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“Opening the Door” to Presidential Press Conferences: A Framework for the Right of Press Access

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“Opening the Door” to Presidential Press Conferences: A Framework for the Right of Press Access

Alexandria R. Taylor*

Abstract

Since President Donald Trump took office in 2017, there has been tension between the White House and the press. While this tension has been present in prior presidencies, its current manifestation raises important First Amendment issues. This Note discusses the limitations of the President to restrict the press’s right of First Amendment access to presidential press conferences. After delving into the Supreme Court’s development and recognition of the press’s right of access and how the lower courts have interpreted this right, this Note proposes a framework to analyze the press’s right of access and addresses the question of when and on what grounds the President can restrict this right. To illustrate these principles, this Note focuses on how three events involving President Trump and the press—the Gaggle Exclusion, the Press Conference Exclusion, and the Press Pass Suspension—implicate the First Amendment and applies the suggested framework for analyzing the press’s right of access to these three events.

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A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves.

Grosjean v. American Press Co.
297 U.S. 233, 250 (1936).

I. Introduction

This Note will address the limitations of the President to restrict the press’s right of First Amendment access to presidential press conferences. Part I will describe how three events involving President Donald Trump and the press implicate the First Amendment. Part II will track the Supreme Court’s development and recognition of the press’s right of access and will explore how lower courts have navigated this right. Part III will provide a framework to analyze the press’s right of access and will address the question of when and on what grounds the President can restrict this right. Part IV will present a framework for analyzing whether President Trump and his Administration have restrained the press’s right of access in violation of the First Amendment, applying it to the three aforementioned incidents.

A. Events Involving President Trump and the Press

Since President Trump took office in 2017, there has been tension between the White House and the press—and it continues to escalate. While this tension has existed in prior presidencies, its current manifestation raises important First Amendment issues. Three events, described below, illustrate how President Trump and his Administration have restrained the press’s right of access and in doing so arguably violated the First Amendment.

1. Incident #1: The Gaggle Exclusion

The first instance, occurring on February 24, 2017, involved journalists from several media outlets who were barred from attending a spontaneous press briefing with the Press Secretary at the White House.¹ That day, reporters did not “expect the usual and more formal on-camera daily briefing from White House Press Secretary . . . but did expect a more spontaneous ‘gaggle’ with the White House’s main spokesperson at some point” that afternoon.² At noon, however, the White House updated the reporters, saying “that the gaggle would be off-camera with an ‘expanded pool.’”³ While some media outlets—including NBC News, CBS, ABC, FOX, the *Washington Times* and the *Wall Street Journal*—were allowed to attend the off-camera briefing, other news organizations—such as CNN, the *New York Times*, *The Hill*, *BuzzFeed* and *Politico*—were not.⁴ Some reporters, including those from *The Associated Press*

1. See Ali Vitali, *White House Excludes Several Outlets from Press Gaggle*, NBC NEWS (Feb. 24, 2017, 2:40 PM), <https://www.nbcnews.com/politics/white-house/white-house-excludes-several-outlets-press-gaggle-n725366> (last visited Feb. 7, 2020) (noting that a spontaneous press briefing at the White House is called a “gaggle”) [<https://perma.cc/ZW7E-8EZJ>].

2. *Id.*

3. See *id.* (defining “pool” as a group of journalists who are chosen with the intention that “the material would be shared with all media colleagues regardless of who was physically present”).

4. See *id.* (noting that the Press Secretary characterized this exclusion by saying, “[W]e had a pool and then we expanded it. We added some folks to come cover it”).

and *Time* magazine, decided to boycott the briefing in light of the exclusion of the other reporters.⁵ Hours before the briefing, President Trump denounced the press, calling it “the enemy of the American people” during his speech to the annual Conservative Political Action Conference.⁶ Trump’s remarks and the White House’s actions were preceded by a CNN report the day before “that a White House official had asked the F.B.I. to rebut a *New York Times* article . . . detailing contacts between Mr. Trump’s associates and Russian intelligence officials.”⁷

Much of the media, including a few media outlets that were in attendance at the February 24, 2017 briefing, and media advocacy groups spoke out against the exclusion of the reporters from the briefing and labeled the exclusion as “unprecedented”⁸ and as “a notable break from protocol.”⁹ While the White House occasionally holds briefings with smaller groups of reporters, the difference in this case was that the White House was “cherry-pick[ing] which media outlets can participate in what would have otherwise been the press secretary’s televised daily

5. *See id.* (explaining that a few media outlets decided to not partake in the “expanded pool” after some media outlets of note were excluded).

6. *See id.* (noting that President Trump called the press “the enemy of the American People” because of his dismay toward the press using anonymous sources).

7. Julie Hirschfeld Davis & Michael M. Grynbaum, *Trump Intensifies His Attacks on Journalists and Condemns F.B.I ‘Leakers,’* N.Y. TIMES (Feb. 24, 2017), <https://www.nytimes.com/2017/02/24/us/politics/white-house-sean-spicer-briefing.html?module=inline> (last visited Feb. 7, 2020) [<https://perma.cc/C5VY-5E45>].

8. *See* Dylan Byers et al., *White House Blocks News Organizations from Press Briefing*, CNN BUS. (Feb. 24, 2017, 7:23 PM), <https://money.cnn.com/2017/02/24/media/cnn-blocked-white-house-gaggle/index.html> (last visited Feb. 7, 2019) (“The decision struck veteran White House journalists as unprecedented in the modern era . . .”) [<https://perma.cc/CTV7-33KY>].

9. *See* Hadas Gold, *White House Selectively Blocks Media Outlets from Briefing with Spicer*, POLITICO (Feb. 24, 2017, 2:31 PM), <https://www.politico.com/story/2017/02/reporters-blocked-white-house-gaggle-235360> (last visited Feb. 7, 2020) (explaining that “the shift—a notable break in protocol” was the abrupt change from an on-camera gaggle to a restricted off-camera gaggle) [<https://perma.cc/26HH-QQ8V>].

briefing.”¹⁰ The White House Correspondents’ Association (WHCA), which has represented the interests of members of the press who cover the White House since 1914, sent out a statement: “The WHCA board is protesting strongly against how today’s gaggle is being handled by the White House. We encourage the organizations that were allowed in to share the material with others in the press corps who were not. The board will be discussing this further with White House staff.”¹¹

10. See Sabrina Siddiqui, *Trump Press Ban: BBC, CNN and Guardian Denied Access to Briefing*, THE GUARDIAN (Feb. 25, 2017, 12:49 PM), <https://www.theguardian.com/us-news/2017/feb/24/media-blocked-white-house-briefing-sean-spicer> (last visited Feb. 7, 2020) (explaining that these particular briefings during the Trump Administration have become “indispensable . . . for journalists trying to interpret the [Administration’s] often contradictory statements . . .”) [<https://perma.cc/HFX3-SK6N>]. A reporter from CNN, whom the White House excluded, explained the break in protocol:

We lined up. We were told there was a list ahead of time, which is sort of abnormal, but we put our name on a list. And then when we went to enter, I was blocked by a White House staffer, who said we were not on the list for this gaggle today. Now, normally, if you were going to do something like this—an extended gaggle, off camera—you would have one person from each news outlet . . . [W]e have multiple people from CNN here every day. So, if you’re going to do something beyond a pool, which is sort of the smallest group of reporters that then disseminates the information, you would have one person from every news outlet. That is not what the White House was doing today. What the White House was doing was handpicking the outlets they wanted in for this briefing. So . . . news outlets that maybe the White House feels are more favorable were all allowed in, whereas I [and other reporters were] . . . blocked from entering.

Callum Borchers, *White House Blocks CNN, New York Times from Press Briefing Hours After Trump Slams Media*, WASH. POST (Feb. 24, 2017, 4:10 PM), <https://www.washingtonpost.com/news/the-fix/wp/2017/02/24/white-house-blocks-cnn-new-york-times-from-press-briefing-hours-after-trump-slams-media/> (last visited Mar. 26, 2020) (quoting CNN Political Correspondent Sara) [<https://perma.cc/2NJQ-RWPS>].

11. White House Correspondents’ Ass’n Board, Statement (Feb. 24, 2017), <https://www.whca.press/2017/02/24/february-24-2017-statement/> (last visited Feb. 7, 2020) [<https://perma.cc/48GM-CWD8>].

2. Incident #2: The Press Conference Exclusion

The second instance, occurring on July 25, 2018, involved the White House banning a “CNN reporter from attending a[n] [open] press event with President Donald Trump . . . after she asked him questions about his former lawyer Michael Cohen and Russian President Vladimir Putin” during an earlier photo op at the White House.¹² While President Trump sat for pictures, the reporter asked questions about these individuals at a time that it was “typical . . . [to] attempt to ask the president questions.”¹³ After the CNN reporter asked her questions, members of the Trump Administration informed her that her questions were “inappropriate,” accusing her of shouting questions and refusing to leave despite repeatedly being asked to do so, and as a result, “she would not [later] be allowed to attend an open press event in the White House Rose Garden.”¹⁴ The president of FOX News, among other media outlets and reporters, issued a statement stating, “We stand in strong solidarity with CNN for the right to full access for our journalists as part of a free and unfettered press.”¹⁵ The WHCA also issued a statement:

We strongly condemn the White House’s misguided and inappropriate decision today to bar one of our members from an open press event after she asked questions they did not like. This type of retaliation is wholly inappropriate, wrong-headed, and weak. It cannot stand. Reporters asking

12. Phil McLausand, *White House Bans CNN Reporter from Rose Garden Event After She Peppers Trump with Tough Questions on Russia, Cohen*, NBC NEWS (July 25, 2018, 8:13 PM), <https://www.nbcnews.com/politics/white-house/white-house-bans-cnn-reporter-rose-garden-event-after-she-n894686> (last visited Feb. 7, 2020) [<https://perma.cc/7X9A-RKZ9>].

13. *See id.* (explaining that this reporter was serving as the “pool reporter” during the Oval Office photo op, “meaning she was asking questions on behalf of several news organizations”).

14. *See id.* (explaining that the reporter was addressed immediately after the questions, and then later the Press Secretary issued a statement).

