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DODD-FRANK'S TITLE II AUTHORITY: A DISORDERLY LIQUIDATION OF EXPERIENCE, LOGIC, AND DUE PROCESS

Chadwick Welch*

INTRODUCTION

The Panic of 2008, as it is sometimes called,[1] included the bankruptcy of Lehman Brothers, the infamous bailout of AIG, and the fire sale of Bear Stearns, all of which were punctuated with an overall economic slowdown and decline in the housing market.[2] Net worth in the United States fell by fourteen trillion dollars.[3] Many blamed the greed or negligence (or both) of corporate executives.[4] Other causes were less tangible but equally apparent. For instance, financial markets had become global and interconnected, and financial products had become increasingly complex.[5] These realizations, and the attendant erosion of confidence, prompted outcries for regulatory reforms.[6]

In response, President Barack Obama signed the Dodd Frank Wall Street Reform and Consumer Protection Act[7] (Dodd-Frank) into law on July 21, 2010.[8] Broadly speaking, Dodd-Frank's objectives were twofold: to regulate the shadow banking system, thereby reducing the risks inherent in contemporary finance, and to mitigate the effects caused by a failure of a large financial institution.[9] Some market observers have noted that Dodd-Frank represents the most significant piece of financial regulation since the Great Depression.[10]

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1 *See, e.g.*, Governor Kevin Warsh, Speech at the Federal Reserve Council of Institutional Investors 2009 Spring Meeting: The Panic of 2008 (Apr. 6, 2009), *available at* http://www.federalreserve.gov/newsevents/speech/warsh20090406a.htm.

2 Roger B. Porter, *Introduction: The Crisis of 2008 and Financial Services Regulation*, *in* NEW DIRECTIONS IN FINANCIAL SERVICES REGULATION 1, 1 (Roger B. Porter et al. eds., 2011).

3 *Id.*

4 *Id.*

5 *Id.*

6 *See, e.g.*, Warsh, *supra* note 1 (describing a loss of confidence and a push for reform).

7 Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified in scattered sections of 7, 12, 15, 22 U.S.C.). Rep. Barney Frank (D-MA) and Sen. Christopher Dodd (D-CT) cosponsored the legislation. *See* Christopher J. Dodd, *Five Myths about Dodd-Frank*, WASH. POST, Oct. 21, 2011, http://articles.washingtonpost.com/2011-10-21/opinions/35278475_1_dodd-frank-community-banks-financial-crisis.

8 Helene Cooper, *Obama Signs Contentious Overhaul of the Financial System*, N.Y. TIMES, July 22, 2010, at B3.

9 *See* DAVID SKEEL, THE NEW FINANCIAL DEAL 4 (2011).

10 *See* Douglas J. Elliott, *Dodd-Frank a Year Later: Has Financial Reform Made Us*

Dodd-Frank gives regulatory bodies sweeping new authority and directs the implementation of significant substantive reforms to the financial services industry.[11] In particular, Dodd-Frank's Title II, the Orderly Liquidation Authority (OLA) bestows upon the Federal Depositors Insurance Corporation (FDIC), the Board of Governors of the Federal Reserve (Board of Governors) and the Secretary of the Treasury enormous power to place systemically important financial institutions in danger of collapse into receivership.[12] This power has enormous implications for the executives and creditors of such institutions. With respect to the former, the OLA coerces corporate executives to submit to receivership rather than defend their corporation's interest in abbreviated, skewed, and secretive hearings.[13] The OLA likewise affects creditors who may be caught off guard when one of its corporate debtors is placed into receivership, particularly because it is not entirely clear when the FDIC will subject a corporation to its power.[14]

To proponents of this sweeping new authority, the premise is simple: regulators must have the authority to take over and liquidate financial institutions when those institutions are so important that a collapse would result in widespread financial calamity.[15] In the aftermath of 2008, where it had become apparent that financial institutions were so interconnected that the failure of one could mean the failure of all, this premise seemed justifiable.[16]

But perhaps in implementation the OLA will exceed what is necessary and reasonable. The OLA provides alarmingly truncated procedures and constrained judicial review that raise legitimate due process concerns for the financial institution's

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Safer Yet?, BROOKINGS (July 19, 2011, 3:01 PM), http://www.brookings.edu/blogs/up-front/posts/2011/07/19-financial-reform-Elliott.

[11] *Id.* (describing Dodd-Frank as "the most far-reaching reform of financial regulation . . . since the Great Depression").

[12] *See* Pub. L. No. 111-203, § 201 et seq. 124 Stat. 1442 (2006).

[13] *See* Brent J. Horton, *How Dodd-Frank's Orderly Liquidation Authority for Financial Companies Violates Article III of the United States Constitution*, 36 J. CORP. L. 869, 891 (2011) (noting the secrecy of OLA proceedings).

[14] *Id.* at 891–92 (noting the secrecy and lack of transparency).

[15] *See* Letter from Am. Bankers Ass'n, The Clearing House, Fin. Servs. Roundtable, and Sec. Induct. & Fin. Mats. Assen to Robert E. Feldman, Exec. Sec'y of the Fed. Depositors Ins. Corp. (May 23, 2011) [hereinafter Am. Bankers Ass'n], *available at* http://www.fdic.gov/regulations/laws/federal/2011/11c11Ad73.PDF (stating that "a severe destabilization or collapse of the U.S. financial system could impose severe and lasting damage on the broader economy . . . by causing a severe contraction of the supply of money and credit over an extended period of time").

[16] *See* Enhanced Oversight After the Financial Crisis: The Wall Street Reform Act at One Year: Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs 112th Cong. 12–14 (2011) (statement of Ben S. Bernanke, Chairman, Fed. Reserve) [hereinafter Enhanced Oversight] (explaining that financial conditions should be met with "a macroprudential approach to supervision and regulation" (emphasis omitted)).

executives and its creditors.[17] Moreover, the regulators can invoke the OLA and place an institution in receivership in total secrecy; the public will not know of the action until liquidation has commenced.[18] In practice, the constitutionality of this power is therefore in doubt.

Part I of this Note briefly recounts the events giving rise to Dodd-Frank and the justification for intervening in financial institutions deemed too big to fail. Part II explains the salient provisions of the OLA. Part III examines the OLA in implementation and posits that, as written, Dodd-Frank raises serious questions of constitutionality under the First and Fifth Amendments. Part IV argues that pre-existing bankruptcy law can adequately deal with the problems the OLA was designed to address but without the attendant constitutional problems. It is important to point out at the outset that this Note purposely avoids delving into macroeconomic theory, and examines the OLA's theoretical effectiveness only when necessary to critique the legal grounds on which it purportedly rests.

