNALS

A. Constitutional Authorization

The United States exists today in a state of undeclared war of self-defense. Two United Nations resolutions endorse the United States’ right to pursue known terrorists in response to the attacks against the United States on September 11, 2001.\(^7\) As a result of this state of war, President George W. Bush’s administration has determined that non-citizen enemy combatants must be tried, not in regular criminal courts, but before military tribunals. Pursuant to Article II, Section II of the Constitution, the President is Commander in Chief of the Armed Forces.\(^8\) On November 13, 2001, President Bush invoked his authority as Commander in Chief and authorized the use of military tribunals to try non-citizen enemy combatants.\(^9\)

Additionally, the legislative and judicial branches have sanctioned the use of such military tribunals at one point or another. The Constitution vests in Congress the power to “provide for the common defense [sic] . . . [and] define and punish . . . [o]ffenses against the Law of Nations.”\(^10\) On September 18, 2001, Congress enacted a joint resolution that permitted the President to use “all necessary and appropriate force” against terrorists, their sponsors, and those who protect them.\(^11\) Further, the Supreme Court has determined that under the Constitution there is authority sanctioning the use of military tribunals.\(^12\) These three sources of presidential,\(^13\) congressional,\(^14\) and judicial\(^15\) approval, coupled

\(^8\) U.S. CONST. art. II, § 2.
\(^9\) See Military Order, supra note 6, at 918.
\(^10\) U.S. CONST. art. I, § 8, cls. 1, 10.
\(^12\) See Ex parte Vallandigham, 86 U.S. 243 (1864); Ex parte Quirin, 317 U.S. 1 (1942); In re Yamashita, 327 U.S. 1 (1946).
\(^14\) The Joint Resolution passed on September 14, 2001 authorizes the President to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that oc-
with the United Nations recognition of a right of self-defense, provide ample protection and precedent for the President’s decision to use military tribunals to try non-citizen enemy combatants.

*Ex parte Quirin* provides a detailed history of the use of military tribunals in the United States and demonstrates that, in this country, trying non-citizen enemy combatants and those who contravene the law of nations has occurred in many instances. In this case, the Supreme Court concluded that the use of military tribunals was justified because the attacks on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.


The Joint Resolution characterizes the attacks as “armed attacks” against the United States in order to justify the use of force in self-defense. Indeed, the Joint Resolution arguably characterizes the attacks as inherently unlawful acts of war, or “war crimes.” Thus, the language of the Joint Resolution clearly contemplates executive action aimed at attacking and killing those responsible for the September 11 attacks, or capturing, detaining, and punishing any such persons. In this sense, it is clear that Congress contemplated the direct, severe application of U.S. power against a foe formally characterized as the enemy.


15 *Ex parte Quirin*, 317 U.S. at 28 (holding that both the Commander in Chief Clause of the Constitution and Congress both allow the President to convene military tribunals).

16 317 U.S. 1 (1942).

17 *Id.* at 31 n.10 (demonstrating that in the “Mexican War military commissions were created in [ ] large number[s] . . . [and d]uring the Civil War military commissions were extensively used for the trial of offenses against the law of war.”).

As a practical matter, it seems that military tribunals were used, despite the questions as to their constitutionality. Their use was again questioned before the Supreme Court during World War II in the case of *Ex Parte Quirin*.

In *Quirin*, a group of Nazi saboteurs attempted to sneak into the United States for the purpose of destroying U.S. infrastructure. They were captured almost immediately and tried by military tribunal. Defense lawyers argued that the accused spies were entitled to a speedy and public trial by an impartial jury, as well as the other constitutional protections contained in the Bill of Rights. The attorney for the spies, relying on *Milligan*, argued that the Constitution applied even during war.

By the time the case was appealed to the Supreme Court, there was a great deal of political pressure to uphold the convictions. The *Quirin* decision upheld the use of a military tribunal as used under the specific circumstances of that case, because the accused spies were “unlawful belligerents.” Nevertheless, many experts argue that it does not provide blanket authorization for the use of military tribunals. Scholar Michael Belknap wrote that Justice Stone thought it was a “dubious decision.” Justice Douglas also regretted the ruling. “It is extremely undesirable to announce a decision on the merits without an opinion accompanying it,” he said, referring to the fact that the Court entered a brief order upholding the tribunals shortly after the arguments, but did not issue a full opinion until many months later. Justice Stone, in writing the opinion, admitted that “a majority of the full Court are not agreed on the appropriate grounds for the decision.” The Court also recognized that some offenses cannot be tried by a military tribunal because they are not recognized by our courts as violations of the law of war or because they are in the class of offenses constitutionally triable only by a jury.
military tribunals is constitutional and stated:

[A]n enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals.\textsuperscript{18}

Later, in \textit{In re Yamashita}, the Supreme Court concluded that a military commander has the right to seize and subject to discipline enemy combatants that have violated the law of war.\textsuperscript{19} The Court reasoned that “[t]he trial and punishment of enemy combatants . . . is . . . not only part of the conduct of war [that operates] as a preventative measure against such violations, but is . . . [a] sanction without qualification . . . so long as a state of war exists—from its declaration until peace is proclaimed.”\textsuperscript{20}

B. Judicial Authority and Case Law

The history of judicial review of military tribunals is lengthy\textsuperscript{21} and dates back to 1863 when the Supreme Court concluded under the Judiciary Act of 1789 that it has no authority to review the outcome of a justly-commissioned military tribunal.\textsuperscript{22} The Court revisited the issue in \textit{Ex parte Quirin}. There, the Court further articulated the principle that military tribunals were not “courts” as contemplated by the Judiciary Act and concluded that neither the Fifth Amendment right to a grand jury nor the Sixth Amendment right to a trial by a
jury of one’s peers attached to proceedings before a military commission.\textsuperscript{23}

The \textit{Ex parte Quirin} Court upheld the use of a military tribunal to try German spies, but only after it first determined that they qualified as “unlawful combatants.”\textsuperscript{24} In justifying the use of the military tribunal, the Court undertook a lengthy discussion about the historical pedigree of such commissions by noting that as far back as the Mexican and Civil Wars, military tribunals were used extensively to try law of war violations.\textsuperscript{25}

The Court has readily recognized the overriding importance of presidential discretion in military matters, especially in times of emergency:\textsuperscript{26}

No doubt there are cases where the expert on the spot may be called upon to justify his conduct later in court, notwithstanding the fact that he had sole command at the time and acted to the best of his knowledge. That is the position of the captain of a ship. But even in that case great weight is given to his determination and the matter is to be judged on the facts as they appeared then and not merely in the light of the event. When it comes to a decision by the head of the State upon a matter involving its life, the ordinary rights of individuals must yield to what he deems the necessities of the moment.\textsuperscript{27}

Historically, federal courts do not review military proceedings.\textsuperscript{28} When such proceedings have been reviewed, it was only at the behest of civilians who were making the claim that “Congress had no constitutional power to subject them to the [military system of justice].”\textsuperscript{29} The Supreme Court chose to review only civilian cases, reasoning that “disruption caused to Petitioner’s civilian lives and the accompanying deprivation of liberty made is ‘especially unfair to require exhaustion’ [through proper military channels]. . . .”\textsuperscript{30}

Throughout the years, there has been recognition of the inherent difference between the proceedings of military and civilian courts.\textsuperscript{31} The two tribunals are

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\item \textsuperscript{23} \textit{Ex parte Quirin}, 317 U.S. at 39 (“Presentment by a grand jury and trial by jury . . . were procedures unknown to military tribunals, which are not courts in the sense of the Judiciary Article, and which in the natural course of events are usually called upon to function under conditions precluding resort to such procedures.” (citation omitted)).
\item \textsuperscript{24} Unlawful combatant is defined as [one] who secretly and without uniform passes the military line of the belligerent in a time of war, seeking to gather military information and communicate it to the enemy, or [one who enters] for the purpose of waging war by the destruction of life or property. [Such people are] generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war and subject to trial and punishment by military tribunals.
\item \textit{Id.} at 30–31.
\item \textsuperscript{25} \textit{Id.}
\item \textsuperscript{26} \textit{See generally} The Brig Amy Warwick (The Prize Cases), 67 U.S. (2 Black) 635 (1863) (allowing for wide use of presidential discretion in determining if the United States was at war).
\item \textsuperscript{27} Moyer v. Peabody, 212 U.S. 78, 85 (1909) (quoting Lawrence v. Minturn, 58 U.S. 100, 110 (1854)).
\item \textsuperscript{28} \textit{See Schlesinger v. Councilman}, 420 U.S. 738, 758–59 (1975).
\item \textsuperscript{29} \textit{Id.}
\item \textsuperscript{30} \textit{Id.} (quoting Noyd v. Bond, 395 U.S. 683, 696 n.8 (1969)).
\item \textsuperscript{31} \textit{See O’Callahan v. Parker}, 395 U.S. 258, 266 (1969), \textit{overruled by Solorio v. United
replete with differences in both purpose and effect, and in the rights afforded to defendants under each system.\textsuperscript{32} In recognition of their differences, courts have explicitly held that courts-martial do not have to provide the same constitutional safeguards as Article III courts.\textsuperscript{33} The differences in jurisdictional reach between Article III courts, military tribunals, and courts-martial, though arguably substantial, do not exclude any of the fora from guaranteeing justice to those tried. The scope of jurisdiction of courts-martial are very limited because the forum has jurisdiction solely over defendants who are members of the armed forces.\textsuperscript{34}

Over time, the Supreme Court began to extend its faith in the military system of justice and broadened the scope of what constitutes the appropriate reach of a military commander’s authority in a time of war.\textsuperscript{35} The \textit{In re Yamashita} Court also recognized a new class of persons subject to military tribunals: the “enemy combatant.”\textsuperscript{36} In 1975, in \textit{Schlesinger v. Councilman}, the Supreme Court once again pronounced its faith in military courts.\textsuperscript{37} The \textit{Schlesinger}
Court stated unequivocally that “deference . . . should be accorded [to] the judgments of the carefully designed military system [of justice]. . . .”38 and reasoned that “it must be assumed that the military court system will vindicate servicemen’s constitutional rights.”39

C. Presidential Authority: The Military Order of November 13, 2001

On November 13, 2001, President George W. Bush released a Military Order entitled “Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism” (“Military Order”), wherein certain procedures and provisions for trying non-civilians by military commission were outlined.40 The Military Order laid out the reasons for the creation of the policy41 and provided a basic framework of parameters to be followed. Implementation of the Order was left to the discretion of the Secretary of Defense.