15. Matt Richardson, *CNN Correspondent Blocked from White House Press Event*, FOX NEWS (July 25, 2018), <https://www.foxnews.com/politics/cnn-correspondent-blocked-from-white-house-press-event> (last visited Feb. 7, 2020) [<https://perma.cc/Y75L-5K4P>].

questions of powerful government officials, up to and including the President, helps hold those people accountable. In our republic, the WHCA supports the prerogative of all reporters to do their jobs without fear of reprisal from the government.¹⁶

3. Incident #3: *The Press Pass Suspension*

The third instance, occurring on November 7, 2018, involved the White House suspending the press pass of CNN’s chief White House correspondent, Jim Acosta, after an incident at a White House press conference.¹⁷ As a result, CNN filed suit against President Trump and several of his aides.¹⁸ The suit asserted that the press pass revocation violated Acosta’s First and Fifth Amendment rights.¹⁹ During the White House press conference, Acosta had asked the President about immigration issues and about possible indictments involving Russia’s interference in the 2016 election.²⁰ A White House intern reached across Acosta “to take the microphone from him.”²¹

16. Olivier Knox, President, White House Correspondents’ Ass’n, Statement from WHCA President Oliver Knox (July 25, 2018), <https://www.whca.press/2018/07/25/statement-from-whca-president-olivier-knox/> (last visited Feb. 7, 2020) [<https://perma.cc/P37W-B4TX>].

17. See Brian Stelter, *CNN Sues President Trump and Top White House Aids for Barring Jim Acosta*, CNN BUS. (Nov. 13, 2018), <https://www.cnn.com/2018/11/13/media/cnn-sues-trump/index.html> (last visited Feb. 7, 2020) (noting that the CNN reporter Jim Acosta and CNN are “seeking a preliminary injunction . . . and a ruling from the court preventing the White House from revoking Acosta’s pass in the future”) [<https://perma.cc/E4CY-HXHK>].

18. See generally Complaint, *Cable News Network, Inc. v. Trump*, No. 1:18-cv-02610 (D.C.C. Nov. 13, 2018) [hereinafter *CNN v. Trump Complaint*].

19. See *id.* at 14–15 (alleging violations of First and Fifth Amendment rights).

20. See Merrit Kennedy & David Folkenflik, *CNN Sues Trump Administration To Restore Jim Acosta’s Press Credentials*, NPR (Nov. 13, 2018, 3:58 PM), <https://www.npr.org/2018/11/13/667425530/cnn-sues-trump-administration-over-jim-acostas-press-credentials> (last visited Feb. 7, 2020) (noting specifically that “Acosta asked the president about his characterization of a migrant ‘caravan’ moving through Mexico as an ‘invasion’ and about possible indictments in the Russian investigation”) [<https://perma.cc/HD73-DVH3>].

21. *Id.*

Acosta responded, “Pardon me, ma’am,’ and did not release the microphone.”²² He then “asked a followup [sic] question, then gave up the mic.”²³ During the exchange, President Trump called Acosta a “rude, terrible person” and said, “[w]hen you report fake news, which CNN does, a lot, you are the enemy of the people.”²⁴ After the incident, the White House initially characterized the interaction by saying Acosta had “plac[ed] his hands on a young woman trying to do her job as a White House intern.”²⁵ The Press Secretary “tweeted a link to a video to back up her claim that Acosta physically fended off” the intern.²⁶ This video was soon discredited by multiple media outlets, finding that the video had been altered to support the White House’s version.²⁷ Later, the Press Secretary justified the revocation of Acosta’s press credentials, issuing a statement characterizing his actions as inappropriate and unprofessional:

CNN, who has nearly 50 additional hard pass holders,²⁸ and Mr. Acosta is no more or less special than any other media outlet or reporter with respect to the First Amendment. . . . The White House cannot run an orderly and fair press conference when a reporter acts this way, which is neither appropriate nor professional. The First Amendment is not served when a single reporter, of more than 150 present, attempts to monopolize the floor. If there is no check on this type of behavior it impedes the ability of the President, the

22. *Id.*

23. Stelter, *supra* note 17.

24. CNN v. Trump Complaint, *supra* note 18, at 10.

25. See Kennedy & Folkenflik, *supra* note 20 (“Initially, when the White House said it was suspending Acosta’s credential, it said it would ‘never tolerate a reporter placing his hands on a young woman just trying to do her job as a White House intern.’”).

26. *Id.*

27. See *id.* (noting that White House counselor Kellyanne Conway later “denied that the video had been altered but then said it had been ‘sped up’ and that ‘they do it all the time in sports to see if there’s actually a first down or a touchdown’”).

28. See, e.g., CNN v. Trump Complaint, *supra* note 18, at 2 (explaining a “hard pass” allows a reporter “regular and unescorted access to the White House and White House briefings”).

White House staff, and members of the media to conduct business.²⁹

After the incident, the President said that Acosta “was not nice to the young woman,” but “I don’t hold him for that because it wasn’t overly, you know, horrible.”³⁰ The President also told other reporters, “You have to treat the White House with respect. You have to treat the presidency with respect.”³¹ In the same breath, he suggested that there “could be others” who might lose their credentials.³²

In his complaint, Acosta claimed that the Trump Administration’s “decision to revoke Acosta’s press credentials violates the First Amendment” because “Acosta’s questions to President Trump during that conference are and were all protected activities under the First Amendment,” and the Administration deprived him of the “right to access the White House grounds by revoking [his] White House credentials.”³³ The complaint characterized the Trump Administration’s changing justifications for denying Acosta press credentials as “hollow” and insufficient to justify “impeding [Acosta’s] First Amendment rights.”³⁴ The complaint further contended that revocation of Acosta’s press access right was “a form of content- and viewpoint-based discrimination and in retaliation for Plaintiffs’ exercise of protected First Amendment activity”

29. Brian Stelter, *Sarah Sanders Responds to the CNN Suit*, CNN BUS. (Nov. 13, 2018, 11:27 AM), https://www.cnn.com/business/live-news/cnn-sues-trump-acosta-reaction/h_60ac92e98a6edf377df982c9ecd131ad (last visited Feb. 7, 2020) [<https://perma.cc/T447-MAVH>].

30. Stelter, *supra* note 17.

31. See David Bauder & Jonathan Lemire, *Trump Claims Video Distributed by White House Wasn’t Altered*, AP NEWS (Nov. 9, 2018), <https://www.apnews.com/8c4b1b634fe64ebba75bbf98edf9db4f> (last visited Feb. 7, 2020) (noting that during this same exchange, Trump said that Acosta is a “very unprofessional guy. I don’t think he’s a smart person but he has a loud voice”) [<https://perma.cc/CM5N-Z8AN?type=image>].

32. See *id.* (noting that President Trump had not decided if Acosta’s pass would be reinstated).

33. CNN v. Trump Complaint, *supra* note 18, at 14.

34. *Id.* at 15.

motivated by a dislike of CNN's and Acosta's "coverage of the administration and critique of the President."³⁵

In reaction to the revocation of the reporter's press pass, the WHCA released a statement in support of CNN:

[WHCA] strongly supports CNN's goal of seeing their correspondent regain a U.S. Secret Service security credential that the White House should not have taken away in the first place. Revoking access to the White House complex amounted to disproportionate reaction to the events of last Wednesday. We continue to urge the Administration to reverse course and fully reinstate CNN's correspondent. The President of the United States should not be in the business of arbitrarily picking the men and women who cover him.³⁶

The presiding federal district court judge ultimately granted CNN's and Acosta's request for a temporary restraining order and ordered the Administration to restore Acosta's credentials.³⁷ The judge did so on the ground that the Administration violated Acosta's Fifth Amendment right by depriving him of "a fair and transparent process."³⁸ The judge did not make any determinations based on the First Amendment claim.³⁹ CNN dropped its lawsuit after the White

35. *Id.*

36. Olivier Knox, President, White House Correspondents' Ass'n, Statement by WHCA President Olivier Knox on CNN Lawsuit Against White House (Nov. 13, 2018), <https://www.whca.press/2018/11/13/statement-by-whca-president-olivier-knox-on-cnn-lawsuit-against-white-house/> (last visited Mar. 3, 2020) [<https://perma.cc/5TE5-YP8J>].

37. See Michael M. Grynbaum & Emily Baumgaertner, *CNN's Jim Acosta Returns to the White House After Judge's Ruling*, N.Y. TIMES (Nov. 16, 2018), <https://www.nytimes.com/2018/11/16/business/media/cnn-acosta-trump.html> (last visited Mar. 3, 2020) (noting that the judge "hand[ed] the cable network [CNN] an early win in its lawsuit against the president and members of his administration") [<https://perma.cc/DJT3-HSET>].

38. See *id.* (noting that the judge stated from the bench that "the administration's process for barring the correspondent 'is still so shrouded in mystery that the government could not tell me' who made the decision").

39. See *id.* (noting that the judge said, "I want to emphasize the very limited nature of this ruling I have not determined that the First Amendment was violated here").

House fully restored Acosta’s press pass.⁴⁰ In the same breath, the White House issued a set of rules that “reporters may only ask ‘a single question’ at a press conference, and “[f]ollow-up questions will only be permitted ‘at the discretion of the President or other White House officials.’”⁴¹ Further, “reporters must ‘physically surrender’ the microphone, when directed.”⁴² In response, the WHCA issued a statement noting its disapproval of the White House’s new rules:

The White House Correspondents’ Association had no role in crafting any procedures for future press conferences. For as long as there have been White House press conferences, White House reporters have asked follow-up questions. We fully expect this tradition will continue. We will continue to make the case that a free and independent news media plays a vital role in the health of our republic.⁴³

As noted, the judge hearing CNN’s and Acosta’s First Amendment challenge did not reach that issue and provide a legal analysis of the right asserted. This Note will do so.

40. See Brian Stelter & David Shortell, *White House Backs Down from Legal Fight, Restores Jim Acosta’s Press Pass*, CNN BUS. (Nov. 19, 2018), <https://www.cnn.com/2018/11/19/media/cnn-acosta-emergency-hearing/index.html> (last visited Mar. 3, 2020) (issuing a statement in which CNN said, “Today the White House fully restored Jim Acosta’s press pass. As a result, our lawsuit is no longer necessary We look forward to continuing to cover the White House”) [<https://perma.cc/3HJU-ZAEU>].

41. See *id.* (“[W]e have made a final determination in this process: [Y]our hard pass is restored. Should you refuse to follow these rules in the future, we will take action in accordance with the rules set forth above.”).

42. *Id.*

43. Olivier Knox, President, White House Correspondents’ Ass’n, WHCA Statement on Restoration of Press Pass (Nov. 19, 2018), <https://www.whca.press/2018/11/19/whca-statement-on-restoration-of-press-pass/> (last visited Mar. 3, 2020) [<https://perma.cc/C247-F6DG>].

II. Locating the Press's Right of Access in the First Amendment

A. Supreme Court Decisions

The First Amendment, among other things, guarantees the rights to freedom of speech and press.⁴⁴ The Supreme Court has held that the government has a heavy burden to justify a direct or indirect burden on First Amendment rights: it must “convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest.”⁴⁵

The Supreme Court began to develop a right of First Amendment access in the 1930s when it found that a labor union could not be denied the right of access to a public building based on an ordinance that would allow the arbitrary suppression of speech and association.⁴⁶ Prior to 1974, the issue of access to public property was addressed in a number of Supreme Court cases not involving the press.⁴⁷

44. See U.S. CONST. amend. I. (“Congress shall make no law . . . abridging the freedom of speech, or of the press . . .”).