I. THE 2008 FINANCIAL CRISIS, PRE-DODD-FRANK FINANCIAL REGULATION, AND "TOO BIG TO FAIL"

To properly understand the enormity of the recent financial crisis that precipitated Dodd-Frank's passage, a brief historical exposition of financial regulation is necessary. The Banking Act of 1933,[19] otherwise known as the Glass-Steagall Act, created the FDIC and regulated banks' ability to speculate by prohibiting commercial banks from engaging in investment banking; for over six decades under Glass-Steagall, commercial and investment banking existed separately.[20] Banks

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[17] *See* Am. Bankers Ass'n, *supra* note 15 (noting that the OLA may insufficiently protect the due process rights of secured and unsecured creditors against potential errors committed by the FDIC in implementation); *see also* Douglas G. Baird & Edward R. Morrison, *Dodd-Frank for Bankruptcy Lawyers* 19 AM. BANKER INST. L. REV. 287, 296–97 (2011) (noting that the inability of courts to review the merits of an FDIC decision to place a company into receivership raises serious due process concerns).

[18] *See Does the Dodd-Frank Act End "Too Big to Fail?": Hearing Before the Subcomm. on Fin. Insts. & Consumer Credit of the H. Comm. on Fin. Servs.*, 112th Cong. 85 (2011) (statement of Professor Stephen J. Lubben, Seton Hall Univ. Sch. Of Law) (criticizing the opacity of the OLA hearings and procedures and noting that lack of transparency will result in public suspicion).

[19] Ch. 89, 48 Stat. 162 (1923) (codified as amended in scattered sections of 12 U.S.C.).

[20] *See* James R. Smoot, *Striking* Camp *and Moving to Higher Ground: The Hazardous Subtleties of "Subtle Hazards" in Bank Regulation*, 4 GEO. MASON L. REV. 21, 24–26 (1995) (noting that Glass-Steagall, enacted during a financial crisis, aimed to separate commercial banking from investment banking). This legislation was necessary because "the promotional incentives of investment banking and the investment banker's pecuniary stake in the success of particular investment opportunities (were) destructive of prudent and disinterested commercial banking and of public confidence in the commercial banking system." Inv. Co. Inst. v. Camp, 401 U.S. 617, 634 (1971).

that wished to lend to consumers could not engage in speculative transactions or issue securities.[21]

The Gramm-Leach-Bliley Act of 1999[22] removed this separation requirement.[23] Investment banks that previously issued securities could now engage in commercial banking by accepting customer deposits.[24] The result was that financial institutions could now grow so large and become so interconnected that the failure of one firm could cause the collapse of other firms that were counterparties to its transactions.[25] In other words, financial institutions became "too big to fail."[26]

Dodd-Frank clearly states its two principal objectives: to limit the risks associated with contemporary finance, and to limit the damage caused by failures of large financial institutions.[27] The first objective seeks to avoid risk altogether, while the second objective seeks to mitigate the effects of a systemically important financial institution's failure.[28] The OLA serves as a primary tool to implement this second objective.[29] However well-intentioned, the OLA as written could be perceived as part of a problematic theme throughout Dodd-Frank that allows for unpredictable and ad hoc regulatory intervention, thereby muddling what should be a framework of transparent rules.[30] Worse, it stretches the bounds of constitutionality by subjecting stakeholders in large companies to a regulatory framework devoid of transparent rules and procedures that govern conduct; on the contrary, the fate of corporations, executives, and creditors depends entirely upon the whims of financial regulators.[31]

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21 *See* Smoot, *supra* note 20, at 25–26.

22 Pub. L. No. 106-102, 113 Stat. 1338 (1999).

23 *See* Matthew J. Restrepo, *The Convergence of Commercial and Investment Banking Under the Gramm-Leach-Bliley Act: Revisiting Old Risks and Facing New Problems*, 11 L. & BUS. REV. AM. 269, 272–73 (2005) (explaining that Gramm-Leach-Bliley allowed for the merger of investment and commercial banking by eliminating the separateness requirement of Glass-Steagall).

24 *Id.*

25 *See id.*; *see also* Paul L. Lee, *The Dodd-Frank Act Orderly Liquidation Authority: A Preliminary Analysis and Critique—Part I*, 128 BANKING L.J. 771, 783 (2011) (noting that the financial meltdown of 2008 prompted the Treasury Department to note that existing options for dealing with interconnected non-bank financial entities were inadequate).

26 *See Statement of Republican Policy: H.R. 4173, the "Dodd-Frank Wall Street Reform and Consumer Protection Act,"* REPUBLICAN CLOAKROOM (June 30, 2010), http://repcloakroom.house.gov/news/DocumentSingle.aspx?DocumentID=%20193034 [hereinafter *Statement of Republican Policy*] (stating that the regulatory authority to designate institutions as systemically important codifies the concept that some institutions cannot be allowed to fail).

27 *See* SKEEL, *supra* note 9, at 4.

28 *Id.*

29 *See* Lee, *supra* note 25, at 779 (explaining that OLA operates as an alternative to a bankruptcy proceeding, but aims to liquidate failed institutions in a more orderly fashion).

30 *See* SKEEL, *supra* note 9, at 9. Skeel points out that "ad hoc intervention by regulators" will "reach[ ] its zenith [when dealing with] financial institutions in distress." *Id.* This is problematic because it disaggregates regulatory discretion from "basic rule-of-law constraints." *Id.*

31 *See Statement of Republican Policy*, *supra* note 26 (criticizing regulator's power).

II. THE ORDERLY LIQUIDATION AUTHORITY

The OLA seeks to "target[ ] the perceived evils that presumably were root causes of the financial crisis."[32] This gives regulators, namely the FDIC, Board of Governors, and the Secretary of the Treasury, the power to designate entities that are systemically important to the financial stability of the United States.[33] This designation can include companies that are not banks at all, provided they meet the statutory definition of a covered entity.[34] Remarkably, the statute does not provide a definitional guidepost for regulators to determine when a company poses a systemic risk. As Federal Reserve Chairman Ben Bernanke admitted, rules promulgated to implement the OLA will "ultimately remain subjective, and . . . the systemic criticality of any individual firm depends on the environment."[35]

By any standard, the powers granted to the FDIC and other executive branch agencies are bold. For brevity's sake, the salient provisions of the OLA, codified at 12 U.S.C. § 5382, are enumerated as follows:

> Subsequent to a determination . . . that a financial company satisfies the criteria [relating to systemic risk], the Secretary [of the Treasury] shall notify the [FDIC] and the covered financial company. If the board of directors . . . of the covered financial company acquiesces or consents to the appointment of the [FDIC] as receiver, the Secretary shall [so appoint]. If the . . . financial company does not . . . consent . . . , the Secretary shall petition the United States District Court for the District of Columbia for an order authorizing [the appointment].[36]
>
> *On a strictly confidential basis, and without any prior public disclosure*, the Court, after notice to the covered financial company and a hearing in which the covered financial company may oppose the petition, shall determine whether the determination of the Secretary that the covered financial company *is in default*

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32 *Regulatory Developments 2010*, 66 BUS. LAW. 665, 665 (2011).

33 *Id.*

34 *See id.* (stating that entities "provid[ing] payment systems, settlement and clearance, and similar services, will be deemed financial market utilities that are systemically important"); *see also* 12 U.S.C. § 5381(a)(11) (2006) (defining "financial company" as a company incorporated under the laws of any state that is "predominately engaged in activities that the Board of Governors has determined are financial in nature").