The Military Order specifically identifies who is to be tried under this Order42 but expressly exempts American citizens from prosecution.43 The Military Order also identifies offenses that are triable by military tribunals: “violations of the laws of war and other applicable laws,”44 as well as “any and all offenses triable by military commission.”45 Of the rights provided to defendants subject to the Military Order, some clearly differ from those afforded to a criminal defendant in a proceeding conducted by Article III courts;46 others are not present at all.47 The right to counsel48 and the right to a full and fair trial49 however, are specifically guaranteed. The Military Order also gives the tribunal exclusive jurisdiction over individuals subject to its dictates and expressly prohibits individuals from seeking review in any state or federal court or international

38 Id. at 753.
39 Id. at 758.
40 Military Order, supra note 6, at 918.
41 Id.
42 Persons subject to the Order include but are not limited to “those who are or were members of Al Qaida [and those who] engaged in, aided, abetted, or conspired to commit, acts of international terrorism” or those who harbor such individuals. Id.
43 Id. at 919.
44 Id. at 918.
45 Id. at 919.
47 The Military Order is also silent on the presumption of innocence and on the provision of Brady material. Military Order, supra note 6.
48 Id. at 920.
49 Id.
tribunal.50

D. The Defense Department Responds: Military Commission Order, No. 1

On March 21, 2002, The Department of Defense (“DOD”) issued Military Commission Order No. 1 (“DOD Order”), a detailed enumeration of procedures for the trial of individuals subject to the Military Order.51 The DOD Order provides a detailed breakdown of the provisions that govern military commissions52 and reserves, along with the Military Order, the exclusive right to promulgate procedures that will govern such tribunals.53

The DOD Order provides a myriad of protections for the accused. Among these protections is the requirement that any attorney, including a civilian one,54 represent a client with zealous advocacy.55 Moreover, to ensure the integrity of the proceedings, the DOD Order includes penalties for lawyers who breach the rules of the Commission.56 The section dealing with protections for the accused contains sixteen subsections mirroring the traditional rights afforded to the accused in a regular criminal proceeding57 and includes the right to a public trial.58 The Order also provides many different ways to protect witness testimony and other information, such as allowing the witness to testify by phone or other audiovisual means.59 Thus, although the Military Order does not explicitly guarantee many of the freedoms of a federal criminal trial as generally understood by Americans, the DOD Order goes to great lengths to balance liberty with security and ensures a fair process to the accused.

Section 9.6(b) of the DOD Order outlines the duties of the commission during the trial: providing a full and fair proceeding along with proceeding impar-

50 Id. at 921.
51 DOD Order, supra note 6.
52 See, e.g., id. § 9.4(a)(2) (number of members that will sit on the commission); id. § 9.4(a)(3) (All members will be members of the armed forces); id. § 9.4(a)(4) (Presiding Officer will be a Judge Advocate General Corps of the Armed Forces Officer); id. § 9.4(a)(5)(i) (Presiding Officer will have the authority to close proceedings).
53 Id. § 9.1.
54 Id. § 9.4(c)(2)(iii)(B).
55 Id. § 9.4(c)(2)(i).
56 Id. § 9.4(a)(5)(ii) (holding that a lawyer may be excluded from appearing before the commission if they engage in misconduct).
57 Id. § 9.5. The accused has the right to see a copy of the charges in his native language, be presumed innocent, be found guilty beyond a reasonable doubt, have council present with the right to cross examine and present witnesses and evidence, be appraised of all exculpatory evidence in possession of the prosecution, not to incriminate himself, to a full and fair trial, to be present at every stage of the proceedings, to not be subject to double jeopardy and for the trial to be open to the public. Id.
58 Id. § 9.5(a).
59 Id. § 9.6(d)(2)(iv).
tially and expeditiously. The DOD Order explicitly states that “[p]roceedings should be open to the maximum extent practicable[” and can be closed upon the Presiding Officer’s own initiative or by the ex parte request of council, provided that the appropriate conditions for the closure are present.

Section 9.6(d)(5) of the DOD Order directly affects the First Amendment right of access and addresses issues such as protective orders, limited disclosures, closure of proceedings, and protection of on the record information. Under the DOD Order, the Presiding Officer can issue a protective order to safeguard classified information, which includes any information that would endanger the physical safety of any proceeding participant, names of witnesses, intelligence sources, methods, activities, or “other national security interests.” Concerns that arise regarding information contained in a document can be addressed in several ways: the document may be redacted, a summary of the classified information may be provided, or a “statement of relevant facts that the [classified] information would tend to prove may” be provided to counsel. Finally, the DOD Order authorizes the Presiding Officer to order evidence containing classified information to be sealed and to limit review of that evidence to only “reviewing authorities in closed proceedings.”

III. HISTORIC FIRST AMENDMENT RIGHT OF ACCESS

A. Civilian Courts

In Richmond Newspapers, Inc. v. Virginia, the Supreme Court addressed the question of whether the First Amendment guarantees the press and the public alike—the right to access a criminal trial. The Court concluded that criminal proceedings carry a “presumption of openness,” reasoning that the right of access to a criminal trial was indispensable and necessary to preserve the freedoms historically guaranteed to all Americans. Furthermore, “the First

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60 Id. § 9.6(b)(1)–(2).
61 Id. § 9.6(b)(3) (emphasis added).
62 Id. § 9.6(d)(5)(i)(A)–(D).
63 Id. § 9.6(d)(5)(i)–(iv).
64 Id. § 9.6(a)(5)(i)(E).
65 Id. § 9.6(d)(5)(ii)(C).
66 Id. § 9.6(a)(5)(iv).
67 Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 (1980) ("We hold that the right to attend criminal trials is implicit in the guarantees of the First Amendment . . . .").
68 Id. at 573 ("[A] presumption of openness inheres in the very nature of a criminal trial under our system of justice.").
69 Id. at 580 ("[W]ithout the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and of the press could be eviscerated." (quoting Brazburg v. Hayes, 408 U.S. 665, 681 (1972))).
Amendment guarantees of speech and of the press standing alone prohibit government from *summarily* closing courtroom doors which had long been open to the public . . . .”

Two years later in *Globe Newspaper Co. v. Superior Court*, the Supreme Court further defined the press’s and public’s right to access criminal proceedings. The *Globe Newspaper Co.* Court struck down a Massachusetts mandatory closure rule pertaining to victims of sexual assault and upheld *Richmond Newspapers Inc.*’s contention that the press and general public have a constitutional right of access to criminal trials. The Court stated that “a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs.” The Court then undertook an historical analysis which harkened back to the practice of English courts and referred to the presumption of openness as “organic.” It further emphasized a “tradition of accessibility” in the American system of justice and the importance placed upon such openness by our forefathers. The need for public scrutiny of the judicial process was another argument advanced by the Court in favor of openness: “public access to the criminal trial fosters an appearance of fairness, thereby heightening public respect for the judicial process.”

Despite the seemingly endless endorsement of public criminal trials, the Court did not sustain the right as absolute, but instead crafted the right as a presumption that could be overcome. Indeed, the Court would allow closed proceedings that contained “sensitive information” if the state could prove the interest advanced could pass a strict scrutiny test. Nevertheless, a footnote in the decision made it clear that “time, place, and manner restrictions” would

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70 *Id.* at 576 (emphasis added).
72 *Id.* at 603.
73 *Id.* at 604.
74 *Id.* at 605.
75 *Id.*.
76 *Id.* at 606.
77 *Id.* (“Although the right of access to criminal trials is of constitutional stature, it is not absolute.”).
78 *Id.* at 607 (holding that the state must show a “[C]ompelling governmental interest, . . . [that] is narrowly tailored to serve that interest” if they wish to restrict access to a proceeding).
79 *Id.*
80 *Id.* at 607 n.17 (quoting *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 63 n.18 (1976)).
not have to pass a strict scrutiny test.\textsuperscript{81}

The \textit{Globe Newspaper Co.} Court objected to Massachusetts’ mandatory closure statute because it was overly broad.\textsuperscript{82} The State’s reasoning was rejected because there was no empirical evidence that such restrictions would protect victims of sex crimes from embarrassment or encourage others similarly situated to come forward.\textsuperscript{83} The Court found that such blanket closure, as the statute permitted, precluded the ability of the presiding judge to make individual findings and to decide each trial on a case-by-case basis, which was clearly the preferred method that the Court had earlier delineated.\textsuperscript{84}

Finally in 1986, in \textit{Press-Enterprise Co. v. Superior Court} (“\textit{Press-Enterprise II}”),\textsuperscript{85} the Court articulated a definitive two-part test for media access to the courtroom.\textsuperscript{86} The first part of the test, known as the “experience test,” presumes that there is a First Amendment right of access to criminal proceedings.\textsuperscript{87} It can be summarized as follows: proceedings cannot be closed unless specific, on the record findings are made demonstrating that “closure is essential to preserve higher values and is narrowly tailored to serve that interest.”\textsuperscript{88} The common theme of the test, both to the accused and to the public, is the “assurance[] of fairness.”\textsuperscript{89} When a defendant objects to closure, “the hearing must be open unless the party seeking closure advances an overriding interest that is likely to be prejudiced.”\textsuperscript{90} Under the test, a trial court must first determine whether there is a presumptive or historical right of access to the proceedings.\textsuperscript{91} The Supreme Court invoked historic English law and held such a right existed.\textsuperscript{92}

\begin{itemize}
\item \textsuperscript{81} \textit{Id.} (citing Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 581–82 n.18 (1980)).
\item \textsuperscript{82} \textit{Id.} at 610–11 (holding that a mandatory blanket closure rule is “unconstitutional.”).
\item \textsuperscript{83} \textit{Id.} at 610 (noting that the State of Massachusetts “offered no empirical evidence that blanket closure would encourage minor victims to come forward with their stories, nor could the state prove that such closure would foster cooperation between the victims and the state).\textsuperscript{84}
\item \textsuperscript{84} \textit{See id.} at 609 n.20.
\item \textsuperscript{85} \textit{Press-Enterprise II}, 478 U.S. 1 (1986).
\item \textsuperscript{86} \textit{Id.} at 8–9 (holding that some government processes, such as grand jury proceedings must be conducted in secret and “[it] takes little imagination to recognize that there are some kinds of government operations that would be totally frustrated in conducted openly.”).
\item \textsuperscript{87} \textit{Id.}
\item \textsuperscript{88} \textit{Id.} at 9–10.
\item \textsuperscript{89} \textit{Id.} at 7.
\item \textsuperscript{90} \textit{Id.} at 9.
\item \textsuperscript{91} \textit{Id.} at 8. The experience and logic test “consider[s] whether the place and process have historically been open to the press and general public.” \textit{Id.}
\item \textsuperscript{92} Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 (1980) (“[W]ithout the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and of the press could be eviscerated.” (quoting Branzburg v. Hayes,
The second part of the broader test is known as the “logic test.” This test asks “whether openness would play a positive role in the functioning of the process . . .” or if there “is a pertinent interest that requires closure.” Here, the trial court balances the interest being advanced by restricting access with the right of the press to broadcast the proceedings or the public to be informed of them as they are happening. If there is a historical right of access and access is deemed logical, then the proceeding is one that passes both prongs of the test, creating a presumptive, but not absolute, First Amendment right of access. Once the presumptive right of openness attaches, proceedings will only be closed if narrowly tailored interests are served.

The Press-Enterprise II Court also concluded that in addition to the actual trial proceedings, there is a presumptive First Amendment right of access to preliminary hearings. Such right of access, the Court reasoned, will provide “community therapeutic value,” give the public “confidence that standards of fairness are being observed,” allow deviations from standard practice to become known, and instill “confidence in the system.” Since the presumptive “First Amendment right of access attaches to [all such] proceedings[,] they cannot be closed unless specific, on the record findings are made demonstrating that ‘closure is essential to preserve higher values’ and is narrowly tailored to serve that interest.”