45. *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 546 (1963); *accord*, *Brown v. Hartlage*, 456 U.S. 45, 53–54 (1982) (“[T]he First Amendment surely requires that the restriction be demonstrably supported by not only a legitimate state interest, but a compelling one, and that the restriction operate without unnecessarily circumscribing protected expression.”); *see also* *NAACP v. Button*, 371 U.S. 415, 438 (1963) (“The decisions of this Court have consistently held that only a compelling state interest in the regulation of a subject within the State’s constitutional power to regulate can justify limiting First Amendment freedoms.”); *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960) (“Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling.”).

46. See *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 516 (1939) (“[The ordinance] enables the Director of Safety to refuse a permit on his mere opinion that such refusal will prevent ‘riots, disturbances or disorderly assemblage.’ It can thus be made the instrument of arbitrary suppression of free expression of views . . .”). The Supreme Court had set the groundwork for *Hague* the year before when it first held that the government could not impose arbitrary restrictions on the right to circulate religious literature on public streets in *Lovell v. Griffin*, 303 U.S. 444 (1938).

47. See, e.g., *Greer v. Spock*, 424 U.S. 828, 828 (1976) (stating that antiwar demonstrators had no First Amendment right of access to a military base for political activity); *Healy v. James*, 408 U.S. 169, 169–70 (1972)

In *Pell v. Procunier*,⁴⁸ the Supreme Court first addressed the press’s right of access to public property.⁴⁹ In that case the Court found that a prison policy did not violate journalists’ First Amendment rights when it disallowed the journalists to have face-to-face interviews with inmates.⁵⁰ The Court noted that while “[t]he First and Fourteenth Amendments bar government from interfering in any way with a free press, . . . [t]he Constitution does not . . . require government to accord the press special access to information not shared by members of the public generally,” nor does it have an affirmative duty to do so.⁵¹ Nevertheless, the Court reaffirmed the importance of a free press and its significance in creating a connector between the general public and its government:

The constitutional guarantee of a free press assures the maintenance of our political system and an open society, and

(explaining that an antiwar organization could not be denied access to campus facilities because of unpopular views); *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 92 (1972) (discussing a public body could not ban political picketing but allow labor picketing near schools); *Cameron v. Johnson*, 390 U.S. 611, 617 (1968) (stating civil marchers could be banned from courthouse property, where their presence interfered with the rights of others to access the building); *Adderley v. Florida*, 385 U.S. 39, 47 (1966) (explaining that civil rights demonstrations could be banned from county jail, a public area not traditionally opened to public access); *Brown v. Louisiana*, 383 U.S. 131, 143 (1966) (asserting that civil rights demonstrators could not be banned from public library based on racial discrimination); *Cox v. Louisiana*, 379 U.S. 536, 544–45 (1965) (explaining that civil rights marchers could not be banned from courthouse grounds under statute that gave unfettered discretion to police); *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963) (asserting that black demonstrators could not be banned from state house grounds for expressing unpopular views).

48. *See Pell v. Procunier*, 417 U.S. 817, 827–28 (1974) (holding that the press may be denied prisoner visitation in a manner consistent with a bar to public access generally).

49. *See id.* at 830–31 (introducing an analysis of the First Amendment claims of plaintiffs under an access to government property framework).

50. *See id.* at 819 (“The plaintiffs brought the suit to challenge the constitutionality, under the First and Fourteenth Amendments, . . . of the California Department of Corrections Manual, which provides that ‘press and other media interviews with specific individual inmates will not be permitted.’”).

51. *Id.* at 834.

secures the paramount public interest in a free flow of information to the people concerning public officials Correlatively, the First and Fourteenth Amendments also protect the right of the public to receive such information and ideas as are published.⁵²

On the same day as the *Pell* ruling, the Court similarly held in *Saxbe v. Washington Post*⁵³ that a prison policy prohibiting face-to-face interviews with individual inmates did not violate the reporter's First Amendment rights.⁵⁴ The policy was merely "a variation of the burden on all individuals, press or not, to allow no one to enter the prison and to speak with whomever he or she would like."⁵⁵ In Justice Powell's dissent, he expressed concern about the idea "that no governmental inhibition of press access to newsworthy information warrants constitutional scrutiny,"⁵⁶ stating:

It goes too far to suggest that the government must justify under the stringent standards of First Amendment review every regulation that might affect in some tangential way the availability of information to the news media [But] [a]t some point official restraints on access to news sources . . . may so undermine the function of the First Amendment that it is both appropriate and necessary to require the government to justify such regulations in terms more compelling than discretionary authority and administrative convenience.⁵⁷

52. *Id.* at 832.

53. *See Saxbe v. Wash. Post*, 417 U.S. 843, 850 (1974) (holding a District of Columbia policy banning face-to-face interviews did not violate the First Amendment's freedom of the press provision). The Court noted that *Saxbe* was "constitutionally indistinguishable" from *Pell*. *Id.*

54. *See id.* at 850 ("[S]ince Policy Statement 1220.1A 'does not deny the press access to sources of information available to members of the general public,' we hold that it does not abridge the freedom that the First Amendment guarantees." (quoting *Pell*, 417 U.S. at 835)).

55. Ilana Friedman, Note, *Where Public and Private Spaces Converge: Discriminatory Media Access to Government Information*, 75 *FORDHAM L. REV.* 253, 264 (2006) (citing *Saxbe*, 417 U.S. at 849).

56. *Saxbe*, 417 U.S. at 860 (Powell, J., dissenting).

57. *Id.*

Based on similar facts in *Pell* and *Saxbe*, the Supreme Court in *Houchins v. KQED, Inc.*⁵⁸ held that “[t]he news media have no constitutional right of access to a county jail, over and above that of other persons, to interview inmates . . . for publication and broadcasting.”⁵⁹ Still, within limitations, the Court recognized the importance of the media’s role to inform the public:

Beyond question, the role of the media is important; acting as the “eyes and ears” of the public, they can be a powerful and constructive force, contributing to remedial action in the conduct of public business. They have served that function since the beginning of the Republic, but like all other components of our society media representatives are subject to limits.⁶⁰

The *Houchins* Court also recognized “the role of the media ‘as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve.’”⁶¹

Two years later, the Supreme Court held that the press had a right of access to criminal trials under the First Amendment in *Richmond Newspapers, Inc. v. Virginia*.⁶² The Court located “[t]he right of access to places traditionally open to the public” in “the amalgam of the First Amendment guarantees of speech and press,” in addition to the right of assembly.⁶³ The Supreme Court considered the policy implications if it were to not recognize the right of access in the case of a criminal trial,

58. See *Houchins v. KQED, Inc.*, 438 U.S. 1, 2 (1978) (holding the media has no special right of access to penal institutions).

59. *Id.*

60. *Id.* at 8.

61. *Id.* at 10 (quoting *Mills v. Alabama*, 384 U.S. 214, 219 (1966)).

62. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 577 (1980) (plurality opinion) (holding the First Amendment guarantees a right of public access to criminal trials).

63. See *id.* at 577–78 (“A trial courtroom also is a public place where the people generally—and representatives of the media have a right to be present, and where their presence historically has been thought to enhance the integrity and quality of what takes place.”).

stating that “[t]he explicit, guaranteed rights to speak and to publish concerning what takes place at a trial would lose much meaning if access to observe the trial could, as it was here, be foreclosed arbitrarily.”⁶⁴ The Court added that “[f]ree speech carries with it some freedom to listen.”⁶⁵ Further, the Court viewed the media as a conduit between the public and criminal proceedings.⁶⁶ Because the press often holds special privileges, such as “special seating and priority of entry,” the press was in the best position to deliver information about a proceeding to the greater public who is unable to observe a trial firsthand.⁶⁷ In turn, this symbiotic relationship “contribute[s] to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system.”⁶⁸ Thus, the Court held that “the right to attend criminal trials is implicit in the guarantees of the First Amendment,” because “[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.’”⁶⁹

Justice Brennan in his concurring opinion predicated a right of press access to attend criminal trials under two conditions: 1) whether there is an “enduring and vital tradition” of public access to the forum, and 2) “whether access to a particular government process is important in terms of that very process.”⁷⁰

64. *Id.* at 576–77.

65. *Id.* at 576.

66. *See id.* at 572–73 (noting that the media functions “as surrogates for the public”).

67. *See id.* at 573 (“While media representatives enjoy the same right of access as the public, they often are provided special seating and priority of entry so that they may report what people in attendance have seen and heard.”).

68. *Id.* (quoting *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 587 (1976) (Brennan, J., concurring)).

69. *Id.* at 580 (quoting *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972)).

70. *Id.* at 589 (Brennan, J., concurring).

In *Globe Newspaper Co. v. Superior Court*,⁷¹ the Supreme Court extended the access rule and held a Massachusetts state law which required judges at trials for sexual offenses against minors to exclude the press and general public from the courtroom during the victim’s testimony unconstitutional under the First Amendment.⁷² The Court applied the *Richmond Newspapers* test—referring to each prong, respectively, as “experience” and “logic”⁷³—to explain why a right of access under the First Amendment applies to criminal trials:⁷⁴

First, the criminal trial historically has been open to the press and general public This uniform rule of openness has been viewed as significant in constitutional terms not only because the Constitution carries the gloss of history, but also because a tradition of accessibility implies the favorable judgment of experience Second, the right of access to criminal trials plays a particularly significant role in the functioning of the judicial process and the government as a whole. Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and to society as a whole. Moreover, public access to the criminal trial fosters an appearance of fairness, thereby heightening public respect for the judicial process. And in the broadest terms, public access to criminal trials permits the public to participate in and serve as a check upon the judicial process—an essential component in our structure of self-government.⁷⁵

71. See *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 603 (1982) (holding a mandatory-closure rule for state courts violates the First Amendment).

72. See *id.* at 602 (“[T]he mandatory-closure rule contained in § 16A [of Chapter 278 of the Massachusetts General Laws] violates the First Amendment.”).

73. See *id.* at 606 (“[T]he institutional value of the open criminal trial is recognized in both logic and experience.”).

74. See *id.* at 605 (“Two features of the criminal justice system, emphasized in the various opinions in *Richmond Newspapers*, together serve to explain why a right of access to criminal trials in particular is properly afforded protection by the First Amendment.”)

75. *Id.* at 605–06.