35 *Too Big to Fail: Expectations and Impact of Extraordinary Government Intervention and the Role of Systemic Risk in the Financial Crisis: Hearing Before the Fin. Crisis Inquiry Comm'n*, 111th Cong. 101 (2010) (testimony of Ben S. Bernanke, Chairman, Fed. Reserve).

36 12 U.S.C. § 5382(a)(1)(A)(i) (2006).

> *or in danger of default* and *satisfies the definition of a financial company* . . . is arbitrary and capricious.[37]
>
> If the Court does not make a determination within 24 hours of receipt of the petition . . . *the petition shall be granted by operation of law*; . . . the Secretary shall appoint the [FDIC] as receiver; and . . . liquidation under this subchapter shall automatically and without further notice or action be commenced and the [FDIC] may immediately take all actions authorized under this subchapter.[38]

This authority seeks to entirely supplant Chapter 11 bankruptcy reorganization for insolvent financial companies with a mandatory liquidation.[39] Under this scheme, liquidation is the only option, albeit with a different set of procedural rules than one would find in a Chapter 7 bankruptcy proceeding.[40] These paradigmatic shifts have drawn sharp criticism from some industry groups and commentators. First, some point out that an additional regulatory scheme amounts to an overreaction that "may overcompensate for the perceived failings of the prior regulatory regime."[41] Second, opponents argue that the OLA will actually create unintended consequences by reinforcing the concept of systemic risk; by identifying nonbank financial companies as systemically important, subjecting these firms to "heightened prudential standards . . . [will] signal[ ] to the market that these firms will be supported by the government."[42] Third, opponents believe that the OLA will continue the practice of bailing out systemically important firms; indeed, under OLA the FDIC has the authority to selectively pay creditors and borrow from the Treasury in order to do so.[43]

As the OLA has yet to be tested in practice,[44] the merits and criticisms of the FDIC's sweeping authority is debatable and generally beyond the scope of this paper. However, the fact that the efficacy of the OLA is open to reasonable debate at all is

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[37] *Id.* § 5382(a)(1)(A)(iii) (2006) (emphasis added). It is important to note that the statute provides for no judicial review of the FDIC's finding that the company at issue poses a systemic risk. *Id.*

[38] *Id.* § 5382(a)(1)(A)(v) (2006) (emphasis added).

[39] *See* Lee, *supra* note 25, at 779 (noting that OLA under Title II allows only for liquidation).

[40] *Id.* (explaining that although the OLA engrafts some provisions of the Bankruptcy Code, it does require that liquidation, as opposed to reorganization, be the only allowable method of resolution). Further, the OLA operates as a special administrative proceeding with limited judicial oversight, and unlike bankruptcy, creditors have virtually no say in the process. *Id.*

[41] *Id.* at 781.

[42] *Id.* at 782.

[43] *Id.*

[44] Heath Tarbert et al., *The Dodd-Frank Act: Two Years Later*, METROPOLITAN CORP. COUNS. (Oct. 10, 2012), http://www.metrocorpcounsel.com/articles/20915/dodd-frank-act-two-years-later.

quite relevant when considering the FDIC's authority in the broader context. The OLA's secretive proceedings constrain the public's (and, of course, the interested parties') ability to monitor governmental action.[45] Because the OLA allows regulators to identify institutions as systemically important, there exists an implicit assumption that the public writ large is a stakeholder with an interest in the resolution of the failing institution; thus, the public should have some access to the proceedings at issue. Moreover, the abbreviated and expedited proceedings curtail due process rights of corporations, the corporate executives, and the corporate creditors, and it is not at all clear that the ends can justify the means.[46] In addressing the "too-big-to-fail conundrum,"[47] Congress failed to account for legitimate First Amendment and due process concerns.

III. THE STATUTORY AUTHORITY AS WRITTEN IS SUBJECT TO NUMEROUS CONSTITUTIONAL CHALLENGES

The public writ large and corporate executives and creditors are, in many respects, poles apart. But with respect to the OLA, they can find common ground. Both groups should feel that the powers conferred on the FDIC constitute regulatory overreaching, albeit for different reasons. The public should be concerned that OLA proceedings are shrouded in secrecy; by being denied a right of public access, the public cannot ensure the government truly acts in its best interests.[48] On the other hand, corporate executives should find the OLA procedures to represent a casual (or perhaps nefarious) disregard of their right to a meaningful opportunity to be heard in order to protect their interests and fulfill their duties to shareholders.[49] These are legitimate First and Fifth Amendment concerns, and each will be discussed in turn.

First, the OLA depends upon procedures conducted in secret in order to accomplish its goals.[50] Because the FDIC makes a recommendation to place a company into receivership,[51] it logically follows that the FDIC must conduct some sort of internal proceeding or formal evaluation as a condition precedent to that recommendation.

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[45] Scott Pruitt & Alan Wilson, Op-Ed., *Dodd-Frank's 'Orderly Liquidation' Is Out of Order*, WALL ST. J., Sept. 26, 2012, at A17.

[46] *Id.*

[47] *Regulatory Developments 2010*, *supra* note 32, at 665.

[48] *See, e.g.*, Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 592 (1980) (Brennan, J., concurring) (observing that public access to court proceedings is an important part of our "checks and balances" system because it "is an effective restraint on possible abuse of judicial power").

[49] *See* Baird & Morrison, *supra* note 17, at 8 (noting that only the Secretary of the Treasury considers shareholder interests).

[50] *See* 12 U.S.C. § 5382(a)(1)(A)–(C) (2006) (requiring the judicial proceedings to be conducted in secret and imposing criminal and/or financial penalties on individuals who disclose information relating to the pendency of an action); *see also* Horton, *supra* note 13, at 891 (noting that secrecy required by the statute raises some suspicion about the efficacy of such procedures).

[51] *See* Baird & Morrison, *supra* note 17, at 8.

These proceedings are obviously closed to the public because the targeted company cannot even be aware of the FDIC's findings until the FDIC makes a recommendation to the Treasury Secretary.[52] Further, the statute provides on its face that judicial review of FDIC's petition for receivership must be conducted in secret;[53] individuals who disclose information relating to these proceedings are subject to hefty fines, criminal prosecution, or both.[54]

The entire deliberative and judicial process may therefore be regarded as secret, and the public cannot know that a company has been placed involuntarily into receivership until the FDIC begins liquidating its assets. The public—the relevant stakeholders especially—cannot challenge the FDIC action at all; once liquidation begins, the court will have already validated the FDIC action, and the interested public cannot discover the action and its consequences until it is too late.[55] This sharply contrasts with the traditional bankruptcy process, where the public has historically been granted some type of access to similar proceedings.[56] In addition, a right to access—even if limited—would serve the public interest and would advance Dodd-Frank's stated objectives by ensuring accountability at the corporate and governmental levels and by providing transparency into the fundamental policy and regulatory choices made to manage the country's economy.[57]

Second, the OLA's expedited and truncated procedures seriously curtail the due process rights of corporate executives and, perhaps, corporate creditors. To be sure, the corporation and its executives have at stake a protected property interest. The directors have no meaningful opportunity to challenge the FDIC's finding that their company poses a risk to the financial stability of the United States until the FDIC files its petition with the court, and because the proceedings are secret, neither will creditors.[58] But once this filing occurs, the judge has only twenty-four hours to review the FDIC's

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[52] *See generally* 12 U.S.C. § 5382(a)(1)(A) (stating that the Secretary of the Treasury shall notify the affected financial company once a determination has been made that the company poses a systemic risk and the district court has been petitioned to appoint FDIC as receiver).