B. Military Courts

Military courts address issues relating to First Amendment rights of access

408 U.S. 665, 681 (1972)).
94 REPORTER’S COMM. FOR FREEDOM OF THE PRESS, supra note 17.
96 Id. at 9.
97 Id. (“[The] presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.”).
98 Id. at 10.
99 Id. at 13 (determining that since violent crimes often “provoke public concern, outrage and hostility” the public is provided a healthy outlet when they know that the law is being enforced).
100 Id. (holding that the mere allowance of public viewing will be able to assure those unable to attend the trial that established procedures are being followed).
101 Id.
102 Id. (finding that openness enhances both the fairness of the trial as a whole and that appearance of fairness that is so integral to the functioning of our justice system).
103 Id. at 13–14, (holding that one such “higher value” could be the defendant’s right to a fair trial (quoting Press-Enter. Co. v. Superior Court (Press-Enterprise I), 464 U.S. 501, 510 (1984))).
104 Id.
in a similar manner. In *United States v. Grunden*, the U.S. Court of Military Appeals held that the right to a public trial is required during courts-martial proceedings, but the court also recognized that the right is not absolute. In addition, the court’s opinion construes the public right of access more narrowly than does the Supreme Court. Although the *Grunden* court noted that exceptional circumstances could result in closure, it still required that such instances be held sparing in order to ensure that the “emphasis [is] always toward a public trial.”

Despite adhering to the presumption of openness, the *Grunden* court observed that if classified information might be disclosed “all spectators may be excluded from an entire trial, over the accused’s objection . . . .” Though the court did not approve the blanket exclusion of spectators under the specific facts of *Grunden*, the court did observe that a compelling showing could approve such a practice if shown that “such was necessary to prevent the disclosure of classified information.”

Although it adhered to the balancing test outlined in *Richmond Newspapers, Inc.* and *Press-Enterprise II*, the *Grunden* court acknowledged the uniqueness of the military society. In developing its right of access test, known as the “*Grunden Test*,” the *Grunden* court stressed the importance of this uniqueness by highlighting the need to protect national security information. The *Grunden* court noted that classified information and national security secrets is an acceptable reason for closure. It further gives explicit textual authority in its decision regarding this matter.

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105 *United States v. Grunden*, 2 M.J. 116 (C.M.A. 1977). Though *Grunden* deals with a defendant’s Sixth Amendment right to a public trial, the decision provides the most adequate test available that addresses concerns of access. The facts in *Grunden* are similar to a military tribunal situation and therefore an interesting analogy can be made with First Amendment rights. Though the First Amendment right of access is not mentioned in this case, the same concerns and considerations surround the application of both amendments and therefore lends itself to an apt analogy.

106 *Id.* at 121.

107 *Id.* at 120.

108 See *id.* Here the court lists specific persons that courts have “long held” have been able to attend such proceedings and includes friends, relatives the accused’s attorney. The list does not include the press or general public (citing *United States v. Brown*, 7 C.M.A. 251, 256 (C.M.A. 1956)).

109 See *id.* at 120–21. Here the court explicitly recognizes that the preservation of classified information and national security secrets is an acceptable reason for closure. It further gives explicit textual authority in its decision regarding this matter.

110 *Id.* at 121.

111 *Id.*

112 *Id.* at 121–22 (because of such differences this case proposed a different test when classified information or matters of national security may be involved. The court held that the judge’s “initial task is to determine whether the perceived need urged as grounds for exclusion of the public is of sufficient magnitude so as to outweigh ‘the danger of a miscarriage of justice which may attend judicial proceedings carried out in even partial secrecy.’” (quoting Stamicarbon, N.V. v. Am. Cyanamid Co., 506 F.2d 532, 539 (2d Cir. 1974)).

113 *Id.* at 122 (“[S]pecial deference should be accorded matters of national security.” (quoting Ethyl Corp. v. EPA, 478 F.2d 47 (4th Cir.1973)); see also *id.* at 122 (If a judge
den Test requires a military judge to conduct a closed preliminary hearing during which the prosecution details what material is classified, where they anticipate such material to be involved in the case,\textsuperscript{114} and the scope of the exclusion of the public.\textsuperscript{115} The proper balance between secrecy and exclusion is struck only when the exclusion of the public is circumscribed to the portions of the testimony that contain classified information.\textsuperscript{116}

In \textit{ABC, Inc. v. Powell},\textsuperscript{117} and \textit{United States v. Scott},\textsuperscript{118} two U.S. military courts of appeals recognized a limited First Amendment right of access. In Powell, the court concluded that "[e]very case that involves limiting access to the public must be decided on its own merits . . . [and] the scope of closure must be tailored to achieve the stated purposes and should also be ‘reasoned’ [and] not ‘reflexive.’"\textsuperscript{119} The court was unequivocal: "Today we make it clear that, absent ‘cause shown that outweighs the value of openness,’ the military accused is likewise entitled to a public Article 32\textsuperscript{120} investigative hearing."

Blanket closures that dispense with specific on the record findings will rarely survive a First Amendment challenge. In United States v. Scott, the court found that a trial judge abused his discretion when he ordered an entire factual stipulation sealed without first making specific factual findings on the record as to his reasoning.\textsuperscript{122} Quoting \textit{Richmond Newspapers, Inc., Press-Enterprise}, finds that the inclusion of certain evidence would expose matters of concern to national security, he is free to exclude the public from their revelation).

\textsuperscript{114} \textit{Id.} at 122. This pre-trial hearing should be held on a case-by-case basis and will determine the differing levels of closure and restriction required. In this hearing, the government "must demonstrate that it has met the heavy burden of justifying the imposition of restraints on this constitutional right." \textit{Id.} The court held that "[the party seeking closure] can do so by demonstrating the classified nature of the materials in question." \textit{Id.}

\textsuperscript{115} \textit{See id.} at 123. The Court held that is it necessary for the judge to analyze not only which witnesses’ testimony will involve classified material but also what specific portions of their testimony will involve such material.

\textsuperscript{116} \textit{Id.} ("This bifurcated presentation of a given witness’ testimony is the most satisfactory resolution of the competing needs for secrecy by the government, and for a public trial by the accused.").


\textsuperscript{118} 48 M.J. 663 (A. Ct. Crim. App. 1998); see also \textit{CYS, supra} note 117.


\textsuperscript{120} \textit{See generally} Uniform Military Code of Justice, 10 U.S.C. § 832 \textit{et seq.} (2000); see also \textit{id.} § 832(a) ("[The purpose of an Article 32 investigation is to] inquir[e] as to the truth of the matter set forth in the charges, consideration of the form of charges, and a recommendation as to the disposition which should be made of the case in the interest of justice and discipline.").

\textsuperscript{121} \textit{Powell, 47 M.J.} at 365 (quoting Press Enter. Co. v. Superior Court, 464 U.S. 501, 509 (1984)).

\textsuperscript{122} 48 M.J. at 667.
and Grunden, the Scott court clearly described its rationale for an open hearing:123

It is clear that the general public has a qualified constitutional right under the First Amendment to access to criminal trials . . . [and] this access applies with equal validity to trials by court-martial. The Manual for Courts-Martial generally provides that “courts-martial shall be open to the public” . . . [and] [o]pening courts-martial to public scrutiny “reduces the chance of arbitrary or capricious decisions and enhances public confidence in the court-martial process.124

Closure would only be considered appropriate if the presiding judge felt there was an “overriding interest” justifying closure.125 The Powell court articulated a four-part balancing test:

(1) the party seeking closure must advance an overriding interest that is likely to be prejudiced; (2) the closure must be narrowly tailored to protect that interest; (3) the trial court must consider reasonable alternatives to closure; and, (4) [the trial court] must make adequate findings supporting the closure to aid in review.126

In United States v. Scott, the court added the additional requirement of explicit on the record findings to justify disclosure. This requirement added extra protection to the process and ensured aid in defense of the decision should an appeal ensue. After reviewing the facts, the Scott court concluded that the trial court’s closure did not survive for several reasons. First, the trial judge sealed the entire stipulation when none of the parties so requested.127 Second, the judge failed to make factual findings on the record to justify his closure, and therefore, it could not be said that such an order was narrowly tailored to serve the interests of the party seeking closure.128

IV. MILITARY TRIBUNALS VERSUS CRIMINAL PROCEEDINGS

A. Why Right of Access Must Differ

There are several reasons why traditional First Amendment right of access should not be extended to military tribunals. First, the Supreme Court has historically manifested approval of the military system of justice.129 There is no evidence that any military court would endanger the rights of those it tried. Second, unlike military servicemen or prisoners of war who are protected by

123 Id.
124 Id. at 665.
125 Id. at 666 (quoting Press-Enter. Co. v. Superior Court, 464 U.S. 501 (1984)).
126 Id. (brackets in original).
127 Id.
128 Id. at 666–67.
the Geneva Convention, non-citizen enemy combatants do not abide by the rules of war and do not merit such protections.130 Third, American citizens will not be under the jurisdiction of military tribunals. Instead, only non-citizen enemy combatants who do not enjoy the same rights as citizens may be subjected to a tribunal’s jurisdiction.131 Fourth, the DOD Order, the implementing document for military tribunals, does not allow for blanket closure without appropriate findings.132 All previous court decisions mandate this appropriate balance. Fifth, terrorists (and other non-citizen enemy combatants) are capable of higher levels of destruction than average criminals and are so dissimilar to them that the process under which the government brings them to justice must recognize this and provide the public with extra security.133 Sixth, there are many indications in the DOD Order that the government intends tribunals to be open proceedings to the fullest extent possible.134 The public and press should therefore be more willing to afford them the parsed secrecy they so desire instead of demanding tribunals strain traditional rules of access around the frame of a forum for which they were never intended.

I. There Is Recognized Confidence in the Military System of Justice

The military system of justice, operating under the Uniform Code of Military Justice,135 was created with guidance from Congress. The Supreme Court, in Schlesinger v. Councilman, pronounced its faith in the ability of this system to be fair by characterizing it as one “carefully designed to protect not only military interests but [a defendant’s] legitimate interests as well.”136 The Court continued: “deference . . . should be accorded [to] the judgments of the carefully designed military justice system established by Congress.”137 In a most

130 See Geneva Convention Relative to the Treatment of Prisoners of War art 4, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (in order to be eligible to receive the protection of a prisoner of war, “members of other militias [or] volunteer corps., including those of organized resistance movements [must] . . . be commanded by a person responsible for his subordinates . . . have a fixed distinctive sign recognizable at a distance . . . carry arms openly [and] . . . conduct . . . operations in accordance with the laws and customs of war”).

131 Military Order, supra note 6, at 919 (“The term ‘individual subject to this order’ shall mean any individual who is not a United States citizen . . . .”).

132 DOD Order, supra note 6, § 9.6(b)(3). Appropriate closure can be undertaken to protect classified information, a participant’s or prospective witness’s physical safety, and “other national security interests.” Id. But the Military Order explicitly states that “[p]roceedings should be open to the maximum extent practicable.” Id. (emphasis added).

133 See Ruth Wedgwood, The Case for Military Tribunals, WALL ST. J., Dec. 3, 2001, at A18 (recognizing that over 3,000 lives were lost on September 11th and describing Bin Laden’s appetite for violence and revenge as “gargantuan.”).