The Court recognized that the government can only overcome the right of access to criminal trials if it can show “that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest.”⁷⁶ Although the Court acknowledged the government’s interests were compelling—to protect sexual abuse victims and to encourage them to come forward with their claims—the means by which the state achieved these interests—imposing a mandatory closure rule—were not narrowly tailored.⁷⁷ The Court stated that “circumstances under which the press and public can be barred from a criminal trial are limited,”⁷⁸ reiterating the criminal trial’s presumption of openness as recognized in *Richmond Newspapers*.⁷⁹

In *Press-Enterprise Co. v. Superior Court (Press-Enterprise D)*,⁸⁰ the Supreme Court applied both the two-pronged test from *Richmond Newspapers* and the compelling interest standard from *Globe Newspaper* to determine whether the right of access in criminal trials could extend to *voir dire* examination of potential jurors.⁸¹ First, under the *Richmond Newspapers* test, the Court concluded that there is a right of access to the jury selection process because jury selection has historically been an open process and, as such, “gives assurance that established procedures are being followed and that deviations

76. *Id.* at 607.

77. *See id.* at 607–10 (“But as compelling as that interest is, it does not justify a mandatory closure rule, for it is clear that the circumstances of the particular case may affect the significance of the interest.”).

78. *Id.* at 606.

79. *See id.* at 605, 610, 619 (referring to *Richmond Newspapers*’ acknowledgement that criminal trials have historically been presumptively open).

80. *Press-Enterprise Co. v. Super. Ct. (Press-Enterprise D)*, 464 U.S. 501, 505 (1984) (holding the selection of jurors to be a public process under First Amendment access principles).

81. *See Amy Jordan, The Right of Access: Is There a Better Fit than the First Amendment?*, 57 VAND. L. REV. 1349, 1355 (2004) (“In *Press-Enterprise I*, the Court for the first time used the dual considerations of *Richmond Newspapers* and *Globe* to assess the press’s right of access to proceedings other than criminal trials.” (citing *Press-Enterprise I*, 464 U.S. at 503)).

will become known.”⁸² Second, under the *Globe Newspaper* test, the Court concluded that, although the “jury selection process may, in some circumstances, give rise to a compelling interest of a prospective juror when interrogation touches on deeply personal matters that person has legitimate reasons for keeping out of the public domain,” the trial judge’s “broad order denying access to information at the *voir dire*” was not narrowly tailored, because he could have limited the information to what “was actually sensitive and deserving of privacy protection.”⁸³

Two years later, the Supreme Court continued to distill Justice Brennan’s two principles from *Richmond Newspapers in Press-Enterprise Co. v. Superior Court (Press-Enterprise II)*,⁸⁴ referring to them as the “tests of experience and logic” to determine “whether a qualified First Amendment right of public access attaches” to preliminary hearings.⁸⁵ The “experience” test required considering “whether the place and process have historically been open to the press and general public.”⁸⁶ The “logic” test required considering “whether public access plays a significant positive role in the functioning of the particular process in question.”⁸⁷ Based on these tests, the Court held that a constitutional right of access applied to preliminary hearings.⁸⁸ The “logic and experience” test “has become the

82. See *Press-Enterprise I*, 464 U.S. at 508 (“Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.” (citing *Richmond Newspapers*, 448 U.S. at 569–71)).

83. *Id.* at 511–13.

84. See *Press-Enterprise Co. v. Super. Ct. (Press-Enterprise II)*, 478 U.S. 1, 10 (1986) (holding the First Amendment right of access of criminal trials applies to preliminary hearings).

85. See *id.* at 10 (concluding that a qualified First Amendment right of access to criminal proceedings attaches to California preliminary hearings); see also *Jordan, supra* note 81, at 1357 (explaining that the right is qualified because “it can be overcome if the government can withstand the strict scrutiny standard of *Globe*”).

86. See *Press-Enterprise II*, 478 U.S. at 8 (distilling the “experience” prong from the consideration that a “tradition of accessibility implies the favorable judgment of experiences”).

87. See *id.*

88. See *id.* at 10 (“The considerations that led the Court to apply the First Amendment right of access to criminal trials in *Richmond*

framework for determining whether the public has a right of access to other aspects of judicial proceedings,” but courts have expanded its application, revealing “a general agreement among the courts that the public’s right of access attaches to decisions ‘of major importance to the administration of justice.’”⁸⁹

A default rule to be derived from the Supreme Court access cases is that once the government has “opened its door” to public access, the Constitution assures the public and the press access.⁹⁰ Moreover, under the logic of the access cases, once government “opens the door” allowing press access, members of the press cannot be arbitrarily excluded based on viewpoint considerations.⁹¹

B. Lower Court Decisions

To date, the U.S. Supreme Court has not decided the extent to which governmental bodies under the First Amendment can exclude members of the press from press conferences. In 1972, in deciding *Lewis v. Baxley*,⁹² an Alabama district court held that “there is a limited First Amendment right of access to . . . the press rooms, and the press conferences dealing with

Newspapers and Globe Newspaper and the selection of jurors in *Press-Enterprise I* lead us to conclude that the right of access applies to preliminary hearings as conducted in California.”).

89. See *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 10–11 (1st Cir. 1986) (noting courts’ recognitions of a public right of access to *voir dire* in a criminal trial, criminal pretrial hearings, and civil cases, for instance) (quoting *In re Globe Newspaper Co.*, 729 F.2d 47 (1st Cir. 1984)).

90. See *Houchins v. KQED, Inc.*, 438 U.S. 1, 16 (1977) (Steward, J., concurring) (“The First and Fourteenth Amendments do not guarantee the public a right of access to information generated or controlled by government The Constitution does no more than assure the public and the press equal access once government has opened its doors.”).

91. See *Developments in the Law—The Law of Media*, 120 HARV. L. REV. 990, 1019–20 (2007) (“[J]ournalists cannot be arbitrarily excluded from press forums to which other journalists have access in retaliation for previously expressed viewpoints.”).

92. See *Lewis v. Baxley*, 368 F. Supp. 768, 777 (M.D. Ala. 1973) (holding the press has a limited First Amendment right of access to state government news).

state government.”⁹³ The court held that this right is “limited” to “access to places that other members of the press may go and congregate in the ordinary course of events,” but that all reporters do not have a constitutional right to an individual interview just because another reporter was granted that access.⁹⁴ The court emphasized that “[t]he right of access is a limited right to reasonable access.”⁹⁵

Several years later, a Hawaii district court applied the *Lewis v. Baxley* holding to another instance of press access.⁹⁶ The Hawaiian court concluded that a mayor could not deny a reporter access to a general news conference held in the mayor’s office because “other news reporters attend[ed] press conferences” in the mayor’s office.⁹⁷ The district court explained:

If he chooses to hold a general news conference in his inner office, for that purpose and to that extent his inner office becomes a public gathering place. When he uses public buildings and public employees to call and hold general news conferences on public matters he is operating in the public and not the private sector of his activities.⁹⁸

The mayor had “opened the door” to the reporters’ right of access to his office after he had made his office available to members of the press generally.⁹⁹ Thus, the mayor could not prevent the plaintiff, an individual reporter, from attending the

93. *Id.*

94. *Id.*

95. *Id.*

96. *See Borreca v. Fasi*, 369 F. Supp. 906, 908–09 (D. Haw. 1974) (“The First Amendment freedom of the press includes a limited right of reasonable access to news This right of access includes a right of access to the public galleries, the press rooms, and the press conferences dealing with government.” (citing *Lewis*, 368 F. Supp. at 777)).

97. *Id.* at 911.

98. *Id.* at 910.

99. *See id.* at 907 (defining a general news conference as a conference “where all media generally are informed of the mayor’s intention to hold a news conference and all are free to attend”).

general press conference.¹⁰⁰ The court also recognized that, while government officials have the First Amendment right to criticize the press, there is a line:

[W]hen criticism transforms into an attempt to use the powers of governmental office to intimidate or to discipline the press or one of its members because of what appears in print, a compelling governmental interest that cannot be served by less restrictive means must be shown for such use to meet Constitutional standards. No compelling governmental interest has been shown or even claimed here.¹⁰¹

In 1976, a Massachusetts district court granted a temporary restraining order against city public officials when they excluded a news station's cameramen from accessing the city council chamber and a press area designated for cameramen, and then only allowed them access to the spectator's section, in violation of their First Amendment rights.¹⁰² The court highlighted the distinction between a news conference and a private interview:

Public officials need not furnish information, other than public records, to any news agency. The opportunities to cover official news sources must be the same for all accredited news gatherers, however. All representatives of news organizations must not only be given equal access, but within reasonable limits, access with equal convenience to official news sources.¹⁰³

Although not absolute, this right "may not be infringed . . . in the absence of a compelling government interest

100. See *id.* 907–08 (noting that the mayor denied the plaintiff, an individual reporter, and his publication multiple times from attending press conferences while other reporters were allowed).

101. *Id.* at 910.

102. See *Westinghouse Broad. Co. v. Dukakis*, 409 F. Supp. 895, 896–97 (D. Mass. 1976) (deciding in favor of the news station because a city councilman had asked two cameramen to leave the council chamber while allowing the same station's reporter to remain).

103. *Id.* at 896.

to the contrary.”¹⁰⁴ The court found that the station was “entitled to share the special facilities provided for other stations, even though they are provided as a convenience.”¹⁰⁵ The court also found that the city public officials had shown no compelling government interest to overcome an interference with the station’s rights under the First Amendment.¹⁰⁶

In *American Broadcasting Companies, Inc. v. Cuomo*,¹⁰⁷ the Second Circuit articulated that, “once there is a public function, public comment, and participation by some of the media, the First Amendment requires equal access to all of the media or the rights of the First Amendment would no longer be tenable.”¹⁰⁸ In that case, the Second Circuit held that “the First Amendment rights of [the television network] ABC and of its viewing public would be impaired by their exclusion from the [mayoral] campaign activities” after the candidates denied ABC access to broadcast live coverage of postelection activities at the candidates’ headquarters.¹⁰⁹ In support of its decision, the Second Circuit explained that the candidates had opened the door to the press having access to their campaign activities:

We think that once the press is invited, including the media operating by means of instantaneous picture broadcast, there is a dedication of those premises to public communications use. . . . The issue is not whether the public is or is not generally excluded, but *whether the members of the broadcast media are generally excluded*. If choice were

104. *Id.* (citing *Quad-City Cmty. News Serv., Inc. v. Jebens*, 334 F. Supp. 8 (S.D. Iowa 1971); *Borreca v. Fasi*, 369 F. Supp. 906 (D. Haw. 1974)).

105. *Id.* at 897.

106. *Id.*

107. *See Am. Broad. Cos., Inc. v. Cuomo*, 570 F.2d 1080, 1083 (2d Cir. 1977) (holding that when there is a public function, public comment, or participation by some media there is a First Amendment requires equal access by all of the media).