[53] 12 U.S.C. § 5382(a)(1)(A)(iii).

[54] 12 U.S.C. § 5382(a)(1)(C).

[55] *See* Pruitt & Wilson, *supra* note 45.

[56] *See* Beth Bates Holliday, *Construction and Application of 11 U.S.C.A. § 107(b)(2), Which Requires Bankruptcy Court to Protect Person with Respect to "Scandalous" or "Defamatory" Information Contained in Paper Filed with Court*, 31 A.L.R. FED. 2D 439, 439 (2008) (stating that "the right of public access to judicial records is codified in 11 U.S.C.A. § 107, which establishes a broad right of public access to all papers filed in a bankruptcy case subject only to limited exceptions").

[57] *See* Enhanced Oversight, *supra* note 16. Chairman Bernanke acknowledged that Dodd-Frank constitutes "sweeping" reform which enables regulators to address the "too-big-to-fail problem" through the use of new and expansive powers. *Id.* at 12–13. He also stated that the private sector must work to adapt to Dodd-Frank by "learn[ing] lessons along the way." *Id.* at 14. It is hard to see how lessons can be learned when the entire process of determining that a company poses a systemic risk is conducted in secret.

[58] *See supra* note 50 and accompanying text.

determination,[59] and he must consider that finding under the very deferential "arbitrary and capricious"[60] standard germane to administrative law.[61]

Moreover, these procedures are unduly coercive and provide directors and officers with only illusory protections. For if the directors or officers do not consent to receivership, they may be found personally liable under an ordinary negligence standard if the court upholds the FDIC's finding,[62] which it presumably will, given the heavily deferential standard of review in the FDIC's favor. Under this specter of personal liability, no rational director would contest the FDIC's determination, even if doing so would be in the best interest of the corporation, its shareholders, or its creditors.

A. Right to Access Under Richmond Newspapers *and Its Progeny*

The First Amendment guarantees a right of access to government proceedings in at least some circumstances. The Supreme Court has found this guarantee to be explicitly granted in the text of the First Amendment itself and implicitly granted within its penumbra.[63] In *Richmond Newspapers, Inc. v. Virginia*,[64] the Supreme Court considered whether reporters had a First Amendment right of access to a criminal trial.[65] The defendant, on trial for murder, had requested that his trial be closed to the public because the previous three trials failed to produce a verdict.[66] The trial judge agreed and closed the trial to the public pursuant to a state statute conferring such authority.[67]

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[59] 12 U.S.C. § 5382(a)(1)(A)(v) (2006).

[60] 12 U.S.C. § 5382(a)(1)(A)(iii).

[61] *See* 5 U.S.C. § 706(2)(A) (2006) (stating that judicial review of decisions made by administrative agencies are to be upheld unless "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law"); *see also* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971) (stating that arbitrary and capricious review is to be employed narrowly, and requires courts to refrain from substituting their judgment for those of the agencies they review); Ethyl Corp. v. EPA, 541 F.2d 1, 34 (D.C. Cir. 1976) (describing this standard of review as being so highly deferential that it carries a presumption of valid agency action).

[62] *See* 12 C.F.R. § 380.7 (2012) (stating that senior executives may be personally liable for the "failed condition of a covered financial company . . . if he or she . . . [f]ailed to conduct his or her responsibilities with the degree of skill and care an ordinarily prudent person in a like position would exercise under similar circumstances"). It is interesting to note that this ordinary standard of negligence will supplant standards of gross negligence required to impose personal liability on executives in some state jurisdictions. *See, e.g.*, *In re* Walt Disney Co. Derivative Litig., 907 A.2d 693, 750 (Del. Ch. 2005) (explaining that directors breach their duty of care only by acting with gross negligence, which requires a finding of "reckless indifference to or a deliberate disregard of the whole body of stockholders" (citations omitted)).

[63] *See, e.g.*, Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 603–04 (1980) (Blackmun, J., concurring).

[64] *Id.* at 555 (majority opinion).

[65] *Id.* at 558.

[66] *Id.* at 559–60.

[67] *Id.* at 560.

Several reporters sued and disputed Virginia's argument that a Sixth Amendment right to a public trial necessarily conferred a concomitant right to a private trial.[68] The Supreme Court agreed.[69] It noted that a public right to attend criminal trials had existed since the Norman Conquest and extended to the present day.[70] The long-established practice of allowing (and in some cases requiring) public access to trials advanced societal goals of justice and fairness.[71]

The Court relied on numerous historical authorities, which noted that Colonial America regarded public access to be a cornerstone of freedom and open government.[72] For instance, West New Jersey colonial law provided that "in all publick courts of justice for tryals . . . civil or criminal, any persons . . . may freely come into, and attend the said courts [so] that justice may not be done in a corner nor in any covert manner."[73] Pennsylvania adopted something similar.[74] And the Continental Congress boasted to its neighbors in Quebec of the desirability and the advantages of public access to trials:

> [One] great right is that of trial by jury. This provides, that neither life, liberty nor property, can be taken from the possessor, until twelve of his unexceptionable countrymen and peers of his vicinage, who from that neighbourhood may reasonably be supposed to be acquainted with his character, and the characters of the witnesses, upon a fair trial, and full enquiry, face to face, *in open Court, before as many of the people as chuse to attend*, shall pass their sentence . . . .[75]

Although history and tradition provided for public access, the Court in *Richmond Newspapers* emphasized that pragmatic concerns and democratic ideals underpinned this tradition.[76] Openness insured that trials functioned properly by "discourag[ing] perjury, the misconduct of participants, and decisions based on secret bias or partiality."[77] Jeremy Bentham, whom the Court championed as a proponent of open justice, similarly observed that:

> Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account. Recordation,

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68 *Id.*
69 *Id.* at 580–81.
70 *Id.* at 564–65.
71 *Id.* at 564–67.
72 *Id.*
73 *Id.* at 567 (quoting SOURCES OF OUR LIBERTIES 188 (Richard L. Perry ed., 1959)).
74 *Id.* at 568 (citing SOURCES OF OUR LIBERTIES, *supra* note 73, at 217, and noting that Pennsylvania's constitution affirmed the principle of open courts).
75 *Id.* at 568–69 (quoting 1 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 107 (1904)).
76 *Id.* at 568–69.
77 *Id.* at 569 (citing M. HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND 343–45 (6th ed. 1820) (discussing the views of Blackstone and Hale)).