134 See DOD Order, supra note 6, § 9.6(b)(3).


137 Id. at 753.
striking endorsement of military justice, the Court wrote, “[I]t must be assumed that the military court system will vindicate servicemen’s constitutional rights.”

Recently, intellectuals with divergent views have found common ground on the issue of the ability of military tribunals to try non-citizen military combatants. Writing for the National Review, Judge Robert Bork called military courts “superior to the run of civilian courts, more scrupulous in examining the evidence and following the plain import of the law.” In addition to Judge Bork’s comments and the endorsement from the Supreme Court in Schlesinger, Harvard University constitutional law professor Laurence H. Tribe notes that “[w]e consider military tribunals sufficiently impartial to judge our own military personnel accused of crimes. Why should members of Al Qaida and those who aid them enjoy a constitutional right to a theoretically purer form of justice than our own soldiers?”

2. The Geneva Convention Does Not Apply to Members of Al Qaida

A crime committed in the United States by a citizen of one state against a citizen of another state may find its way to federal court. The defendant will be given a whole host of rights during the course of his trial. Since criminal proceedings in the United States are traditionally open to the public, the trial will be publicly accessible to private citizens and exposed to the scrutiny of the media. This openness will ensure “respect for the judicial process,” will assure the public of the proceedings’ fairness, and will “serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion.” Both Richmond Newspapers, Inc. and Globe Newspaper Co., citing the traditional First Amendment right of access cautioned against blanket closure of criminal proceedings. Defendants facing a military tribunal, however, are not quite in the same position and therefore should not be tried

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138 Id. at 759.
139 See Bork, supra note 129, at 18.
141 See Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 573 (1980) (“[A] presumption of openness inheres in the very nature of a criminal trial under our system of justice.”); see also Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 605 (1982) (“[T]he criminal trial historically has been open to the press and general public.”).
142 Globe Newspaper Co., 457 U.S. at 606.
143 Richmond Newspapers, Inc., 448 U.S. at 571.
144 Id. at 576 (“The First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors which had long been open to the public at the time that Amendment was adopted.” (emphasis added)); see also Globe Newspaper Co., 457 U.S. at 608 (holding that even the compelling interest of the statute did not justify mandatory closure).
under the same rules.

It would be difficult to argue that members of Al Qaida are not “unlawful combatants” as defined under Ex parte Quirin, and that they do not attack Americans with the purpose of causing immense destruction to life or property. It would be equally impossible to demonstrate what Al Qaida “uniforms” look like. Under Ex parte Quirin’s definition of who is eligible to be tried by military tribunal, it is clear that members of Al Qaida are eligible.

It is equally clear that they should not be treated as prisoners of war (“POW”) under the Geneva Convention. To be treated as such, combatants must at a minimum, “(1) be commanded by a person responsible for subordinates; (2) have a fixed and distinctive emblem recognizable at a distance; (3) carry arms openly; and (4) operate in accordance with the laws and customs of war.”

Al Qaida members should not be given the benefit of POW status for several reasons. First, although Al Qaida is led by heads and commanders “[t]his organizational structure should not be read as defining a hierarchical chain of command . . . [instead] it serves as a means for coordinating functions and providing material support to operations.” Today Al Qaida is best described as “a loose collection of regional networks with a greatly weakened central organization.” Al Qaida is a guerilla terrorist organization, not an army that answers to a chain of command. Second, operational secrecy is one of the network’s primary and favored methods of organizing attacks. They have no recognizable uniforms and rarely carry weapons openly. Finally, Al Qaida makes no attempt to comply with the law of war that forbid the targeting of civilians. Their “choice to carry out the [September 11th] attacks during the

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145 See supra note 24.
146 Id. One of the principle differences between unlawful belligerents and soldiers, that are entitled to the full protection of the Geneva Convention, is that belligerents “secretly and without uniform pass[] the military lines . . . in time of war . . . .” (emphasis added).
147 See Geneva Convention Relative to the Treatment of Prisoners of War, supra note 130; see also Wedgwood, supra note 133 (“[Al Qaida] disregarded two fundamental principles of morality and law in war—never deliberately attack civilians, and never seek disproportionate damage to civilians in pursuit of another objective.”).
149 Id.
150 Id. at 11 (“The organization is far more decentralized. Bin Laden’s seclusion forced operation commanders and cell leaders . . . to make[] . . . decisions previously made by him.”).
151 Id. Al Qaida operatives have perpetrated numerous attacks on the United States since the early 1990s but until recently, most high-ranking officials have successfully evaded capture.
152 Id. at 3, 11.
morning rush hour, reveals this fact.”

By providing members of Al Qaida with the same protections given to soldiers who follow the rule of law, our system of justice would be providing a disincentive to soldiers to act within the structures of the Geneva Conventions during combat. As put by David Rivkin, Jr., a member of the United Nations Sub-Commission on the Promotion and Protection of Human Rights:

There have to be distinctions between how you treat POW’s and Non-POW’s. Non-POW’s get the floor, POW’s get the ceiling. There has to be some difference between the two . . . . [N]ot everybody is created the same and it’s not a question of inhumanity, it’s a question of profound symbolism and an effort to delegitimize these people.

3. Only Non-Citizens Will Be Tried by Tribunal

The only persons that may be tried by a military tribunal are non-citizens. The fear that an average American would ever be subjected to a military tribunal is unfounded. The current test for trying a defendant before a court-martial is “one of status, namely, whether the accused in the court-martial proceeding is a person who can be regarded as falling within the term ‘land and naval Forces.’” Just as jurisdiction of courts-martial is based on classification as a member of the armed forces, jurisdiction for military tribunals would be based on classification as an “unlawful combatant” and “non-citizen.” A person dressed in military garb, committing a crime that stems from his military responsibilities during a time of war would be the most likely candidate to be

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153 Wedgwood, supra note 133.

154 POW is an abbreviation for prisoner of war. The term is defined as “[a] person [usually] a soldier, who is captured by or surrender to the enemy in wartime.” BLACKS’ LAW DICTIONARY 1233 (8th ed. 2004).


156 See supra note 130 and accompanying text.

157 See Solorio v. United States, 483 U.S. 435, 439 (1987) (quoting Kinsella v. United States, ex rel. Singleton, 361 U.S. 234, 240–41 (1960)) (“Without contradiction, the materials . . . . show that military jurisdiction has always been based on the ‘status’ of the accused, rather than on the nature of the offense.”). Even though Solorio was a court-martial and not a military tribunal, the argument in Solorio that jurisdiction should be based on status can easily be extended to military tribunals, which arguably more closely resemble court-martial than do regular criminal proceedings.

158 See Ex parte Quirin, 317 U.S. 1, 30–31 (1942).

159 See Military Order, supra note 6, at 919 (persons subject to the order include but are not limited to those who are or were “at relevant times” members of Al Qaida, those who engage in, aid, abet, or conspire to commit acts of international terrorism or those who harbor such individuals); see also id. (“The term ‘individual subject to this order’ shall mean any individual who is not a United States citizen . . . .”).
tried by a tribunal.\textsuperscript{160} A citizen committing a domestic crime does not fit this description.

The Military Order was not designed to retain a jurisdictional reach over ordinary citizens; instead, it asserts jurisdiction primarily over members of Al Qaeda who engage in international terrorism and those who render assistance to them.\textsuperscript{161} Domestic crimes are specifically excluded.\textsuperscript{162} Further, “non-citizens do not have the same Constitutional rights as citizens—they are not allowed to vote, not allowed to remain in the country without the proper documentation, not allowed to remain indefinitely—and as such are subject to more intense scrutiny.”\textsuperscript{163} “[T]here is no Constitutional obligation to allow aliens in the country in the first place,” says Mike Ramsey, University of San Diego, School of Law professor.\textsuperscript{164} Therefore, even though the DOD Order provides defendants most of the legal protections guaranteed to citizens, and seeks to ensure “a full and fair trial,” the protections provided are not required to be identical.\textsuperscript{165}

4. Military Commission Guidelines Do Not Allow for Blanket Closure

The majority of the statutes and proceedings struck down in the First Amendment case law referenced above were situations where statutes or judges mandated blanket closure of the proceedings without engaging in indi-
individual fact-finding or examining the circumstances before them. In *Richmond Newspapers, Inc.*, the Supreme Court struck down the Virginia Supreme Court’s decision to uphold the right of a judge to close criminal proceedings in a murder trial. Defense counsel, frustrated with previous problems of information being leaked to the media and the delay of three previous trials, convinced the trial judge to close the trial because the first three attempts by the state to convict the defendant were overturned for a variety of reasons. However, on appeal, the closure order was overturned because no specific on the record findings were made regarding the closure and “absent an overriding interest articulated in findings, the trial of a criminal case must be open to the public.”

In *Globe Newspaper Co.*, the Supreme Court struck down a Massachusetts law that closed proceedings in cases where minors had been sexually assaulted. The Commonwealth argued that the statute encouraged minors to come forward with charges of abuse and protected them from the risks of psychological harm. Though the Court recognized this legitimate state interest, they held that the statute was not tailored narrowly enough to survive a First Amendment challenge. The *Globe Newspaper Co.* Court condemned the statute for permitting blanket closure of the proceedings, especially when the state could not empirically prove that the statute encouraged victims to come forward.

The DOD Order, unlike the closures at issue in the preceding two cases, does not provide for the blanket or mandatory closure that *Globe Newspaper Co.* and *Richmond Newspapers, Inc.* prohibit. In fact, the DOD Order specifically mandates that “[p]roceedings should be open to the maximum extent practicable.” The DOD Order places the question of closure in the hands of

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166 Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 576 (1980) (“[T]he First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors which had long been open to the public at the time that Amendment was adopted.” (emphasis added)); see also Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 608 (1982) (holding that even the compelling interest of the statute did not justify a mandatory closure rule).

167 *Id.* at 581.

168 *Id.* at 596.

169 *Globe Newspaper Co.*, 457 U.S. at 596.

170 *Id.* at 598.

171 *Id.* at 610–11.

172 *Id.* at 609 (“The Commonwealth has offered no empirical support for the claim that the rule of automatic closure . . . will lead to an increase in the number of minor sex victims coming forward and cooperating with state authorities.”).

173 See DOD Order, *supra* note 6, § 9.6(d)(5)(i)(A)–(E). The Order specifically delineates when appropriate closure can be undertaken, such as to protect classified information, the physical safety of participants or prospective witnesses and for other concerns. *Id.* § 9.6(b)(3).