108. *Id.* at 1083; *see also, e.g., Nation Magazine v. U.S. Dep’t of Def.*, 762 F. Supp. 1558, 1573 (S.D.N.Y. 1991) (“Regardless of whether the government is constitutionally required to open the battlefield to the press as representatives of the public, a question that this Court has declined to decide, once the government does so it is bound to do so in a non-discriminatory manner.”).

109. *Am. Broad. Cos., Inc.*, 570 F.2d at 1083.

allowed for discrimination in a public event of this magnitude in the various media, then we reject the contention that it is within the prerogative of a political candidate. We rather think that the danger would be that those of the media who are in opposition or who the candidate thinks are not treating him fairly would be excluded. And thus we think it is the public which would lose.¹¹⁰

Each of these press access opinions, while illuminating in some respects, are “vague regarding the degree of inclusiveness needed to trigger a right of equal access.”¹¹¹

In 1977, the D.C. Circuit in *Sherrill v. Knight*¹¹² provided more precise guidance regarding press access in the very context of White House press conferences.¹¹³ The D.C. Circuit concluded that because “the White House has voluntarily decided to establish press facilities for correspondents who need to report therefrom,” it has triggered the proviso that the government “open[ed] its door” to “all bona fide Washington-based journalists,” and thus could not arbitrarily exclude journalists from White House press facilities.¹¹⁴ In *Sherrill*, the Secret Service denied the Washington correspondent for *The Nation* a press pass to White House press facilities.¹¹⁵ The White House and Secret Service argued in support of their access denial:

110. *Id.* (emphasis added).

111. See Luke M. Milligan, *Rethinking Press Rights of Equal Access*, 65 WASH. & LEE L. REV. 1103, 1107 n. 10 (2008) (noting that these decisions were based “on the factual context of the exclusion of the reporter: [G]eneral news conferences open to all media” (quoting *Snyder v. Ringgold*, 40 F. Supp. 2d 714, 717 (D. Md. 1999))).

112. See *Sherrill v. Knight*, 569 F.2d 124, 130 (D.C. Cir. 1977) (holding that denial of press access to the White House briefing room must be based on a compelling governmental interest and is subject to other procedural requirements).

113. See *id.* at 126 (detailing facts of the case including the denial of a White House press pass to a reporter).

114. *Id.* at 129.

115. See *id.* at 126 (“The denial resulted solely from the determination of the Secret Service, after investigating Mr. Sherrill, that he not be issued the pass.”).

Because the public has no right of access to the White House, and because the right of access due the press generally is no greater than that due the general public, denial of a White House press pass is violative of the [F]irst [A]mendment only if it is based upon the content of the journalist’s speech or otherwise discriminates against a class of protected speech.¹¹⁶

The D.C. Circuit rejected the defendants’ argument, noting that, regardless of an individual reporter’s more restricted access into the “greater” White House itself, White House press facilities specifically “hav[e] been made publicly available as a source of information” for journalists and “are perceived as being open to all bona fide Washington-based journalists”¹¹⁷ Because the White House has “voluntarily decided to establish press facilities for correspondents who need to report therefrom,” it was of no moment that press facilities merely ensured a right to access of the press and not the “general public.”¹¹⁸ Thus, the White House “opened the door” to equal press access to certain of its facilities by opening the facilities to the press in general.¹¹⁹ The *Sherrill* court demarcated this general rule by noting that the President retained the discretion to grant exclusive interviews or briefings with selected journalists without the risk of opening the door to having to grant exclusive interviews to all journalists.¹²⁰

In finding that “[t]he protection afforded newsgathering under the [F]irst [A]mendment guarantee of freedom of the press . . . requires that this access not be denied arbitrarily or

116. *Id.* at 129.

117. *Id.*

118. *Id.*

119. *Id.*; see also Milligan, *supra* note 111, at 1107 (balancing barring “bad” forms of selective access (press conferences) and “good” forms of selective access (exclusive interviews) by producing a test that says “[a]n excluded reporter enjoys a presumptive right of access whenever such access is already generally inclusive of the press”).

120. See *Sherrill*, 569 F.2d at 129 (“Nor is the discretion of the President to grant interviews or briefings with selected journalists challenged. It would certainly be unreasonable to suggest that because the President allows interviews with some bona fide journalists, he must give this opportunity to all.”).

for less than compelling reasons,”¹²¹ the D.C. Circuit in its decision took into account not only the interests of members of the press and the publications for which they write but also the interests of the “public at large.”¹²² If the government arbitrarily restricts a journalist from “newsgathering” and “sources of information,” the corollary to the journalist’s restriction is that the government will also be restricting the “public at large” from accessing a variety of “sources of information.”¹²³ Further, while the *Sherrill* court acknowledged the unique security concerns at the White House, it found that merely informing the reporter the Secret Service’s basis for the exclusion of the journalist—“reasons of security”—without more, was insufficient.¹²⁴ The D.C. Circuit acknowledged that a showing of “potential risk to the physical security of the President or his family,” in conjunction with a “publish[ed] or otherwise ma[de] publicly known . . . [,] explicit and meaningful standard governing denial of White House press passes,” may constitute a compelling interest to permit denial of press access to particular reporters.¹²⁵

121. *Id.* (citing *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975); *Pell v. Procunier*, 417 U.S. 817, 829–35 (1974); *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972); *Lovell v. Griffin*, 303 U.S. 444 (1938)).

122. *See id.* at 129–30 (“Not only newsmen and the publications for which they write, but also the public at large have an interest protected by the first amendment in assuring that restrictions on newsgathering be no more arduous than necessary, and that individual newsmen not be arbitrarily excluded from sources of information.” (citing *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491–92 (1975); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943))).

123. *See id.* (“[R]ight conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection” (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943))).

124. *See id.* at 130 (“Merely informing . . . rejected applicants that rejection was for ‘reasons of security’ does not inform the public or other potential applicants of the basis for exclusion of journalists from White House press facilities. Moreover, we think that the phrase ‘reasons of security’ is unnecessarily vague . . .”).

125. *See id.* 130–31 (“This standard is sufficiently circumspect so as to allow the Secret Service, exercising expert judgment which frequently must

But what happens in a situation where the government’s provided rationale may not be supported by a compelling reason or where the government arbitrarily denies the reporter access? In other words, what happens if the government’s stated rationale is pretextual? The *Sherrill* court’s procedural guidelines allow for the opportunity to rebut the government’s decision to deny access:

We think that notice to the unsuccessful applicant of the factual bases for denial with an opportunity to rebut is a minimum prerequisite for ensuring that the denial is indeed in furtherance of Presidential protection, rather than based on arbitrary or less than compelling reasons. The requirement of a final statement of denial and the reasons therefor is necessary in order to assure that the agency has neither taken additional, undisclosed information into account, nor responded irrationally to matters put forward by way of rebuttal or explanation.¹²⁶

Subsequent to *Sherrill*, three network television companies—ABC, NBC, and CBS—alleged that the White House Press Office’s decision to exclude their representatives “from participating in the press pool coverage of . . . White House events, while continuing to allow pool participation by representatives of other forms of news media” interfered with the First Amendment right of access of the press to cover news events and right of the public to receive information about the activities and operation of the government.¹²⁷ After an extensive

be subjective in nature, considerable leeway in denying press passes for security reasons.”)

126. *Id.* at 131 (citations omitted).

127. *Cable News Network, Inc. v. Am. Broad. Cos.*, 518 F. Supp. 1238, 1241–42 (N.D. Ga. 1981). The district court provided a definition of a “press pool” as:

The obligation of those in the pool is to share their material with those media representatives not included. Traditionally, a very small pool, called a “tight pool” has been used when it has been deemed necessary to restrict media attendance to no more than thirteen persons (which includes one television crew of five persons; [for instance,] the television representation in the tight pool has been rotated among CBS, ABC, and NBC). Also, a so-called “expanded pool” consisting of more than thirteen media

review of Supreme Court opinions regarding the press's right of access, in addition to the *Sherrill* opinion, a Georgia district court confirmed "that the First Amendment include[s] a right of access to news or information concerning the operations and activities of government."¹²⁸ This right, however, is "subject to limiting considerations such as confidentiality, security, orderly process, spatial limitation, and doubtless many others."¹²⁹

The court applied Justice Brennan's test in *Richmond Newspapers* to decide whether the White House violated the station's rights of access.¹³⁰ First, the court noted that "there is a history of pool coverage of presidential activities going back through several past Administrations in which television news representatives took part"; in other words, "there is an enduring and vital tradition of public entree (through the press as agents) to the presidential activities covered by press pool."¹³¹ Second, "pool coverage of presidential activities is important to the President," because a "public awareness and understanding of the President's behavior facilitates his effectiveness as President," which is "necessary for a determination by the public of the adequacy of the President's performance."¹³² Thus, television stations "have a limited right of access to White House

representatives, has been used when some numerical limitation has been deemed necessary, but where more than thirteen persons can be accommodated. Both the "tight pool" and the "expanded pool" include representatives of the print and the television media.

Id. at 1240–41.

128. See, e.g., *id.* at 1242–44 (reviewing *Richmond Newspapers*, *Branzburg*, *Pell*, *Saxbe* and *Sherrill* to identify the right of access); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972), *Pell v. Procunier*, 417 U.S. 817, 834–35 (1974), *Saxbe v. Wash. Post Co.*, 417 U.S. 843, 869 (1974), *Sherrill v. Knight*, 569 F.2d 124 (D.C. Cir. 1997).

129. *Am. Broad. Cos.*, 518 F. Supp. at 1244.

130. See *id.* (applying the *Richmond Newspapers*' two principles that take into account "the information sought and the opposing interests invaded" (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 588 (1980))).

131. *Id.*

132. *Id.*

pool coverage in their capacity as representatives of the public and on their own behalf as members of the press.”¹³³

After the district court found that television stations had a limited right of access, it balanced “the interest served by the sought-for newsgathering activity against the interest served by the governmental restraint.”¹³⁴ The court recognized the public’s interest in having the television stations present in White House pool coverage outweighed the interest served by the governmental restraint, because as “the importance of the particular news event or news setting increases,” “the importance of conveying the fullest information possible [also] increases,” and here, presidential activities are considered of the utmost importance.¹³⁵ The government failed to present “any reason such as considerations of security or space limitation.”¹³⁶ Thus, the court held that “the total exclusion of television representatives from White House pool coverage denie[d] the public and the press their limited right of access, guaranteed by the First Amendment.”¹³⁷

In *Stevens v. New York Racing Association*,¹³⁸ a New York district court found that the New York Racing Association (NYRA) violated the First Amendment rights of a horse-racing newspaper’s publisher when it barred him from taking photographs at the NYRA’s racing tracks that were otherwise open to the press.¹³⁹ The court looked at whether the NYRA restricted the publisher’s access based upon the content of the

133. *Id.* at 1245.