> appeal, whatever other institutions might present themselves in the character of checks, would be found to operate rather as cloaks than checks; as cloaks in reality, as checks only in appearance.[78]

Thus, the Court noted that public access to criminal trials had withstood the test of time and had become a deeply rooted part of tradition because public participation played such an effective role in the administration of government.[79] And more than promoting effective government, public observation inspired confidence in governmental competence.[80]

After its exposition of history and tradition, the Court remarked that a "presumption of openness inheres . . . under our system of justice."[81] The First Amendment, in prohibiting the abridgement of speech and the press, and in vesting a right to peaceably assemble, guarantees some right of public access to trials in order to prevent "government from limiting the stock of information from which members of the public may draw."[82] The First Amendment goes beyond guaranteeing a right of individual expression, the Court explained, by safeguarding "the right to receive information."[83] In this way, the First Amendment "prohibit[s] government from summarily closing courtroom doors which had long been open to the public."[84]

Thus, the Court held, courtrooms are public places where the public generally has a right to access, because the public's presence historically has "enhance[d] the integrity and quality of what takes place."[85] In summarizing its holding, the Court stated that the First Amendment implicitly guarantees the right to attend trials; in the absence of such a guarantee the freedoms of speech and of the press would be unnecessarily curtailed.[86]

The Court in *Press-Enterprise Co. v. Superior Court*[87] formally announced that an experience and logic test applied in First Amendment challenges to gain a right of access to governmental proceedings.[88] In this case, the Court held that the public had a constitutional right of access to transcripts from a preliminary hearing given to a defendant accused of murder.[89] In cases dealing with First Amendment claims to a

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78 *Id.* at 569 (quoting 1 J. BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 524 (1827)).

79 *See id.* at 569.

80 *See id.* at 572 ("[P]eople in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.").

81 *Id.* at 573.

82 *Id.* at 576 (quoting First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 783 (1978)) (internal quotation marks omitted).

83 *Id.* at 576 (quoting Kleindienst v. Mandel, 408 U.S. 753, 762 (1972)) (internal quotation marks omitted).

84 *Id.*

85 *Id.* at 578.

86 *Id.* at 580–81.

87 478 U.S. 1 (1986).

88 *Id.* at 9.

89 *Id.* at 5–6.

right of access, the Court stated that courts should consider first, "whether the place and process have historically been open to the press and general public,"[90] and second, "whether public access plays a significant positive role in the functioning of the particular process in question."[91]

A qualified First Amendment right of public access attaches if a court answers both inquiries in the affirmative, which can be overcome only by a showing that closure is necessary to preserve some important interest and is narrowly tailored to achieve that interest.[92] A showing of reasonable alternatives may be sufficient to defeat a contention that the closure is narrowly tailored.[93]

Although the *Richmond Newspaper* and *Press-Enterprise* Courts confined their holdings to the criminal trial context, later challenges predictably arose in the context of administrative proceedings. In *Detroit Free Press, Inc. v. Ashcroft*,[94] newspaper publishers challenged an administrative directive that prohibited public access to deportation removal hearings.[95] The Sixth Circuit held that *Richmond Newspapers* applied to the proceedings in question.[96] Noting that courts lack the power to second-guess governmental choices, the Court acknowledged that the public represents the sole "safeguard on th[e] extraordinary governmental power" that the executive and legislative branches have to delineate individual liberties.[97]

In the deportation context, the Court heralded this right as indispensable because the executive branch had the authority to unilaterally declare an alien as a "special interest" case, thereby closing the proceedings to the public.[98] Although the government may have articulated plausible reasons for doing so, particularly in the aftermath of the September 11th terrorist attacks, the Court recognized that this power could lead to governmental abuse.[99] The Court explained:

> Democracies die behind closed doors. The First Amendment, through a free press, protects the people's right to know that their government acts fairly, lawfully, and accurately in deportation proceedings. When government begins closing doors, it selectively controls information rightfully belonging to the people. Selective information is misinformation. The Framers of the First

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90 *Id.* at 8.

91 *Id.*

92 *Id.* at 9.

93 *See id.* at 14 (holding that failure to consider whether alternatives of total closure of the preliminary hearing would have adequately preserved a defendant's right to a fair trial rendered the narrow tailoring requirement insufficient).

94 303 F.3d 681 (6th Cir. 2002).

95 *Id.* at 683.

96 *Id.* at 694–700.

97 *Id.* at 683.

98 *Id.*

99 *Id.* at 682–83.

> Amendment "did not trust any government to separate the true from the false for us."[100]

This right of public access made sense, the Court explained, because the Constitution prohibits administrative agencies from making unreviewable determinations that implicate individual rights and liberties.[101] The Court especially viewed with derision the government's assertion that immigration judges (who are Article I judges) could make a unilateral determination that a particular alien was a "special interest" case in order to deny public access for security reasons.[102] Indeed, it noted that suppressing information simply by citing security concerns threatened to do violence to the very purpose of the First Amendment because "[t]he guarding of . . . secrets at the expense of informed representative government provides no real security for our Republic."[103]

The Sixth Circuit noted, as a threshold matter, that *Richmond Newspapers* had not been confined to the criminal trial context since first decided.[104] Moreover, it prefaced its analysis on the fact that the modern administrative state, although unknown to the Founders at the time the Bill of Rights was adopted, did not provide the government with a mechanism to circumvent the application of the First Amendment in certain proceedings.[105] It flatly rejected any assertion to the contrary by stating:

> [No] line has been drawn between judicial and administrative proceedings, with the First Amendment guaranteeing access to the former but not the latter. "[T]he First Amendment question cannot be resolved solely on the label we give the event, i.e., 'trial' or otherwise." . . . [T]here is a limited First Amendment right of access to certain aspects of the executive and legislative branches.[106]

The Court observed that the newspaper plaintiffs should have access to quasi-judicial proceedings, such as the deportation hearings at issue, but it emphasized that any distinction between "trials and other official proceedings is not necessarily dispositive."[107] Because the individual had an ultimate stake in the hearing that resembled

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[100] *Id.* at 683 (quoting Kleindienst v. Mandel, 408 U.S. 753, 773 (1972)).

[101] *Id.* at 692.

[102] *Id.* at 692–93.

[103] *Id.* at 693 (quoting New York Times Co. v. United States, 403 U.S. 713, 719 (1971) (Black, J., concurring)).

[104] *Id.* at 695.

[105] *Id.* (citing United States v. Miami Univ., 294 F.3d 797, 824 (6th Cir. 2002) (regarding a student disciplinary board hearing); Brown & Williamson Tobacco Corp. v. Fed. Trade Comm'n, 710 F.2d 1165, 1177–79 (6th Cir. 1983) (regarding a civil action against administrative agency); Soc'y of Prof'l Journalists v. Sec'y of Labor, 616 F. Supp. 569, 574 (D. Utah 1985) (regarding an administrative proceeding)).

[106] *Id.* (quoting Press-Enter. Co. v. Superior Court, 478 U.S. 1, 7 (1986)).

[107] *Id.* at 696 (quoting Press-Enter. Co. v. Superior Court, 464 U.S. 501, 516 (1984) (Stevens, J., concurring)).

what could be expected at trial, a First Amendment right of access should prevent the "legislature [from] artfully craft[ing] information out of the public eye."[108] The dispositive force invoked by applying *Richmond Newspapers* was therefore not the characterization of the proceeding itself, but rather a party's potential for hardship under an adverse ruling.