174 *Id.* § 9.6(b)(3) (emphasis added).
the Presiding Officer, who would be hard-pressed to justify a blanket order that purports to restrict access to the entire proceeding.\footnote{Id. § 9.4(a)(5)} The Order contains numerous provisions for protecting witnesses, testimony, and information.\footnote{Id. § 9.6(b)(3) (provision for closing proceedings); id. § 9.6(d)(2)(i) (provision for protection of witnesses); id. § 9.6(D)(5)(i)(A) (provision for protecting information).} This cumulatively indicates that the Presiding Officer must be flexible in determining which portions of the proceedings can be open and which must be closed. By detailing when closure is appropriate and when it is not, and by explicitly allowing for the attendance of the public and the press, and for the release of transcripts,\footnote{Id. § 9.6(b)(3).} the guidelines for military tribunals, when invoked to protect a demonstrable piece of national security information, would undoubtedly survive the required standard of strict scrutiny.\footnote{See Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 (1982) (holding that the state must show a “compelling governmental interest” that is “narrowly tailored to serve that interest” if they wish to restrict access to a proceeding).}

5. Terrorist Threat: Greater Threat Warrants Greater Restriction

The aforementioned cases that guarantee a First Amendment right to a public trial all involve domestic common law and statutory crimes, such as robberies, rapes, or murders. Military tribunals are reserved for non-citizen enemy combatants who violate the laws of war.\footnote{BLACK’S LAW DICTIONARY defines “law of war” as: The body of rules and principles observed by civilized nations for the regulation of matters inherent or incidental to the conduct of public war, such as the relations of neutrals and belligerents, blockades, captures . . . prisoners, and declarations of war and peace. BLACK’S LAW DICTIONARY 895 (8th ed. 2004).} These are crimes on a larger scale\footnote{See Kevin Drew, Tribunals Break Sharply from Civilian Courts, CNN.COM, Dec. 7, 2001, http://edition.cnn.com/2001/LAW/12/06/inv.tribunals.explainer/ (“These are not ordinary criminal defendants, in the sense that even someone who commits a grievous crime as an isolated murder does not have as their fundamental purpose bringing down an entire society.”).} which are historically tried by the military\footnote{See Wedgwood, supra note 133.} under the law of nations. Each case that ensures the right to an open trial under the First Amendment is a case dealing with common law crimes, a fact pointed out by Chief Justice Burger in a footnote to \textit{Richmond Newspapers, Inc.}’s holding.\footnote{See Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 574 n.9 (1980) (quoting \textit{In re Oliver}, 333 U.S. 257, 266 (1948)) (“[W]e have been unable to find a single instance of a criminal trial conducted in camera in any federal, state or municipal court during the history of this country. Nor have we found any record of even one such secret criminal trial in England.”).} Previous case law has textually circumscribed the First Amendment right to
a public trial to criminal trials only. A trial is not a tribunal; the two are different in procedure and concern. Trials take place in time of peace and try citizens for ordinary criminal offenses. “They are built for a system that would rather see 100 guilty men go free than to convict one innocent accused.”

Article III courts “are skewed toward acquitting the guilty.” This is laudable for peacetime America, but wholly unsatisfactory in a war against terrorism that has already resulted in the loss of thousands of lives, leaving untold thousands or millions in further jeopardy.

Unlike trials, tribunals are reserved solely for non-citizen enemy combatants during the backdrop of an armed conflict. Tribunals further contain the added danger that these defendants, if released, will likely return to the battlefield, taking up arms against the country that chose to free them. It is worth noting that Ex parte Quirin, the case that upholds the constitutionality of military tribunals, was, unlike Article III proceedings, closed to the public.

Alternatively, some may contend that because of the enormous magnitude of the offense perpetrated, terrorist trials should be afforded more access than regular criminal proceedings. Such crimes are often gruesome and usually provoke severe public outrage. Some may argue that this heightened emotional response makes the need for public exposure that much greater, so as to ensure fairness of process. Although such oversight is important, an argument in favor of unfettered expansion is specious as it only considers one side of the equation. Most notably, such arguments forget that the test of access needs to balance the right of access with the need for closure.

183 Tribe, supra note 140, at 20 (“The old adage that it is better to free 100 guilty men than to imprison one innocent describes a calculus that our Constitution . . . does not impose on government when the 100 who are freed belong to terrorist cells that slaughter innocent civilians . . . .”).


185 Id.

186 Gordon England, Secretary of the U.S. Navy, Special Defense Department Briefing on Status of Military Tribunals (Dec. 20, 2004), http://www.defense.gov/transcripts/2004/tr20041220-1841.html (“There’s been at least 12 . . . detainees that have been . . . released . . . from Guantanamo that have indeed returned to terrorism . . . .”); see also Video tape: Symposium on the Geneva Convention and the Rules of War in the Post-9/11 and Iraq World (Mar. 24, 2005) (comments of Colonel Manuel Supervielle, Executive Officer and Special Counsel to the Office of General Counsel, Department of the Army) (“The single biggest concern, overriding everything else, was the safety of our troops who were guarding these guys in Guantanamo. This is not a case of the traditional enemy prisoner of war from a nation state. These guys, many of them said ‘we will continue to try to kill you if given the opportunity.’”) (video on file with American University’s Pence Law Library).

187 See REPORTER’S COMM. FOR FREEDOM OF THE PRESS, supra note 17.

188 See United States v. Grunden, 2 M.J. 116, 121–22 (C.M.A. 1977) (proposing a different test when classified information or matters of national security may be involved. The court held that the judge’s “initial task is to determine whether the perceived need urged as
prong comes at the detriment of the other and possibly the entire process. The Military Order\footnote{189} recognizes the need for balancing both considerations of public assurance of fairness and protection of sensitive information. In doing so, it strikes a correct balance between both sides. The DOD Order provides for public oversight and stresses the need for an open process\footnote{190}, but it does not do so blindly.\footnote{191}

6. Tribunal Proceedings Will Be Predominantly Open

In addition to the express language found in the Military Order, there are other indicators that military officials anticipate these tribunals to be public. First, the DOD Order’s emphasis on the maintenance of open proceedings is in line with the language of Powell\footnote{192} that absent “‘cause shown that outweighs the value of openness,’ the accused is entitled to a public trial.” Second, there is a media center contained in the facility at Guantanamo Bay, to which members of the press have access.\footnote{193} Unless such access was anticipated and encouraged, there would have been no need to provide such a facility. In this facility, members of the press have the right to observe proceedings through a delayed video feed.\footnote{194} The delay is present to allow the feed to be cut off if a defendant were to reveal classified information.\footnote{195} General Hemingway, Legal Advisor to the Appointing Authority, Office of Military Commissions, for the DOD explains:

[T]here is a time delay on the feed to the remote installation where the media are also viewing. That’s done for national security reasons. And if there is improper disclosure of secure or classified information during the course of the proceedings, the commission room would have to immediately be cleared. And of course, people who were in there would have to be given a cautionary instruction.\footnote{196}

\footnote{189} Military Order, \textit{supra} note 6, at 918.
\footnote{190} DOD Order, \textit{supra} note 6, § 9.6(b)(3).
\footnote{191} The mechanisms the DOD Order employs to ensure the balance between openness and the protection of sensitive information are discussed in length in the next section.
\footnote{194} \textit{Id}.
\footnote{195} \textit{Id}.
\footnote{196} \textit{Id}.
B. Traditional Rules of Access Cannot Adequately Deal With Terrorist Trials

Federal courts and traditional rules of access are not equipped to deal with the myriad of new safety concerns that arise when terrorists are on trial in Article III courts. Terrorist trials of this sort pose an immense threat to juror safety. In addition, a proceeding in open federal court would provide terrorists not only a forum in which to expound their message of hate and evil against the West, but also a convenient “bully pulpit” in which to instruct other members of their groups to commit more terrorist attacks. Because of these concerns, very few trials of this nature have ever been tried in a federal court.

Perhaps the most compelling argument for closure is the necessity of guarding against the dissemination of classified and potentially damaging information in the public record, which an Article III court would inevitably have to provide. Should transcripts containing classified information become available for terrorists to see, it would be tantamount to aiding the enemy. Also, federal judges lack experience in dealing with certain military matters, such as the detention of enemy combatants and protecting classified information.

When not properly considered, these concerns can be damaging not only to trial participants but to the security of the country as well. Terrorists and criminal defendants do not pose equal threats to society. The concerns surrounding the trial of the former are simply not present when the latter is on trial. Therefore, while recognizing that the regular criminal defendant retains a First Amendment right to a public trial, the concerns surrounding the trial of terrorists are too dissimilar to allow the same procedures to be used.

I. Traditional Right of Access Could Endanger Trial Participants

Terrorists have the potential to compromise the safety of the judge, the prosecutor, and the jury—all of whom may become potential terrorist targets not only during the process, but also for the rest of their lives. In a regular criminal proceeding, the press and public have a right to access the entire trial proceedings including the voir dire process and the names of the individual jurors once each is chosen. In these types of trials, such routine disclosures are generally not of much concern, but when the defendant is a terrorist who

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197 See Wedgwood, supra note 133.
198 Bork, supra note 129, at 18.
199 See Wedgwood, supra note 133.
200 Id.; see also Bork, supra note 129, at 18.
201 Clemmons, supra note 184, at 31; see also Wedgwood, supra note 133.
may retain control over a covert terrorist cell operating in the area, the potential for harm to the juror, the judge, and their family members is compounded exponentially. Professor Ruth Wedgwood considers a frightening, albeit possible, consequence of trying terrorists in federal court:

It is hard to imagine assigning three carloads of federal marshals, rotated every two weeks, to protect each juror for the rest of his life. An Al Qaeda member trained in surveillance can easily follow jurors home, even when their names are kept anonymous. Perhaps it is only coincidence that the World Trade Center towers toppled the day before Al Qaeda defendants were due to be sentenced for the earlier bombings of East Africa embassies—in a federal courthouse in lower Manhattan six blocks away.203

The Presiding Officer in a military tribunal has the option of keeping the selection and identity of jurors secret, an option federal judges generally do not retain.204 Even if the selection of jurors in a federal trial was closed and trial participants’ names were kept anonymous, there would be no assurance of their safety. A military tribunal sits on an American military base or at an undisclosed location, making safeguarding each juror’s identity much more manageable. Further, and perhaps more compelling, tribunals consist of a jury comprised wholly of members of the armed forces who are well versed in the operations surrounding the war on terrorism and fully realize its breadth. It makes more “sense to place this process in the hands of those trained professionals who have volunteered to fight the war on terrorism[,]” than to place it in the form of a target on the back of an average American and his family.205

2. Traditional Rights of Access Provides Terrorists With a “Bully Pulpit”

In addition to the safety of the trial participants, allowing the general public and the media access under the traditional rules would provide terrorist defendants with an audience to whom to preach. We cannot allow the First Amendment to provide a dangerous “bully pulpit,” for terrorists from which to preach their message of hate against the West and possibly stir others to commit more terrorist attacks206 or to complicate relations between the United States and other Islamic governments.207 The closed proceedings of a military tribunal can

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203 Wedgwood, supra note 133.
204 See id.
205 Clemmons, supra note 184, at 31.
206 Bork, supra note 129, at 18 (claiming that an open trial “covered by television, would be an ideal stage for an Osama bin Laden to spread his propaganda to all the Muslims in the world.”); see also Clemmons, supra note 184, at 31 (“[P]ublic trials serve as a bully pulpit for terrorists who want to claim martyrdom and incite further violence.”); Tribe, supra note 140, at 20 (“Nonmilitary trials grant an extended pulpit to an accused [who is] . . . capable of stirring others to further acts of violent terror.”).
207 Bork, supra note 129, at 18 (as a result of a publicized trial “[m]any Islamic governments would likely find that aroused mobs make it impossible to continue cooperating with the U.S.”).
help guard against these problems by providing a filter between the terrorists’ messages and whom they will reach. By prohibiting videotaping, audio recording, or any other instantaneous type of transmission of the proceedings\textsuperscript{208} a military tribunal limits transmission of the proceedings to second-hand non-verbatim communication, either through the notes of a journalist or the memory of an observer. By limiting the dissemination of information in this way, it is less likely that terrorist messages will be effectively spread directly or unknowingly through newspaper reports.