134. *Id.* (citing *Borreca v. Fasi*, 369 F. Supp. 906 (D. Haw. 1974)).

135. *Id.*

136. *Id.*

137. *Id.*

138. *See Stevens v. N.Y. Racing Ass’n*, 665 F. Supp. 164, 175–77 (E.D.N.Y. 1987) (holding that a nonprofit racing association deprived a publisher of its First Amendment rights when it restricted the publisher’s photographer from taking photographs in certain areas of the racing track, while other press members were allowed access to take photographs).

139. *See id.* at 177 (“[D]efendant is enjoined . . . from prohibiting plaintiff . . . from carrying a camera into the paddock areas . . . unless . . . plaintiff’s conduct in the paddock area unreasonably annoys patrons . . . or interferes with the business conducted in the paddock.”).

publication or whether the restriction “serve[s] a legitimate government purpose” and “outweigh[s] the systemic benefits inherent in unrestricted (or lesser-restricted) access.”¹⁴⁰ The court found that the NYRA violated the publisher’s First Amendment rights, because the publisher put forth sufficient facts to show the NYRA’s restriction was content-based, and in fact, likely “pretextual.”¹⁴¹ The rationale behind the restriction—that the publication’s “coverage made [the plaintiff] appear bigger than the [NYRA]’s events”—is “based on disapproval of the contents of [the newspaper].”¹⁴² Moreover, the fact that the NYRA’s rationale appeared pretextual, due to its changing, inconsistent rationales as to why it restricted the publisher’s access, bolstered the court’s decision that the NYRA’s restriction was content-based.¹⁴³ But even if the restriction was not content-based, the court concluded that the publisher had demonstrated sufficient facts that the restriction did not “serve a legitimate government objective or that the benefits derived from the restriction [were] fewer than the harm that it cause[d],” because no one had actually complained about the publisher and there was no indication that the publisher’s activities “interfered with the normal activities carried on” at the racing track.¹⁴⁴ In sum, “the costs of the restriction in terms of loss of editorial freedom and newsgathering, as well as a possible reduction in the readership’s enjoyment, outweigh[ed] any benefits which defendant [could have been] expected to derive from the restriction.”¹⁴⁵

140. *Id.* at 175.

141. *See id.* at 175–76 (“The conclusion that defendant’s decision was content-based is bolstered by the fact that defendant’s explanation that the limitation was imposed because of plaintiff’s conduct appears pretextual.”).

142. *Id.* at 175.

143. *See id.* at 175–76 (explaining how the rationale for restricting the plaintiff’s access appeared “pretextual” because of the defendants’ “inconsistencies” pre-deposition and post-deposition, revealing that no one had actually complained about the plaintiff’s behavior).

144. *Id.* at 176–77.

145. *Id.* at 177.

The D.C. Circuit distinguished its prior *Sherrill* decision in *JB Pictures, Inc. v. Department of Defense*,¹⁴⁶ where media and veterans’ organizations challenged a Department of Defense policy barring all members of the press and public from access to the mortuary of deceased soldiers at a military base.¹⁴⁷ The D.C. Circuit found that that the Department of Defense’s access policy did not violate the plaintiffs’ First Amendment right of access because “military bases do not share the tradition of openness on which the Court relied in striking down restrictions on access to criminal court proceedings,” a reference to the *Richmond Newspapers/Press-Enterprise* “logic and experience” test.¹⁴⁸ The D.C. Circuit also found that the Department of Defense applied its access policy “in a uniform fashion . . . regardless of their views on war or the United States military.”¹⁴⁹ Thus, the access policy did not violate the First Amendment’s guarantees of freedom of the press, because the base had not “opened the door” to press access.¹⁵⁰

In 2002, the D.C. Circuit reaffirmed *Sherrill* in *Getty Images News Service Corp. v. Department of Defense*,¹⁵¹ recognizing that when the Department of Defense (DoD) grants

146. See *JB Pictures, Inc. v. Dep’t of Def.*, 86 F.3d 236, 242 (D.C. Cir. 1996) (holding that the regulation at issue did not violate the First Amendment rights to freedom of speech and the press).

147. See *id.* at 238 (“JB Pictures[,] . . . several other media and veterans’ organizations and individual reporters challenged the . . . access policy on First Amendment grounds, arguing that precluding access to the war dead . . . while permitting access to other activities . . . constituted impermissible ‘viewpoint discrimination.’”).

148. *Id.* at 240.

149. *Id.* at 239.

150. See *id.* (noting that merely because the policy allowed the public and press “substantial” access to certain areas of the base, and sometimes for particular occasions, this did not “open the door” to “complete” access). Compare *id.*, with *Pell v. Procunier*, 417 U.S. 817, 833–35 (1974) (finding that the prison had not “opened the door” even though it made some areas of the prison available to the press and public).

151. See *Getty Images News Servs. Corp. v. Dept. of Def.*, 193 F. Supp. 2d 112, 124 (D.C. Cir. 2002) (holding that the media organization “is likely to succeed on the claim that, at some point in time, published criteria and a process for obtaining relevant information must be in place to govern media access to ongoing detention activities at Guantanamo Bay”).

certain media organizations limited access to Guantanamo Bay, while restricting others, the First Amendment requires that the DoD “must not only have some criteria to guide its determinations, but must have a reasonable way of assessing whether the criteria are met.”¹⁵² Even though the D.C. Circuit remained cognizant of the heightened deference associated with military affairs, “equal access claims by the press warrant careful judicial scrutiny,” regardless of the activity at issue.¹⁵³ The government should “publish . . . the criteria used in . . . [its] selection process and provide a way for applicant media organizations to submit information demonstrating that they satisfy the criteria,” an ode to the D.C. Circuit’s imposed procedural guidelines in *Sherrill*.¹⁵⁴ This process, in turn, would enable the government “to conduct a reasoned evaluation of media organizations under clear governing criteria,” which would ensure that the government does not arbitrarily deny access to the media.¹⁵⁵

A California district court in *Telemundo of L.A. v. City of L.A.*¹⁵⁶ considered whether a ceremony commemorating the Mexican War of Independence constituted a public or nonpublic forum in order to determine the extent to which a television broadcast station’s First Amendment rights may be exercised.¹⁵⁷ The court’s consideration of the characterization of the forum is

152. Friedman, *supra* note 55, at 283 (quoting *Getty Images*, 193 F. Supp. at 121).

153. See *Getty Images*, 193 F. Supp. at 119 (noting that even though Guantanamo Bay Naval Base is not a public forum, equal access claims under the First Amendment require careful judicial scrutiny).

154. *Id.* at 121 (citing *Sherrill v. Knight*, 569 F.2d 124, 130 (D.C. Cir. 1977)).

155. See *id.* at 120–21 (expressing concern that the DoD’s method of selecting which media organizations are placed on flights to Guantanamo Bay arbitrarily or unreasonably denies access to the Naval Station) (citing *Sherrill*, 569 F.2d at 130).

156. See *Telemundo of L.A. v. City of Los Angeles*, 283 F. Supp. 2d 1095, 1103 (C.D. Ca. 2003) (holding that “the City’s restrictions on Telemundo’s access to the official ceremony are unreasonable[,]” violating Telemundo’s First Amendment rights).

157. See *id.* at 1101 (considering “the character of the location where the expressive activity will occur” to begin its First Amendment claim analysis).

similar to the “experience” factor in the “logic and experience” test—whether there is an “enduring and vital tradition” of public access to the forum.”¹⁵⁸ The court recognized that government property becomes a public forum if the property has “traditionally been held in the trust for the use of the public” or has been “opened for expressive activity by part or all of the public.”¹⁵⁹ On the other hand, “nonpublic forums include property which is not by tradition or designation a forum for public communication.”¹⁶⁰ If the property is a public forum, the government may impose “time, place, or manner” restrictions, provided that “the restrictions are content-neutral” and “narrowly tailored to serve a significant governmental interest” and “leave open ample alternative channels for communication of the information.”¹⁶¹ The court found that a ceremony commemorating the Mexican War of Independence constituted a public forum, because the ceremony had taken place on government property for at least three years, “transforming publicly owned property into a public forum for expressive activity.”¹⁶² Next, the court considered whether the city’s restrictions on the station’s broadcast of the ceremony were reasonable, in light of the fact that the city granted another station access to the ceremony.¹⁶³ After the station initiated the lawsuit, the city argued that the restrictions on the station were necessary for public safety reasons.¹⁶⁴ The court found that the city’s restrictions on the station’s access to the ceremony were

158. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 589 (1980) (Brennan, J., concurring).

159. *Telemundo of L.A.*, 283 F. Supp. 2d at 1101–02.

160. *Id.* at 1102.

161. *See id.* (“If government property has by law or tradition been given status as a public forum, a state’s right to limit protected expressive activity is sharply circumscribed.”).

162. *Id.*

163. *See id.* at 1102–03 (“[The city] initially decided that KMEX’s cameras should be granted access to the official ceremony while Telemundo should be required to use a pool feed.”).

164. *See id.* at 1103 (“However, now that the City has made the decision [to not grant access to Telemundo], it argues that the restrictions on Telemundo are required for public safety reasons pursuant to Los Angeles Fire Department Standard Policies and Procedures for outdoor concert events.”).

unreasonable, because the city put forth no evidence that it had any meaningful or legitimate public safety concerns, such as occupancy restrictions, and thus the restrictions appeared pretextual.¹⁶⁵ Lastly, the court inquired into whether the station had shown a reasonable possibility of irreparable injury.¹⁶⁶ The court rejected the city's argument that, because the station to which the city had granted access would provide a pool feed to the plaintiff's station, it would not be irreparably harmed.¹⁶⁷ The First Amendment encompasses the right to certain creative, discretionary choices, such as deciding "what to film, what to emphasize, and what images to relay to viewers."¹⁶⁸ Further, the city had not shown that the pooling was in fact necessary.¹⁶⁹

In *Raycom National, Inc. v. Campbell*,¹⁷⁰ an Ohio district court found that a mayor had not violated a broadcast station's First Amendment rights when the mayor ordered city officials to stop giving the station interviews.¹⁷¹ The court discussed what would have had to occur in order for the station's First Amendment rights to have been violated.¹⁷² If, for example, a broadcast station's reporters were "prohibited from attending press conferences," or if the government were to bar "access to information generally available to other members of the media,"

165. *See id.* ("In reviewing the declaration of L.A. Fire Department Inspector Benjamin Flores, the Court did not find that he concluded that occupancy restrictions preclude Telemundo's cameras or trucks.")

166. *See id.* (analyzing the question of irreparable harm in the preliminary injunction test after determining that the station had "established a substantial likelihood of success on its First Amendment claim").