In its application of the "experience" prong, the Court considered whether deportation hearings had traditionally been open to the public.[109] Again, it noted that a short tradition of access could result in the satisfaction of the *Richmond Newspapers* test, especially because access to a particular government proceeding may be a fundamental part of the proceeding itself.[110] Deportation hearings, the Court found, had generally enjoyed a policy of openness.[111] And because this history of openness presumably informs legislation, open hearings therefore advance fairness to the parties involved.[112] This "favorable judgment of experience"[113] provided proof that formal administrative hearings should be open, a presumption recognized by the Supreme Court at the inception of the modern administrative state:

> The vast expansion of this field of administrative regulation in response to the pressure of social needs is made possible under our system by adherence to the basic principles that the legislature shall appropriately determine the standards of administrative action and that in administrative proceedings of a quasi-judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. These demand a "fair and open hearing."[114]

Public access likewise satisfied the "logic" prong, because such access played a "significant positive role" in the deportation process.[115] In this part of its analysis, the Court announced five factors that informed its result. "First, public access acts as a

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[108] *Id.*

[109] *Id.* at 700.

[110] *See id.* at 701 (stating that "a tradition of accessibility implies the favorable judgment of experience . . . . what is crucial in individual cases is whether access to particular government process is important in terms of that very process" (quoting Richmond Newspapers Inc. v. Virginia, 448 U.S. at 555, 589 (1980) (Brennan, J., concurring) (emphasis omitted))). This underscores the notion that the First Amendment contains "broad principles" and must apply in the administrative context, which was unknown to the Framers at the time the Bill of Rights was adopted. *Id.*

[111] *Id.*

[112] *Id.* at 702.

[113] *Richmond Newspapers*, 448 U.S. at 589.

[114] *Detroit Free Press*, 303 F.3d at 703 (quoting Morgan v. United States, 304 U.S. 1, 14–15 (1938)) (emphasis omitted).

[115] *Id.* at 703 (quoting Press-Enter. Co. v. Superior Court, 478 U.S. 1, 8–9 (1986)).

check on the actions of the Executive by assuring us that proceedings are conducted fairly and properly."[116] This is particularly true where the executive enjoys vast authority, and in this regard the power of public scrutiny safeguards essential liberties.[117]

"Second, openness ensures that government does its job properly; that it does not make mistakes."[118] In the immigration context, the consequences of a mistake made because of inadequate process should be painfully obvious.[119] In other contexts, however, a relevant inquiry would focus on consequences to private parties in interest, or the public writ large, that could flow from a governmental mistake.

Third, openness to governmental proceedings has a "cathartic effect"[120] by providing an outlet for "community concern, hostility, and emotion[ ]."[121] This cathartic effect was purportedly served in *Detroit Free Press* by allowing the public to scrutinize deportation of aliens in the painful wake of September 11th; especially in trying times, the public must be reassured that the government can decisively act in a manner that fosters respect and protection for individual rights and liberties.[122]

"Fourth, openness enhances the perception of integrity and fairness."[123] Government proceedings, the Court surmised, cannot command public confidence unless the public can know for itself that such proceedings are legitimate.[124] In short, secrecy breeds suspicion and distrust.

Fifth, a right of access "ensure[s] that the individual citizen can effectively participate in and contribute to our republican system of self-government."[125] The First Amendment seeks to promote and protect discussion of government action;[126] consequently, the public must be informed if it is to challenge or affirm a particular governmental process.[127] But when the government can suppress information, whether in deportation hearings or in other contexts, its procedures can become "a powerful tool for deception" that undermines the very function that lies at the heart of good governance.[128]

The *Detroit Free Press* court concluded by holding that the closed deportation hearings failed the narrow tailoring requirement.[129] Although the government had

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[116] *Id.* at 703–04.

[117] *See id.* at 704.

[118] *Id.*

[119] *See id.*

[120] *Id.*

[121] *Id.* (quoting Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 571 (1980)).

[122] *See id.* (noting the heightened importance of government's adherence to the preservation of individual rights during trying times).

[123] *Id.*

[124] *Id.*

[125] *Id.* (quoting Globe Newspaper v. Superior Court, 457 U.S. 596, 604 (1982)) (internal quotation marks omitted).

[126] *Id.*

[127] *Id.* at 705.

[128] *Id.*

[129] *Id.*

shown that closure served a compelling interest—in this case, preventing terror groups from analyzing which of its members had been intercepted, and how—the court warned that a simple invocation of "national security" could not justify a "wholesale suspension of First Amendment rights."[130]

Similarly, in *North Jersey Media Group, Inc. v. Ashcroft*,[131] the Third Circuit held that a newspaper did not have a right of access to deportation hearings.[132] Although there had been a history of open deportation hearings, the court did not find that public access played some positive (i.e., logical) role in the process.[133] Thus, although *Detroit Free Press* and *North Jersey Media* were ultimately decided differently, one important congruity can be logically deduced from these opinions—the *Richmond Newspapers* "experience and logic test" applies to administrative hearings.

1. *Richmond Newspapers* and its Progeny Apply to Orderly Liquidation Authority Proceedings

Because OLA proceedings necessarily entail an adjudication of private rights and public interests,[134] a presumption exists that these proceedings should be open to the public under the First Amendment.[135] The "First Amendment guarantees of speech and press . . . prohibit government from summarily closing courtroom doors which had long been open to the public at the time that Amendment was adopted."[136] This rule forbids the government from arbitrarily interfering with the public's access to important information in contravention of First Amendment guarantees of freedom of speech and press.[137]

Again, administrative and civil proceedings do not enjoy automatic immunity from the teachings of *Richmond Newspapers* simply because they do not carry criminal consequences.[138] Although the Supreme Court has not explicitly decided the issue, the circuit courts are strongly in accord that the two-part experience and logic test under *Richmond Newspapers* applies to determine whether the First Amendment guarantees public access to civil proceedings.[139]

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[130] *Id.* at 709–10.
[131] 308 F.3d 198 (3d Cir. 2002).
[132] *Id.* at 221.
[133] *Id.* at 201.
[134] *See supra* notes 48–49 and accompanying text (discussing interests at stake).
[135] *See* Baird & Morrison, *supra* note 17, at 13.
[136] Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 576 (1980).
[137] *See id.* at 583 (Stevens, J., concurring) (noting generally the importance of guaranteeing public access as a safeguard against a governmental policy of concealment).
[138] *See supra* notes 104–06 and accompanying text.
[139] *See* Detroit Free Press v. Ashcroft, 303 F.3d 681, 685 n.11 (6th Cir. 2002) (citing Rushford v. New Yorker Magazine, 846 F.2d 249, 253 (4th Cir. 1988); Westmoreland v. CBS, 752 F.2d 16, 23 (2d Cir. 1984); *In re* Cont'l Ill. Sec. Litig., 732 F.2d 1302, 1308 (7th Cir. 1984); Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1061 (3d Cir. 1984); Newman v. Graddick, 696 F.2d 796, 801 (11th Cir. 1983)).