Besides placing much needed restrictions on public access to tribunals, the DOD Order guarantees the right of the accused to be present at every proceeding but limits that right by allowing for his removal if he engages in “disruptive conduct.”\textsuperscript{209} This provision, obviously aimed at preventing the accused from preaching potentially dangerous messages in the courtroom, demonstrates once again how the DOD Order guidelines recognize First Amendment rights for the accused, but also has built-in balancing devices that federal courts do not.

3. Traditional Rights of Access and Inexperienced Judges Cannot Protect Classified Information

Finally, and perhaps the most compelling reason that the rules governing military tribunals must differ from the traditional access, is the need to protect classified information and its collection methods. These subjects will inevitably be a major part of any terrorist trial and require particular attention. Generally, regular criminal proceedings are not fraught with matters of national security and do not contain reams of classified evidence and information. Most federal judges and juries do not have the requisite security clearance to access classified information that a tribunal Presiding Officer and military jury have.\textsuperscript{210} Furthermore, it is doubtful that many federal judges have the experience to deal with such information.\textsuperscript{211} It is not contended that no federal judge has ever accessed classified information. However, since knowledge of sources and methods of intelligence collection, along with the information gathered from them are of great value to the United States,\textsuperscript{212} it is more logical to limit dissemination of such sensitive information to persons who are exposed to it on a daily basis and to those familiar with procedures for its handling.

\begin{footnotes}
\item 208 See DOD Order, supra note 6, § 9.6(b)(3).
\item 209 Id. § 9.5(k).
\item 210 See Clemmons, supra note 184, at 31.
\item 211 Wedgwood, supra note 133 (explaining that federal judges have never heard these types of case).
\item 212 Clemmons, supra note 184, at 31 (calling the protection of sensitive and classified information “important to protect our national security interests”).
\end{footnotes}
Traditional First Amendment rules of access, applicable in Article III courts, are comparably ill-equipped to address national security concerns, as those rules do not permit closure to protect sensitive but unclassified information.\textsuperscript{213} Such rules would require witnesses to testify in open court about the substantive nature of the intelligence, how it was gathered, and from whom.\textsuperscript{214} In a recent article, Judge Bork quotes Charles Krauthammer, a Pulitzer Prize-winning journalist for the Washington Post, in detailing a chilling consequence of applying traditional First Amendment rights of access to terrorist trials: “In the trials of the bombers of our embassies in Africa, the prosecution had to reveal that the United States had intercepted bin Laden’s satellite phone calls: ‘As soon as that testimony was published, Osama stopped using the satellite system and went silent. We lost him. Until Sept. 11.’”\textsuperscript{215}

Dissemination to the press and public of the testimony of agents who gather information on terrorist defendants would invariably also reach other terrorists. Such dissemination would almost assuredly result in the devastating consequences like those that resulted from disclosing the federal government’s awareness of Osama Bin Laden’s satellite communications. Revealing sensitive information in such a manner would be ill-advised and tantamount to aiding the enemy.\textsuperscript{216} As Professor Wedgwood puts it, “[e]ndangering America’s cities with a repeat performance is a foolish act.”\textsuperscript{217} Traditional treatments of the First Amendment are simply unworkable to protect classified information in the context of a terrorist trial. National security concerns surrounding evidence and testimony are too plentiful to allow similar access to these proceedings.

V. FIRST AMENDMENT RIGHT OF ACCESS TESTS: ADEQUACIES AND INADEQUACIES

The case law pertaining to the First Amendment right of access to the courts is lengthy, and the tests set forth to protect and guarantee that right are numerous. These tests have been applied in abundance to courts-martial proceedings, but military courts have yet to speak on the application of these tests to military tribunals. Yet, the application of these tests to the military tribunal have been lacking does not mean that the framework set forth in some of these cases is impractical or unnecessary. Although not all of the tests employed by courts

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\textsuperscript{213} Wedgwood, supra note 133 (“The 1980 Classified Information Procedures Act . . . doesn’t permit closing the trial or the protection of equally sensitive unclassified operational information.”).
\textsuperscript{214} See Bork, supra note 129, at 18.
\textsuperscript{215} Id.
\textsuperscript{216} See Wedgwood, supra note 133.
\textsuperscript{217} Id.
to guarantee the First Amendment right of access to criminal trials can and should be applied to military commissions. However, some of the more common elements of these tests (namely those that recognize military tribunals more closely resemble a court-martial than a civilian trial) are workable when applied to military commissions.

By arguing for the trial of non-citizens by military commissions, this Comment contends that there is a middle ground between the two extreme options: the *Press-Enterprise II* test and blanket non-disclosure.

**A. Richmond Newspapers, Inc. v. Virginia**

The *Richmond Newspapers, Inc.* decision is an inadequate predicate from which to assert that a First Amendment right of access applies to military tribunals. First, the language in the decision addresses criminal trials; nowhere in the case is application of the rule to military tribunals contemplated. One might argue that military tribunals are criminal trials; however, it is unlikely that the Court was contemplating a twenty-first century military tribunal when addressing a Virginia murder prosecution in 1980.

*Richmond Newspapers, Inc.* also argues against “summarily closing courtroom doors”—authority that the DOD Order does not give to the Presiding Officer in a military tribunal. Instead of authorizing overarching closure, the DOD Order grants a Presiding Officer the discretion to “close all or part of a proceeding . . .” if he or she finds certain enumerated situations exist. However, he has no power to restrict access to the entire process without cause. The use of “a” instead of the word “the” in the guidelines is a further indicator that the Presiding Officer must make individual findings to justify closure of each portion of the proceedings and would not have the power to initiate a blanket closure.

**B. Globe Newspaper Co. v. Superior Court**

In *Globe Newspaper Co.*, the Court acknowledged that criminal trials have historically been open to the press. Once again, this may be true of criminal trials, but it would be a mistake to try to extend the right of access established in *Globe Newspaper Co.* to a military proceeding. This is especially true once

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218 *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 (1980) (“[T]he right to attend criminal trials is implicit in the guarantees of the First Amendment.” (emphasis added)); *see also* id. at 573 (“[A] presumption of openness inheres in the very nature of a criminal trial.” (emphasis added)).

219 Id. at 576.

220 *See* DOD Order, supra note 6, § 9.6(b)(3)

221 Id.
one considers that *Ex parte Quirin*, the case that established the constitutional-
ity of military tribunals, was a closed proceeding. The two proceedings are
simply too different. A court-martial, which more closely resembles a military
tribunal than a criminal proceeding, is much more hospitable to the idea of
closure.

In courts-martial, there is a fundamental understanding and appreciation of
the necessity to protect the information that will inevitably be part of that type
of proceeding. This understanding may generally be lacking or unappreciated
in a regular criminal trial. In *Globe Newspaper Co.*, the Court applied a strict
scrutiny test to the state’s request to restrict access to sensitive information.
The Court wrote, “it must be shown that the denial is necessitated by a compel-
ing governmental interest, and is narrowly tailored to serve that interest.”
A footnote in the case mentions that time, place, and manner restrictions would
not have to meet such a high threshold—a point was not stressed in the body of
the opinion.

The *Globe Newspaper Co.* test is inadequate when applied to tribunals for
two reasons. First, tribunals seek to protect not only classified but also sensi-
tive information. Classified information is subject to a higher level of protec-
tion than sensitive information, and the disclosure of either can potentially
jeopardize national security if shown to parties not cleared to access it. *Globe
Newspaper Co.*’s test is one of strict scrutiny—a threshold which sensitive in-
formation but unclassified information might have a tough time surmounting.
Classified information is not the only information that needs limits on dissemi-
nation; sensitive information needs to be given the same protection. The lower
threshold of discretionary authority given to the Presiding Officer in a military
tribunal is more appropriate than *Globe Newspaper Co.*’s inadequately high
standard.

Second, the methods of closure employed by the DOD Order can all be clas-
sified as time, place, and manner restrictions; there is no attempt at blanket
closure. The DOD Order allows for “public release of transcripts at the appro-

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223 See ABC, Inc. v. Powell, 47 M.J. 363 (C.A.A.F. 1997); see also United States v. Grunden, 2 M.J. 116, 120 (C.M.A. 1977) (the holding makes numerous references to the many instances where a trial can be closed over defense’s objection and states that “that the right to a public trial is not absolute.”); United States v. Scott, 48 M. J. 663, 665 (A. Ct. Crim. App. 1998) (quoting Press-Enter. v. Superior Court (*Press Enterprise I*), 464 U.S. 501, 104 (1984) (holding that a court-martial can be closed if an “overriding interest justi-
fies closure.”)).
225 Id. at 607 n.17 (“Of course, limitations on the right of access that resemble time, place, and manner restrictions . . . would not be subject to such strict scrutiny.”) (quoting Young v. Am. Mini theaters, Inc., 427 U.S. 50, 63 (1976))).
priate time"—a time restriction. The DOD Order provides that certain parts of the record can be sealed, to be viewed only by “authorities in closed proceedings”—a manner restriction. This Order also allows for attendance by the press and public but prohibits “photography, video, or audio broadcasting, or recording”—another manner restriction. By allowing for partial closure as opposed to blanket closure and only inhibiting certain types of access, the DOD Order’s restrictions fall well within time, place, and manner classification and, therefore, are not required to meet the higher threshold of strict scrutiny outlined in Globe Newspaper Co..

C. Press-Enterprise II

In 1980, Richmond Newspapers, Inc. was the first case to guarantee a defendant the First Amendment right to a public trial. Six years later, in Press-Enterprise v. Superior Court (Press-Enterprise II), the Supreme Court articulated a detailed explanation of the exact rights of the accused and set forth the test that an individual must overcome to deprive a defendant of that right. By far the most comprehensive of any previous attempt to address such rights, the Press-Enterprise II test permits closure of criminal proceedings only if specific on the record findings demonstrate that “closure is essential to preserve higher values and is narrowly tailored.” The Press-Enterprise II test seeks to determine if “closure is essential to preserve higher values;” it is a two-pronged “experience and logic” test. First, the trial court must determine, through experience, if there is a historical right of access to the proceedings. Second, the court must examine, logically, whether granting access would play a positive role in the judicial process or if there is pertinent information that needs protection and warrants a closed proceeding. If both prongs are satisfied, a First Amendment right of access is presumed, and the reasons for closure must pass a test of strict scrutiny.

One difficulty that arises when attempting to apply the Press-Enterprise II test to tribunals is the application of the “experience” prong. “Since military tribunals do not have much history, it is difficult to determine whether the [tri-

227 See DOD Order, supra note 6, § 9.6(b)(3).
228 Id. § 9.6(d)(5)(iv).
229 Id. § 9.6(b)(3).
231 Id. at 8–9.
232 Id.
233 Id. at 13–14 (explaining that the presumption may be overcome only by an overriding interest based on findings “that closure is essential to preserve higher values and is narrowly tailored to serve that interest”).
bunal] would rely on the presumptive openness of courts-martial as an example of [historical right of access,] or whether they would look to battlefield tribunals . . . ” such as in \textit{Ex parte Quirin} or \textit{In re Yamashita}.\footnote{234} Undoubtedly these two fora are more closely related to a modern military tribunal than they are to modern day Article III proceedings. Because such similarity exists, either forum would be a more appropriate comparison when making such a determination. It would be a fatal mistake to base such a determination for tribunals solely on the historical right of access provided in regular criminal proceedings.