167. *Id.*

168. *Id.*

169. *Id.*

170. *See Raycom Nat'l, Inc. v. Campbell*, 361 F. Supp. 2d 679, 688 (N.D. Ohio 2004) (holding that the station was not entitled to a temporary restraining order because it is unlikely to prevail on its claim that the mayor's action violated the station's First Amendment rights).

171. *See id.* at 681 (explaining that the mayor "issued an 'edict' prohibiting City officials and employees from speaking with or providing information to WOIO reporters" with the exception of answering requests for formal records).

172. *See id.* at 683–84 (noting that what plaintiff was alleging—that the station received "interviews or statements off-the-record"—did not amount to a successful First Amendment claim, and an injunction would give the station "preferential status").

then a reporter may have a successful First Amendment claim.¹⁷³ If, on the other hand, a government official merely denied exclusive interviews or other special requests that went beyond information generally available to other members of the media, First Amendment issues would not be triggered.¹⁷⁴

In *Nicholas v. City of New York*,¹⁷⁵ a New York district court stated that, when a restriction on the press appears to be content-based, it is the proper “subject of additional factual development” for a court to inquire into “the motivation underlying the limitations on news-gathering . . . especially where . . . there are allegations that the reasons provided for the restriction are ‘pretextual.’”¹⁷⁶ The plaintiff, a photojournalist, alleged that his First Amendment rights were violated when the New York Police Department (NYPD) revoked his press pass in retaliation for the content of his speech.¹⁷⁷ He claimed that the NYPD discriminated against him based on “his work and the NYPD’s prior experiences with him,” when the NYPD “knowingly permitted two photojournalists to take pictures of the scene from ‘behind police lines,’ while the rest of photojournalists were corralled in the ‘press pen,’ out of sight and earshot.”¹⁷⁸ The court looked at the circumstances surrounding Nicholas’s exclusion and the NYPD’s comments about Nicholas, and inferred that the NYPD “targeted him because they did not believe him to be a ‘team player,’ and they had experienced previous run-ins with him.”¹⁷⁹ The court

173. *Id.* at 683.

174. *Id.* at 684.

175. *See Nicholas v. City of New York*, No. 15-CV-9592, 2017 WL 766905, at *5 (S.D.N.Y. Feb. 27, 2017) (holding that the plaintiff’s First Amendment allegation, whether characterized as either viewpoint-based discrimination or arbitrary, supports a theory of his exclusion from news-gathering).

176. *Id.* at *6 (citing *Stevens v. N.Y. Racing Ass’n*, 665 F. Supp. 164, 175 (E.D.N.Y. 1987)).

177. *See id.* at *1 (“Nicholas alleges that Defendants violated his First and Fourteenth Amendment rights by revoking his New York Police Department (“NYPD”) press credential without due process and in retaliation for the content of his speech.”).

178. *Id.* at *5–6.

179. *Id.* at *6.

accepted Nicholas's argument that the NYPD arbitrarily denied him access:

[A]rbitrary restrictions on news-gatherers may run afoul of the First Amendment, unless Defendants can explain the need, because the First Amendment protects the public against the government's arbitrary interference with access to important information, including the diversity of media outlets covering an event. The nature and potential arbitrariness of the limit on some news-gatherers but not others is an additional area for more factual development.¹⁸⁰

In 2018, a South Dakota district court in *Danielson v. Huether*,¹⁸¹ like the court in *Raycom National*, found that the plaintiff had not alleged sufficient facts to show that city government officials violated his First Amendment rights when they stopped sending him notifications of press releases and press conferences normally sent to the media, denied him access to special locations for newsgathering, and stopped answering his questions.¹⁸² In response to the first two allegations, the court found that he had not cited any cases holding that he had a right to receive notices of press releases and press conferences, nor had he shown "that these special locations were otherwise generally available to the media."¹⁸³ In regard to the third allegation, the court found that "government officials have no First Amendment obligations to respond to a particular reporter."¹⁸⁴ Although the court did not rule in favor of the plaintiff, it suggested what would trigger First Amendment issues: "Of course, denying a member of the press access to certain types of information otherwise made available for public

180. *Id.* (citations omitted).

181. *See Danielson v. Huether*, No. 4:18-CV-04039, 2018 WL 6681768, at *10 (D.S.D. Dec. 19, 2018) (holding that the plaintiff's "allegations that the Defendants failed to treat him like other members of the media are insufficient to allege a violation of the First Amendment").

182. *See id.* at *10. ("Unlike the plaintiffs in *Cuomo* [or] *Sherrill*, . . . Danielson does not claim that government officials excluded him from press conferences or press facilities that were generally open to the public or the media.").

183. *Id.*

184. *Id.*

dissemination could present potential First Amendment problems.”¹⁸⁵

III. Analysis of the Press’s Right of Access

A. When and On What Grounds Can the President Restrict the Press’s Right of Access?: A Framework

The aforementioned case law dealing with the press’s right of access to government property or certain forums sets forth a number of factors to consider in deciding whether the government has “opened the door” to press access and on what grounds the government can limit that access.¹⁸⁶ This case law provides workable principles for analyzing whether President Trump and his Administration have restrained the press’s right of access in violation of the First Amendment.

Once the President and the Administration have “opened the door” to press access generally, they must provide the press equal access.¹⁸⁷ They can neither exclude a reporter arbitrarily or for less than compelling reasons,¹⁸⁸ nor exclude based on the viewpoint of that reporter or of the affiliated media outlet.¹⁸⁹

185. See *id.* at *10 (distinguishing from *Cuomo* and *Sherrill*, noting that plaintiff merely claims “that the City told him that he could no longer receive notifications of press releases and conferences normally sent to the media . . . and that the City has denied him access to special locations”).

186. See *Developments in the Law—The Law of Media*, *supra* note 91, at 1019 (acknowledging that “the media’s right to gather information is far from straightforward”).

187. See, e.g., *Sherrill v. Knight*, 569 F.2d 124, 129 (D.C. Cir. 1977) (“[W]e are presented with a situation where the White House has voluntarily decided to establish press facilities for correspondents who need to report therefrom. These press facilities are perceived as being open to all bona fide Washington-based journalists . . .”).

188. See, e.g., *id.* (“White House press facilities having been made publicly available as a source of information for newsmen, the protection afforded newsgathering under the [F]irst [A]mendment guarantee of freedom of the press, requires that this access not be denied arbitrarily or for less than compelling reasons.”) (citations omitted).

189. See, e.g., *id.* at 129 (“[A]rbitrary or content-based criteria for press pass issuance are prohibited under the [F]irst [A]mendment . . .”).

In order to determine whether the Administration has “opened the door” of the forum to press access, both the *Richmond Newspapers*’ two-part “logic and experience” test¹⁹⁰ and *Cuomo*’s equal access test¹⁹¹ provide guidance. Where there is a history of press access, access should generally not be denied.¹⁹² This general rule, however, does not preclude the President from granting an individual interview with a specific reporter without being required to grant individual interviews with other reporters.¹⁹³

Once a court has determined the Administration has “opened the door” to the press generally, it should then inquire whether the government has denied particular reporters access arbitrarily, for less than compelling reasons, or based on the viewpoint of that reporter or of the affiliated media outlet. The court is to engage in careful judicial scrutiny in considering the press access issue.¹⁹⁴ Such careful judicial scrutiny requires the Administration to put forth compelling reasons for restricting members of the press that do not include discriminatory or

190. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 589 (1980) (Brennan, J., concurring) (asking first, whether there is an “enduring and vital tradition” of public access to the forum, and second, “whether access to a particular government process is important in terms of that very process”); see also *Press-Enterprise Co. v. Super. Ct.*, 478 U.S. 1, 10 (1986) (referring to the *Richmond Newspapers* test as “tests of experience and logic”); *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 606 (1982) (“[T]he institutional value of the open criminal trial is recognized in both logic and experience.”).

191. See *Am. Broad. Cos., Inc. v. Cuomo*, 570 F.2d 1080, 1083 (2d Cir. 1977) (“[O]nce there is a public function, public comment, and participation by some of the media, the First Amendment requires equal access to all of the media or the rights of the First Amendment would no longer be tenable.”).

192. *Id.*

193. See, e.g., *Sherrill v. Knight*, 569 F.2d 124, 129 (D.C. Cir. 1977) (“Nor is the discretion of the President to grant interviews or briefings with selected journalists challenged. It would certainly be unreasonable to suggest that because the President allows interviews with some bona fide journalists, he must give this opportunity to all.”).

194. See, e.g., *Getty Images News Servs. Corp. v. Dep’t of Def.*, 193 F. Supp. 2d 112, 119 (D.C. Cir. 2002) (“[E]qual access claims by the press warrant careful judicial scrutiny.”); *Sherrill*, 569 F.2d at 130 (noting that the government must provide “meaningful” rationales to allow for “meaningful judicial review of decisions to deny press passes”).

arbitrary exclusions or pretextual rationales.¹⁹⁵ Further, even when an Administration invokes a concern related to the special nature of the presidency and the White House, like “confidentiality, security, orderly process, [or] spatial limitation,”¹⁹⁶ as the reason for restricting press access, the court should still ask whether the restriction serves a compelling government interest and is narrowly tailored to serve the Administration’s interest.¹⁹⁷ Thus, the court should be able to inquire into an Administration’s motive to determine if the Administration has a legitimate purpose for restricting the press’s access.¹⁹⁸

195. See, e.g., *Nicholas v. City of New York*, No. 15-CV-9592, 2017 WL 766905, at *6 (S.D.N.Y. Feb. 27, 2017) (“[T]he motivation underlying the limitations on news-gathering is properly the subject of additional factual development, especially where, as here, there are allegations that the reasons provided for the restriction are pretextual.”); *Stevens v. N.Y. Racing Ass’n*, 665 F. Supp. 164, 175–76 E.D.N.Y. 1987 (“The conclusion that defendant’s decision was content-based is bolstered by the fact that defendant’s explanation that the limitation was imposed because of plaintiff’s conduct appears pretextual.”).

196. *Cable News Network, Inc. v. Am. Broad. Cos.*, 518 F. Supp. 1238, 1244 (N.D. Ga. 1981).

197. See *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 607 (1982) (recognizing that the government can only overcome the right of access to criminal trials if it can show “that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest.”).