Even assuming, for the sake of argument, that the government has additional latitude in determining when to shield noncriminal proceedings from the public, OLA provisions are punitive in nature.[140] This punitive aspect should militate in favor of openness, particularly because the directors can be subject to personal liability by contesting the FDIC's decision to place the corporation into receivership.[141]

2. The "Experience" Prong Weighs in Favor of Public Access to FDIC Determinations of Systemic Risk and the Concomitant Judicial Review Required to Implement Receivership

OLA proceedings should be open to the public because similar proceedings have long been matters of public concern.[142] In determining whether the first prong of *Richmond Newspapers* is satisfied, courts should "consider[ ] whether the place and process have historically been open to the press and general public."[143]

Generally, the public enjoys observation rights with respect to most proceedings that occur within the federal court system.[144] Proceedings designed to deal with insolvency are no different; accordingly, a presumption in favor of openness attaches in bankruptcy cases.[145] In limited circumstances, a bankruptcy court may deny public access in order to protect trade secrets or to prevent disclosure of defamatory material.[146] With respect to the public access doctrine, this represents a radical point of demarcation between bankruptcy practice and the OLA. Historically, bankruptcy courts have shielded information containing trade secrets or defamatory material from public scrutiny.[147] These considerations justify closure because they have little to do with the underlying proceeding, they can be used for improper purposes, and they are specifically enumerated (and therefore appropriately limited) by statute.[148]

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140 *See* 12 U.S.C. § 5382(a)(1)(C) (2006).

141 *See supra* note 62 and accompanying text.

142 *See* William T. Bodoh & Michelle M. Morgan, *Protective Orders in the Bankruptcy Court: The Congressional Mandate of Bankruptcy Code Section 107 and Its Constitutional Implications*, 24 HASTINGS CONST. L.Q. 67, 68 (1996) (stating that the U.S. Bankruptcy Code § 107(a) "creat[es] a presumption in favor of public access to *all* papers filed in a bankruptcy case as well as to bankruptcy court dockets").

143 Press-Enter. Co. v. Superior Court, 478 U.S. 1, 8 (1986).

144 *See Federal Courts & the Public*, U.S. COURTS, http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/FederalCourtsAndThePublic.aspx (last visited Mar. 15, 2013) ("With certain very limited exceptions, each step of the judicial process is open to the public. . . . [F]ederal courthouses are . . . designed to inspire in the public a respect for the tradition and purpose of the American judicial process . . . . [This] right of public access . . . is partly derived from the Constitution . . . . By conducting their judicial work in public view, judges enhance public confidence in the courts.").

145 *See* 11 U.S.C. § 107(a) (2006) (providing that bankruptcy filings and bankruptcy court dockets "are public records and open to examination").

146 *Id.* § 107(b).

147 Bodoh & Morgan, *supra* note 142, at 91–92.

148 *See* § 107(b); Bodoh & Morgan, *supra* note 142, at 92.

On the contrary, the OLA carries with it no presumption of openness, and it fails to even acknowledge the public's interest in open judicial proceedings. Perhaps Congress could have included carefully crafted exceptions to a presumption of closure, but as drafted, the OLA proceedings are absolutely secret.[149] As previously stated, avoiding a proprietary injury to a party has justified limiting public access to bankruptcy proceedings.[150] But closing the OLA proceedings to the public protects no party to the proceedings; if the FDIC has invoked its authority, its targeted corporation should already be in financial distress and therefore would have no reason to fear additional injury.[151] Therefore, because insolvency proceedings have historically been open to the public and because Congress departed from similar practice by failing to specifically enumerate grounds for closure, courts should find the first prong of *Richmond Newspapers* satisfied in challenges to the OLA on public access grounds.

3. The "Logic" Prong Weighs in Favor of Limited Public Access to FDIC Determinations of Systemic Risk and the Concomitant Judicial Review Required to Implement Receivership

OLA proceedings should be open to the public because, as a stakeholder in the resolution of systemically important financial institutions, it must be informed on matters on which government action substantially affects its interests. In determining whether the second prong of *Richmond Newspapers* is satisfied, courts should consider "whether public access plays a significant positive role in the functioning of the particular process in question."[152] Even when openness would frustrate certain governmental operations, the proponent of closure must demonstrate that some overriding interest would be prejudiced if the proceeding were not closed.[153]

The five-factor logic test[154] articulated by *Detroit Free Press* strongly militates in favor of public access to OLA proceedings. First, opening at least part of the OLA process (at the very least, the judicial hearing) would enhance the appearance of fairness. After all, secrecy breeds suspicion, and considering what is at stake in each OLA proceeding, the FDIC (and other relevant agencies) would ultimately benefit from this openness in the long run.

Secondly, the FDIC may take extra precaution to ensure that invoking the OLA represents the last and most sound option if that decision could be later dissected by

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149 *See* 12 U.S.C. § 5382(a)(1)(A)(iii) (2006).

150 *In re* Phar-Mor, Inc., 191 B.R. 675, 679 (Bankr. N.D. Ohio 1995) (acknowledging the First Amendment right to access but denying intervenor access to bankruptcy court papers because they contained defamatory and scandalous material).

151 *See* 12 U.S.C. § 5383(b) (2006) (stating the requirements for the Secretary of Treasury to invoke authority over a financial company).

152 Press-Enter. Co. v. Superior Court, 478 U.S. 1, 8 (1986).

153 *See generally id.* (noting that a party whose interest is potentially affected by governmental action has the right to object to closure unless the government can articulate some justification otherwise).

154 *See supra* notes 116–28 and accompanying text.

the public. Without that safeguard, no real guarantee could exist that OLA constituted the best option, or that other alternatives—such as reorganization—were seriously considered. Liquidation will have irreversible consequences in all cases,[155] so oversight conducted ex post will do nothing to remedy a governmental mistake, even though it may prevent future ones.[156] This avoids the governmental tendency to conduct secret proceedings in order to "avoid criticism [by] . . . proceed[ing] informally and less carefully."[157]

Third, openness would provide the "cathartic effect"[158] with respect to a matter of great public concern. The 2008 financial crisis left the public reeling, and hostile emotions will probably not abate anytime soon.[159] The public might therefore appreciate the sense of justice that open OLA proceedings could provide; that sense of justice would be reinforced—and the cathartic effect enhanced—if the public could know that the proceedings were conducted with a full panoply of rights accorded to the corporate stakeholders resisting enforcement.

Fourth, and perhaps most persuasively, openness would lend integrity and fairness to the proceedings. After all, much of the rationale for Dodd-Frank rests on the premise that the public has lost confidence on what appears to be an insufficiently regulated market economy.[160] But by closing OLA proceedings to the public, Congress has undermined its own stated objectives of transparency. Moreover, simply enhancing the OLA's procedural safeguards (as discussed more fully below) would be insufficient in and of itself; procedures, no matter how fair, are meaningless if the proceedings themselves are shielded from public scrutiny.[161]

Fifth, and finally, openness allows the public to actively participate in a republican system of government.[162] As *Detroit Free Press* points out, citizens must be privy to government action if they are to affirm or contest them.[163] If companies are systemically

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155 *See* § 5382(a)(1)(B) (stating the effect of determinations).