The next potential problem with straining the rubric of the \textit{Press-Enterprise II} test to fit a military tribunal is the application of the “logic” prong. Under the “logic” prong of the test, a fact finder may determine that it is logical to generally prefer public access to a trial as opposed to a trial in secret. Following that line of reasoning, the test would find that a presumptive First Amendment right of access would attach and closure would have to pass the test of strict scrutiny. However, this analysis is inadequate for the task of determining whether it is logical to close military tribunals because it denies the fact that military tribunals need to protect not only classified and secret information but also information which has been deemed sensitive and may have a harder time clearing the high hurdle of strict scrutiny.

Another potential question is whether the parsed access afforded under the DOD Order qualifies as “public.” Except for transcripts and notes taken by those physically present at the proceeding, no recording of the proceedings of any kind is allowed. In the \textit{Press-Enterprise II} opinion, the Court acknowledged: “it takes little imagination to recognize there are some types of government issues that would be totally frustrated if conducted openly.”\footnote{235} One can only hope that the type of operations bearing on national security that are routinely implicated in military tribunals were foreseeable contemplated.\footnote{236}

\textbf{D. Powell and Scott: Military Case Law}

Two cases from military appellate courts also help to highlight some of the concerns surrounding the First Amendment right of access to military tribunals. In 1997, an appellate court’s review of the Article 32 investigation “[made] it clear that, absent cause shown that outweighs the value of openness, the military accused is likewise entitled to a public [trial].”\footnote{237} However, the

\footnote{234} \textsc{reporter’s comm. for freedom of the press, supra} note 17.  
\footnote{235} \textit{Press-Enterprise II}, 478 U.S. at 8–9.  
\footnote{236} \textit{Id.} Though the opinion specifically listed grand jury proceedings as a government operation whose objective would be compromised if conducted in the open, it is not hard to extend this analogy to national security operations, which are undoubtedly more significant.  
\footnote{237} See ABC, Inc. v. Powell, 47 M.J. 363, 364 (C.A.A.F. 1997)
Court tempered this statement by stating that “the right to a public hearing is not absolute . . . [and] determinations must be made on a case-by-case, witness-by-witness, and circumstance-by-circumstance basis.”238 Additionally, the court wanted to ensure that closure was reasoned and not reflexive.239

The language employed by the Military Court of Appeals in Powell is less stringent than the language that pervades the opinions of general criminal proceedings. There is no mention of Globe Newspaper Co.’s requirement of “narrow tailoring,”240 nor is there any mention of the need to satisfy a “compelling governmental interest,” as set forth in Press-Enterprise II.241 To say decisions of closure must be “reasoned” and made on a “case-by-case” basis is to merely advocate to ensure an accused is afforded a full and fair trial. The more flexible language in the Powell decision supports the conclusion that the military courts are more hospitable to the idea of partially closed proceedings. This is probably the case because both judges and participants recognize the differences between the two fora and are more cognizant of the inherent dangers that accompany unfettered access of the press and public.242

The DOD Order adheres to the language in Powell, in so much that the DOD Order defaults to a presumption of openness, but recognizes the special nature surrounding evidence in a military type of trial. When referencing First Amendment rights of access to modern day tribunals, Powell provides a much more sound framework from which to begin an analysis. The tests set forth in Globe Newspaper Co. and Press-Enterprise II require the Court to exercise heightened scrutiny before a court can be closed. In contrast, the test set forth in Powell lowers the hurdle the government must overcome when seeking closure. The language in Powell strikes a more workable balance between the First Amendment right of access and national security and should be adopted by military tribunals. When examining the DOD Order in light of the Powell

238 Id.
239 Id.
240 See Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 (1982) (“[I]t must be shown that the denial [of access] is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest.”).
241 See Press-Enterprise II, 478 U.S. at 9 (“The presumption [of openness] may be overcome only by an overriding interest based on the findings that the closure is essential to preserve higher values and is narrowly tailored to serve that interest.”).
242 E.g., United States v. Voorhees, 4 U.S.C.M.A. 509, 532 (C.M.A. 1954). The court specifically recognizes the differences between the two types of tribunals by holding that: [T]he rights of the man in the service must be proportioned by a more refined measuring rod than are those belonging to the man in the street. What may be questionable behavior in civilian life, and yet not present any danger to our form of Government, may be fatal if carried on in the military community. The substantial interest of society with which we deal must be weighed on scales adjusted to the necessities of the military service . . . .

Id.
test, it is evident that the DOD Order is in line with the language of Powell.

The first line of § 9.6(b) of the DOD Order charges the commission with providing a “full and fair trial” and reiterates that standard in the subsequent sections.\(^{243}\) It also provides for “open proceedings except where otherwise decided by the Appointing Authority . . . .”\(^{244}\) Unless closure outweighs openness, “the military accused is likewise entitled to a public [trial].”\(^{245}\) Additionally, the DOD Order lists only a few specific instances in which closure would be appropriate, some of which are protection for: (1) classified information; (2) witnesses; (3) intelligence methods; or (4) law enforcement collection methods.\(^{246}\) By delineating the circumstances in which closure is appropriate, and by precluding blanket closure, the DOD Order forces Presiding Officers to make case-by-case and circumstance-by-circumstance decisions regarding closure. Such determinations demonstrate as well that the DOD Order follows the Powell requirement of particularized findings.

Finally, the DOD Order provides that “[t]he Presiding Officer may decide to close all or part of a proceeding . . . .”\(^{247}\) When reading this section in conjunction with earlier language that mandates proceedings be kept open as much as possible, this section once again can be construed as an attempt by the DOD Order to conform to Powell’s guidelines.\(^{248}\)

In 1998, just one year after Powell, the U.S. Army Court of Appeals addressed the First Amendment right of access in another court-martial proceeding.\(^{249}\) In United States v. Scott, the court reviewed a military judge’s decision to seal an entire factual stipulation offered by the U. S. Attorney regarding a soldier who was facing charges of sexual assault and attempted murder.\(^{250}\) Ultimately, the military judge’s determination to seal the stipulation was rejected by the Army Court of Criminal Appeals because the lower court judge did not attempt to make separate findings on the record to justify his decision.\(^{251}\) The Army Court of Criminal Appeals concluded that “[t]he right of public access to

\(^{243}\) See DOD Order, supra note 6, § 9.6(b)(1)–(2).

\(^{244}\) Id. § 9.6(b)(3).


\(^{246}\) DOD Order, supra note 6, § 9.6(b)(3).

\(^{247}\) Id.

\(^{248}\) Id. There is one additional provision specifically delineated in the DOD Order than can be read as quite expansive, it is the provision that allows for closure when “other national security” interests are implicated. DOD Order § 9.6(b)(3). Though some might read this provision as an attempt to expand the possibilities of closure to the infinite, it was undoubtedly an attempt to include situations not contemplated at the time of drafting but important enough that their manifestation would still require the same degree of attention and confidentiality, if they were to later arise.


\(^{251}\) Id. at 667 (“[W]e are left with no other conclusion to draw but that the military judge abused his discretion in sealing the entire stipulation of fact.”).
criminal trials applies with equal validity to trials by courts-martial[,]252 and that “courts-martial shall be open to the public.”253 However, the court qualified this right by noting that “[t]he presumption of openness may be overcome.”254 Once again, the language is softer than in Press-Enterprise II and more congenial to the idea of closure.255

Unnecessary blanket closure, such as those in the Scott case, is what the above mentioned courts have condemned. It is a practice in which the DOD Order also does not permit. In fact, the guidelines for military tribunals err on the side of openness. Thus, the DOD Order allows for attendance at open proceedings “by the public and accredited press…” [and further allows for] “public release of transcripts at the appropriate time.”256 Perhaps this helps to explain why the language in the Scott holding is harsher and seeks to invoke a higher standard for closure than do most military tribunal cases.257

E. United States v. Grunden

In United States v. Grunden the issue before the Military Court of Appeals was whether the First Amendment rights of access must give way when balanced against sensitive national security concerns. Unlike the cases dealing with a criminal proceeding, Grunden carves out a specific example where sensitive national security concerns would lead to, at a minimum, a plausible circumstance for blanket closure.258 The Grunden holding stands for the proposition that to prevent the disclosure of classified information, “all spectators may be excluded from an entire trial, [even] over the accused’s objection . . . .”259 Nevertheless, the Grunden court maintained limits on this seemingly broad allowance for closure by cautioning that “[t]he simple utilization of the terms

252 Id. at 665.
253 Id. (citing R. for Courts-Martial 806(a)).
254 Id.
255 But see id. Though the Scott decision quotes heavily from Press-Enterprise II and the decision does indeed later invoke the harsher language utilized by many regular criminal courts, this should not be seen as a military endorsement of that language or an application of those standards to military law. Instead, the holding should be circumscribed to the facts of the case.
256 DOD Order, supra note 6, § 9.6(b)(3).
257 Scott, 48 M.J. at 666–67. Here, the judge was found to have abused his discretion by issuing a blanket closure order without making any particularized on the record findings. The invocation of such harsh language normally reserved for the opinions of general criminal proceedings, is appropriate when being used to strike down a unsubstantiated blanket order of closure but would not be appropriate in other circumstances. Id.
258 See United States v. Grunden, 2 M.J. 116, 121 (C.M.A. 1977) (“The blanket exclusion of the spectators from all or most of a trial, such as in the present case, has not been approved . . . nor could it be absent a compelling showing that such was necessary to prevent the disclosure of classified information.”) (emphasis added).
259 Id. (emphasis added).
‘security’ or ‘military necessity’ . . .” will not allow constitutional protections to vanish, and further maintained that the authority to exclude must be “cautiously exercised . . . .” Moreover, the opinion requires a nexus between national security and a justification for closure.

Once again, as in Powell and Scott, the language in Grunden is more flexible than the language one would find in the decision of an Article III court. Because the language in military court decisions is less stringent in discussing closure, and because the security issues surrounding tribunals are plentiful, it would be more suitable to use these types of cases to form the basis of a military tribunal right-of-access test. Here, the Gruden court is clearly aware of the need to protect national security information and states that exclusion “on such a basis can be justified.” Moreover, the Military Court of Appeals demonstrates its cognizance of the special concerns that surround military tribunals to which regular criminal courts may be blind: “This court recognizes that the Supreme Court . . . acknowledged the uniqueness of the military society, and that it has reaffirmed that belief in recent decisions.” Of all the judicial decisions previously discussed, the Gruden test addresses this situation most effectively.