198. See, e.g., *Brown v. Hartlage*, 456 U.S. 45, 53–54 (1982) (“[T]he First Amendment surely requires that the restriction be demonstrably supported by not only a legitimate state interest, but a compelling one, and that the restriction operate without unnecessarily circumscribing protected expression.”); *Stevens v. N.Y. Racing Ass’n*, 665 F. Supp. 164, 175 (E.D.N.Y. 1987) (explaining that a limitation on the press, even if not content-based, must “serve a legitimate governmental purpose, must be rationally related to the accomplishment of that purpose, and must outweigh the systemic benefits inherent in unrestricted (or lesser-restricted) access”); see also *Developments in the Law—The Law of Media*, *supra* note 91, at 1029–31 (suggesting a motive-based inquiry focusing on “why, not whether, the doors have been shut on particular reporter,” which “would likely eliminate the most obvious and egregious forms of viewpoint discrimination,” while also allowing government officials to “defend themselves by showing that the access denial was based on legitimate motives”).

B. Applying the Framework to the Three Trump-Press Incidents

The outset of this Note summarized three incidents in which President Trump and his Administration excluded members of the press, arguably in violation of the First Amendment.¹⁹⁹ This section will apply the framework for analyzing the press's right of access suggested above to those three incidents.²⁰⁰

1. Incident #1: The Gaggle Exclusion

The first incident involved the White House's exclusion of certain news organizations from an off-camera gaggle with the Press Secretary while allowing others to attend, hours after President Trump had denounced the press as "the enemy of the American People" due to his frustration with a *New York Times* article detailing contacts between Trump and Russian intelligence officials.²⁰¹ The White House had pre-determined the media outlets that would be allowed into the gaggle, which many characterized as a notable break from protocol in the White House.²⁰²

The first question is whether the White House "opened the door" to press access. White House press conferences in general have been a "regular, if not always successful, feature of presidential–press relationships" since President Woodrow Wilson's Administration, a mark of a long history and an enduring tradition.²⁰³ Further, press conferences in the White House play an important role in establishing a forum for the press that in turn provides a connection between daily White House activities and the general public, who lack hard passes. Thus, as to press conferences, the two-prong "experience and

199. See discussion *supra* Part I.A.

200. See discussion *supra* Part III.A.

201. See discussion *supra* Part I.A.1.

202. See *supra* notes 9–10 and accompanying text.

203. See Martha Joynt Kumar, *Source Material: Presidential Press Conferences: The Importance and Evolution of an Enduring Forum*, 35 PRESIDENTIAL STUD. Q. 166, 168 (2005) ("The development of this forum came about through the efforts of the president and his staff, but the commitment to such sessions is testimony to the press's continuing interest in the presidency no matter who serves as president or what he says or does.").

logic” analysis in *Richmond Newspapers* would support a First Amendment right of access the White House must recognize.

But does access to press pools or gaggles enjoy the same right of access? White House press pass holders historically have enjoyed access to gaggles. Moreover, press access to gaggles play a particularly significant role, taking the place of typical daily press conferences.

The second question is whether the government has denied a reporter arbitrarily, for less than compelling reasons, or based on the viewpoint of the reporter or of the affiliated media outlet. The White House’s motivation to exclude specific media outlets arguably was not compelling because the White House did not justify its action with logistical concerns, such as spatial constraints.²⁰⁴ The exclusion may also have been arbitrary because the Press Secretary’s explanation did not include any meaningful reason for the exclusion:²⁰⁵ “We had a pool and then we expanded it. We added some folks to come cover it. We do what we can to be accessible I think we have gone above and beyond when it comes to accessibility and openness”²⁰⁶ Further, an argument can be made from the timing that the decision to exclude specific media outlets was motivated by the viewpoints of those particular outlets. The exclusion of outlets, including that of the *New York Times*, occurred within a few hours of Trump denouncing the press “as the enemy of the American people” in reaction to the *Times* article.²⁰⁷ To overcome the government’s heavy burden in First Amendment cases, the White House would have had to put forth a legitimate, compelling interest for excluding the media outlets from the gaggle.²⁰⁸ It did not appear to do so.

204. See *Cable News Network, Inc. v. Am. Broad. Cos.*, 518 F. Supp. 1238, 1244 (N.D. Ga. 1981) (specifying “confidentiality, security, orderly process, [or] spatial limitation” as possible compelling concerns).

205. See cases cited *supra* note 194.

206. Vitali, *supra* note 1.

207. Vitali, *supra* note 6.

208. See cases cited *supra* notes 197–198.

2. Incident #2: *The Press Conference Exclusion*

The second incident involved the White House banning a CNN reporter from attending an open press event with President Trump after she asked him questions about his former lawyer Michael Cohen and Russian president Vladimir Putin at an earlier photo op at the White House.²⁰⁹

The first question—whether the Administration has “opened the door” to the press generally—is easily satisfied here because the event in the Rose Garden was characterized as open.²¹⁰ The second question—whether the Administration denied a reporter arbitrarily, for less than compelling reasons, or based on the viewpoint of that reporter or of the affiliated media outlet—requires looking at the Administration’s rationale for excluding the reporter.²¹¹ After the incident, Press Secretary Sarah Sanders said that the reporter had “shouted questions and refused to leave despite repeatedly being asked to do so [We] made clear that any other journalist from her network could attend.”²¹² Unless the reporter was acting out in a way that triggered legitimate concerns regarding security or other published guidelines restricting the type of questioning in which the reporter engaged, the White House may have excluded the reporter arbitrarily or for less than compelling reasons. More likely, the White House excluded the reporter based on the content of the reporter’s questions given the close temporal connection between the reporter’s questions about touchy news stories involving the President’s professional relationships and the subsequent exclusion.

3. Incident #3: *The Press Pass Suspension*

The third incident involved the suspension of CNN reporter Jim Acosta’s press pass because of an alleged, and later discredited, altercation between Acosta and a White House

209. See discussion *supra* Part I.A.2.

210. See discussion *supra* Part I.A.2.

211. See cases cited *supra* note 194.

212. McLausand, *supra* note 12.

intern.²¹³ After the incident, Press Secretary Sanders issued a statement that indicated a shift from the White House’s original rationale for suspending Acosta’s license—that Acosta placed his hands on the White House intern—to the rationale that the White House must “run an orderly and fair press conference” and cannot allow a member of the press “to monopolize the floor.”²¹⁴ A district court judge later granted CNN’s temporary restraining order and ordered the Administration to reinstate Acosta’s hard pass, but did not base the decision on First Amendment grounds.²¹⁵

The first question—whether the Administration had “opened the door” to the press—is satisfied here because the press conference took place in the long-established White House Press Room. *Cuomo*’s equal access test to determine whether the government has “opened the door” provides guidance: “[O]nce there is a public function, public comment, and participation by some of the media, the First Amendment requires equal access to all of the media or the rights of the First Amendment would no longer be tenable.”²¹⁶ First, the White House press facilities provide a “public function,” because they allow members of the press from a variety of media outlets access to White House press conferences, which in turn allows those media outlets to provide a buffet of perspectives to the interested public. Second, without this access, “public comment”—whether interpreted as the press’s ability to comment on and critique the government, or the public’s ability to make well-informed opinions after the press has provided it with information concerning the operations and activities of government—would be impossible. Third, the fact that Washington-based reporters and White House correspondents have hard passes, as Acosta has, to have more-or-less unrestricted, albeit regulated, access to White House press conferences establishes “participation by some of the media.”

213. See discussion *supra* Part I.A.3.

214. See discussion *supra* Part I.A.3.

215. See discussion *supra* Part I.A.3.

216. *Am. Broad. Cos., Inc. v. Cuomo*, 570 F.2d 1080, 1083 (2d Cir. 1977).

Under the second part of the analysis, there are two perspectives as to whether the White House revoked Acosta's hard pass arbitrarily, for less than compelling reasons, or based upon his viewpoint. On one hand, the White House may have arbitrarily excluded Acosta because the alleged physical altercation between Acosta and the White House intern was later disproven.²¹⁷ Thus, it follows that the Press Secretary's statement after the revocation of Acosta's hard pass indicating that the "White House cannot run an orderly and fair press conference when a reporter acts this way, which is neither appropriate nor professional," is unsupported.²¹⁸ On the other hand, the White House may have excluded Acosta based on its opinion of CNN because during the incident in the press conference, President Trump said, "When you report fake news, which CNN does, a lot, you are the enemy of the people."²¹⁹ Moreover, the White House may have excluded Acosta based on the content of Acosta's questions due to the almost immediate temporal connection between Acosta's questions about touchy subjects and Trump's request to have the microphone taken away from Acosta.²²⁰ In any case, the White House's shifting, inconsistent rationales point to the likelihood that the exclusion was pretextual, a factor present in the 2017 case *Nicholas*.²²¹

IV. Conclusion

This Note proposes a framework for courts to apply in future right of access cases where the President and his or her Administration exclude or restrict the access of specific reporters to press-briefing events. In light of the three events involving the Trump Administration described in this Note, one of which resulted in a lawsuit, it is not impracticable to expect forthcoming similar incidents as well. In the first few months of 2019, President Trump tweeted that "THE RIGGED AND

217. See *supra* text accompanying note 27.

218. See *supra* text accompanying note 29.

219. See *supra* text accompanying note 24.

220. See discussion *supra* Part I.A.3.

221. See *supra* text accompanying note 176.

CORRUPT MEDIA IS THE ENEMY OF THE PEOPLE!”;²²² that the *New York Times* is “a true ENEMY OF THE PEOPLE!”;²²³ and the *Washington Post* is “Fake News” after these newspapers published news stories that he did not like.²²⁴ These remarks would provide support for a reporter’s claim that the President has violated the reporter’s First Amendment right of access because his comments are consistent with an unconstitutional motive to exclude “unfriendly” members of the press.²²⁵

The White House has “opened the door” to the press because there is an enduring tradition of press members being granted passes to the White House to gain access to daily press conferences, whether planned or impromptu. This established access is invaluable as it is through the press that the general public becomes informed on the actions and policies of the current Administration. The case law discussed in this Note indicates that the White House must possess a compelling government interest for press access limitations that is legitimate and viewpoint neutral, and that the limitations must be narrowly tailored to serve that interest. Anything less is an impermissible “closing” of the door and frustration of the political values the First Amendment is designed to protect.

222. Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 17, 2019, 7:56 AM), <https://twitter.com/realdonaldtrump/status/109711749933685553?lang=en> (last visited Feb. 7, 2019) [<https://perma.cc/5TN4-68UC>].

223. Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 20, 2019, 8:49 AM), <https://twitter.com/realdonaldtrump/status/1098218016255414272?lang=en> (last visited Feb. 7, 2019) [<https://perma.cc/DLW4-5BME>].

224. Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 20, 2019, 7:44 AM), <https://twitter.com/realdonaldtrump/status/1098201685518893056?lang=en> (last visited Feb. 7, 2019) [<https://perma.cc/EEE5-QL3N>].

225. See *Developments in the Law—The Law of Media*, *supra* note 91, at 1029 (suggesting a motive-based inquiry focusing on “*why*, not whether, the doors have been shut on particular reporter”).