When balancing openness and security, the Gruden test laid out by the Military Court of Appeals is by far the most workable that for tribunals. The Presiding Officer’s initial task is to determine “whether the perceived need urged as grounds for the exclusion of the public is of sufficient magnitude so as to outweigh ‘the danger of a miscarriage of justice which may attend judicial proceedings carried out in even partial secrecy.’” This determination is made at a closed preliminary hearing where the government must demonstrate the classified nature of the material it plans to use. Any classified information that would implicate national security is given “special deference,” and exclusion is ordered if “there is a reasonable danger that presentation of [such] materials before the public will expose military matters which in the interest of national security should not be divulged.”

Once again, the use of softer, less stringent language in this military court

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260 Id.
261 Id.
262 Id.
263 Id. at 121 n.9 (quoting Parker v. Levy, 417 U.S. 733, 743 (1974)).
264 Id. at 122 (citing StamiCarbon, N.V. v. Am. Cyanamid Co., 506 F. 2d 532, 539 (2d Cir. 1974)).
265 Id. (“The prosecution to meet this heavy burden must demonstrate the classified nature, if any, of the materials in question. It must then delineate those portions of its case which will involve those materials.”).
266 Id. (quoting Ethyl Corp. v. EPA, 478 F.2d 47 (4th Cir 1973)).
267 Id. (quoting United States v. Reynolds, 345 U.S. 1, 10 (1953)).
opinion is important. A “reasonable danger” that classified information would imperil national security is all the prosecution must demonstrate to affect disclosure. This is by far the lowest threshold yet encountered to restrict First Amendment access. Phrases such as “compelling governmental interest” and “narrowly tailored” that connoted the higher test of strict scrutiny are nowhere to be found in this decision. Ultimately, this demonstrates once again how military courts retain an acute awareness of the issues surrounding the unauthorized dissemination of classified material.

After the judge decides if openness will endanger national security information, he must then “decide the scope of the exclusion of the public . . . [by asking] the prosecution [to] delineate which witnesses will testify on classified matters, and what portion of each witness’ testimony will actually be devoted to this area.” This second determination helps keep closure limited to the areas solely devoted to classified information and helps preserve the accused’s right to a public trial, while still safeguarding the security of the nation.

Civilian criminal courts and judges often lack experience with classified, national security information and therefore fail to appreciate fully the need to give such information adequate protection. When it comes to the trial of non-citizen enemy combatants for acts of terrorism, any right of access test that does not address such concerns will be dangerously inadequate. Because civilian judges may not appreciate the harm that can arise when such information is improperly disclosed, it is likely that tests created in civilian courts may inadequately address this issue. Rules of access governing military tribunals need to be promulgated and cultivated by Presiding Officers in military courts who can fully understand the importance of safeguarding such volatile and potentially damaging information. The correct balance between openness and national security will be maintained only when this occurs.

VI. ALTERNATIVE SOLUTIONS: THE NATIONAL SECURITY GRAND

268 Compare Grunden, 2 M.J. at 121–122 (holding that a “reasonable danger” to national security will permit disclosure), and ABC, Inc. v. Powell, 47 M.J. 363 (C.A.A.F. 1997) (“Closure . . . should . . . be ‘reasoned’ and not ‘reflexive.’” (citing San Antonio Express-News v. Morrow, 44 M.J. 706, 710 (A.F. Ct. Crim. App. 1996))), with Globe Newspaper v. Superior Court 457 U.S. 596, 606–07 (using much stronger language and deciding that a denial of access must be “necessarily by a compelling government interest, and . . . narrowly tailored to serve that interest”), and Press-Enter. Co. v. Superior Court (Press-Enterprise II), 478 U.S. 1, 9 (1986) (explaining that the presumption of openness can only be overcome by a finding that “closure is essential to preserve higher values and is narrowly tailored to serve that interest”).

269 Grunden, 2 M.J. at 123 (“This bifurcated presentation of a given witness’ testimony is the most satisfactory resolution of the competing needs for secrecy by the government and for a public trial by the accused.”).

270 Id.
JURY MODEL

Courts take First Amendment free access rights seriously and because of the historical foundation on which these rights rest, courts often reject efforts to exclude the press and public when such efforts may be unjustified. The idea that justice can be carried out in secret and without public scrutiny is antithetical to the historical American notions of open judicial proceedings.

The DOD and Military Orders attempt to secure a heightened level of secrecy during terrorist trials because of the sensitive and classified information contained therein. The immense importance of this information and the impact its dissemination could have on national security is no small matter of importance. Endangering intelligence materials, collection methods, sources, and strategies by making them public knowledge would not only be irresponsible, it would be an egregious breach of national security.

The nexus between these two competing concerns is where problems arise. At some point, the right to a public trial and the protection of national security must be reconciled. One way to do this is to use a grand jury model to provide the accused with an audience that does not endanger national security. Grand juries sit for between six to eighteen months. They are comprised of ordinary citizens whose identities and deliberations are secret. A military tribunal could employ similar techniques and almost ensure against dissemination of sensitive information to dangerous parties.

Much like a civilian secret grand jury, tribunal jurors could be selected from government and military personnel who already have the requisite security clearances to access classified information. By adding this additional safeguard to the closed military tribunal, one would still be able to select an impartial

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271 See Press-Enterprise II, 478 U.S. 1, 8 (1986) (calling the public’s right of access to a trial an “essential qualit[y] of a court of justice . . .” and holding that access will be denied only under a strict scrutiny test.); id. at 9 (quoting Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 567 (1980)).

272 See generally Levine v. United States, 362 U.S. 610, 617 (1960) (“Unlike an ordinary judicial inquiry, where publicity is the rule, grand jury proceedings are secret.”); Goodman v. United States, 108 F.2d 516 (9th Cir. 1939).

From earliest times it has been the policy of the law to shield the proceedings of [grand juries] from public scrutiny, and to this end the grand jurors themselves have always been sworn to keep their own counsel and that of the state or of the King. Courts and text writers have advanced various reasons for this rule of privacy. In part the purpose is to protect grand jurors, complainants and witnesses, so that the jurors may deliberate and vote without fear that their conduct will be disclosed elsewhere, and that those who testify may feel free to speak the truth without reserve. Other reasons for the rule are that if the accused should learn that his conduct is under investigation he is likely to flee arrest or to tamper with witnesses; and that one who is unjustly accused, but is exonerated by the refusal of the grand jury to indict, may not suffer injustice by a disclosure that he has been under investigation for the commission of a crime.

Id. at 519.
panel of persons to oversee the proceedings, but not violate the security concerns that the DOD Order addresses. Their presence would add impartial observers to the closed proceedings without endangering confidential information. Laws that forbid the dissemination of classified information would bind these people to secrecy; they could not disclose the closed portions of the trial without exposing themselves to criminal prosecution. Moreover, a presiding Officer, mindful of their presence, would be less likely to abuse the power afforded to him under the liberal closure rules of the DOD Order.

Presently, there is no ability for an accused that stands trial before a tribunal to appeal. Perhaps this one area needs refining. If a panel cannot, upon observing abuse of process by either the government or the Presiding Officer address such abuse, it can provide no meaningful check at all. Without imposing an entire appeals process on the proceeding, which the Military Order specifically rejects, the panel should instead be given the power to convene after each closed session to decide if the conduct of the officers of the court during the closed proceeding is proper. Should the panel find it was not, either through a majority or unanimous vote, a representative of the panel could meet with the Presiding Officer to address the concerns. Creating this panel and coupling it with the closure rules already in place under the DOD Order ensures the protection of national security is protected while another meaningful check is placed upon the tribunal.

VII. CONCLUSION

In a civilian criminal proceeding, the risks to national security are ordinarily insignificant or non-existent, whereas in a military tribunal, classified information often comprises much of the evidence presented by the prosecution. As a result, it is easy to see why civilian criminal trials have enjoyed a historic tradition of openness, while judges in courts-martial have been more likely to uphold a restricted right of access. A natural consequence of such historical

275 DOD Order, supra note 6, § 9.6(h)(6).
277 Court-martial cases use softer language in their opinions as opposed to the tighter language used by judges in regular criminal proceedings and are more likely to recognize the validity of closure than they are to justify a present First Amendment right of access based on a historic one. Compare United States v. Scott, 48 M.J. 663, 665 (A. Ct. Crim. App. 1998) ([A]n “overriding interest [can] justifi[y] closure.”) and ABC, Inc. v. Powell, 47 M.J. 363, 365 (C.A.A.F. 1997) (“[T]he right to a public hearing is not absolute.”) and United States v. Grunden, 2 M.J. 116, 121 (C.M.A. 1977) (“[A]ll spectators may be excluded to prohibit the release of classified information.”), with Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 573 (1980) (“[A] presumption of openness inheres in . . . our
differences in access is that the closure of courts-martial is more acceptable to the general public and also often seems more legitimate in their eyes.

While recognizing that the U. S. Constitution applies with full force to each proceeding and that both proceedings carry a presumption of openness, the structure of a court-martial deals more competently with the sensitive national security concerns surrounding classified or confidential information in a military prosecution. As such, the tests promulgated by military courts achieve the correct balance between individual rights and national security. Since military courts are often exposed to confidential information, tests delineated in the opinions of military judges were undoubtedly designed with national security considerations in mind. Unlike the tests designed by civilian judges that have little or no experience with protecting classified national security information, tests designed by military judges need not be strained to fit concerns they were not designed to accommodate. Military tribunals more closely resemble a court-martial rather than a regular criminal proceeding. Accordingly, First Amendment access tests handed down by the military courts containing more relaxed language regarding closure provide a better fit for tribunals than the strict scrutiny test of criminal courts.

Individual rights offer important protections and for regular criminal defendants on trial during a peacetime scenario, they are constitutionally guaranteed. Persons subject to military tribunals however, do not fall into that category and these times are anything but peaceful. From the massive amount of harm and devastation they can inflict, to their undying and often fanatical will to succeed, there is nothing regular or individual about a terrorist. They have declared war against this country and operate using rogue tactics outside the bounds of civility. They exist in highly organized and collective cells that are capable of masterminding plans that can devastate thousands of lives. The drive and will they maintain to carry out their plots is exceptional. Terrorists often work in contingent teams. If one fails, another is ready and able to replace it. They exist only to destroy the very society that provides the constitutional protection they seek.

The DOD Order and several military courts seek to strike the appropriate balance between the rights of the accused to a public trial and the right of a country to protect its citizens and valuable intelligence. With an eye always towards safeguarding the citizens of this country, both individually and collectively, the DOD Order mandates that terrorist trials carry a presumption of

\text{system of justice.}^{276}\text{ and Press-Enter. Co. v. Superior Court, 478 U.S. 1, 8 (1986) (calling the public trial an “essential quality of the court of justice”).}

\text{278 See Scott, 48 M.J. at 665.}

openness, but recognizes that even though traditional First Amendment rules of access “can be strained to accommodate the pressing need for secrecy, it does not follow that they are best-suited for the task.”

Since September 11th, the world has changed. We exist today in a state of war in perpetuity. Non-citizen terrorists are not garden-variety criminals and therefore our treatment of them must also change. There is a way to balance liberty and security so as to ensure the accused a public trial, while simultaneously protecting covert intelligence collection methods and materials from exposure to the world. That way must be found, “[b]ut as we resist measures that make us no better than those we seek to disarm and defeat, we must not bind ourselves too tightly to a mast suited only for navigating peaceful seas.”

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280 See Tribe, supra note 140, at 20.
281 Id.