156 *See* Detroit Free Press v. Ashcroft, 303 F.3d 681, 704 (6th Cir. 2002); *see also* 12 U.S.C. § 1464(d)(2)(B) (2006) (providing a thirty day window for federally chartered thrift institutions to seek judicial review of a receivership determination and providing for a stay of receivership during the pendency of the appeal). The OLA provides for no stay pending appeal; if an institution appeals the district court's order of receivership, liquidation continues without interruption. 12 U.S.C. § 5382(a)(1)(B).

157 *Detroit Free Press*, 303 F.3d at 704.

158 *Id.*

159 *See* SKEEL, *supra* note 9, at 21–22.

160 *See* H.R. 4173 pmbl., 111th Cong. (2010) (stating its purpose "[t]o promote the financial stability of the United States by improving . . . transparency in the financial system").

161 *See Detroit Free Press*, 303 F.3d at 704 (stating that even strict procedural safeguards "would be of limited worth if the public is not persuaded that the standards are being fairly enforced. Legitimacy rests in large part on public understanding" (quoting First Amendment Coal. v. Judicial Inquiry & Review Bd., 784 F.2d, 467, 486 (3d Cir. 1986) (Adams, J., concurring in part, dissenting in part))).

162 *Id.* at 704.

163 *Id.* at 705.

important enough to be liquidated by the FDIC, then surely the public should be privy to the procedures employed and the basis claimed for the governmental action. To be sure, any action (or inaction) would impact the economy writ large and thus the lives of every citizen, at least tangentially. The public therefore has a resounding right to know how and why the FDIC chooses to invoke the OLA; without that knowledge, the public cannot hold its elected representatives accountable for the successes or failures of republican government.

4. No Compelling State Interest Exists for Denying Public Access to Orderly Liquidation Proceedings

To be sure, proponents of OLA will argue that administrative and judicial proceedings should be secret in the systemic risk context in order to prevent irrational or erratic market reaction.[164] Indeed, this is probably the only "compelling justification" that could arguably permit regulators to curtail a right of access and on which to base criminal penalties for disclosure.[165] Opponents have more than a quibble with this argument, because it is flatly wrong.

To illustrate, consider the market reactions surrounding Lehman's bankruptcy and AIG's rescue. Both scenarios were similar in that important financial entities were distressed, but were different in that the procedures employed to deal with that distress diverged.[166] In the former, the government took no action, and Lehman dissolved into bankruptcy;[167] in the latter, the government spared AIG the same fate by providing it with an astounding 127.4 billion dollars.[168] The market reacted similarly in each, despite the fact that one firm failed and one survived.[169] Thus, secret proceedings will do little, if anything, to curtail market reaction to the subsequent resolution procedures when a financial institution suffers from financial distress.

B. Notice, Hearing, and the Limits of Procedural Due Process with Respect to Deprivation of Property

The expansive government powers inherent in the FDIC's orderly liquidation authority seriously curtail Fifth Amendment due process rights of corporations, their executives, and their creditors. Viewed in the aggregate, the truncated procedures

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[164] *See* Baird & Morrison, *supra* note 17, at 14–15.

[165] *See* 12 U.S.C. § 5382(a)(1)(c) (2006).

[166] SKEEL, *supra* note 9, at 24.

[167] *See* Peter J. Wallison, *The Fed vs. the FDIC on Lehman's Failure*, AMERICAN (Apr. 27, 2011), http://www.american.com/archive/2011/april/the-fed-vs-the-fdic-on-lehmans-failure (explaining that questions continue to circulate as to why the Federal Reserve allowed Lehman to fail but infused capital into insolvent firms before and after that failure).

[168] *Bailout Tracker*, CNNMONEY.COM, http://money.cnn.com/news/storysupplement/economy/bailouttracker/#AIG (last visited Mar. 15, 2013).

[169] *See* SKEEL, *supra* note 9, at 23 (using the volatility index to compare market reactions to Lehman's bankruptcy filing and AIG's bailout).

are crafted to produce a result where a court simply affirms an administrative determination. As the law is currently written, corporate executives and corporate creditors lack a meaningful opportunity to contest the FDIC's findings and its petition for receivership.

First, the FDIC, Board of Governors, and Secretary of the Treasury must make a collective determination that an institution presents a risk to the "financial stability"[170] of the United States. The Secretary of the Treasury may then direct the FDIC to subject that institution to receivership.[171] Presumably, the FDIC may rely upon public information relating to the corporation and any other private information that may be available to it by virtue of its regulatory functions.[172] This determination of systemic importance, however, must necessarily be grounded in a subjective assessment of facts.[173] The FDIC makes its determination in private, without the corporation and its executives having an opportunity to contest its determination.[174] As will be explained, the statute essentially provides for summary judicial ratification of the FDIC's decision to place a company into receivership.[175]

Second, the FDIC only informs the corporation of its determination immediately before filing a petition for receivership in the district court.[176] Once informed of the FDIC's determination, the corporation may consent to receivership or contest the FDIC's determination in the district court.[177] However, the district court only has twenty-four hours in which to review the FDIC's determination, and if the court fails to rule within that time frame, the corporation is placed into receivership by operation of law.[178] Directors and officers of non-consenting corporations may be personally liable under a theory of ordinary negligence for the failure of their company, and negligence is presumed if a corporation is placed in receivership.[179]

The entire process gives the corporation only an illusory right to a meaningful hearing. Because the FDIC's determination is subject only to very deferential "arbitrary and capricious" review,[180] the directors and officers should presume that the FDIC's

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[170] *See* 12 U.S.C. § 5383(a)(2)(A)–(B) (2006) (stating that the FDIC may present the Secretary of the Treasury its determination that a company is "in default or in danger of default" and a "description of the effect that the default of the financial company would have on financial stability in the United States").

[171] *Id.* § 5383(b).

[172] *Id.* (stating the Secretary of the Treasury shall take any action, "[n]otwithstanding any other provision of Federal or State law," in order to make a determination).

[173] For instance, accurate valuations and solvency opinions of companies large enough to be subject to the OLA would be open to debate.

[174] *See supra* notes 50–52 and accompanying text.

[175] *See* discussion *infra* notes 180–87 and accompanying text.

[176] § 5382(a)(1)(A)–(B).

[177] *Id.* § 5382(a)(1)(A)(i).

[178] *Id.* § 5382(a)(1)(A)(v).

[179] 12 C.F.R. § 380.7 (2012).

[180] *See* § 5382(a)(1)(A)(iii) (requiring court to uphold a determination of systemic risk unless the FDIC's determination that the company was in "default or in danger of default" and that

unilateral decision will be upheld.[181] Moreover, because they may suffer personal liability as a result,[182] there is little reason to think they would refuse to consent to receivership even if the FDIC's finding of systemic risk was erroneous.

The procedures employed can potentially affect the interested corporate creditors; accordingly, the FDIC cannot disregard the creditor's right to due process when invoking the OLA.[183] To be sure, if the FDIC places the institution into receivership, it will ultimately determine which creditors get paid.[184] The creditors should therefore be entitled to either notice or the opportunity to participate in the judicial review of the FDIC's determination because their property interests will be affected by the liquidation of their corporate debtor.[185]

As written, these procedures are coercive and are crafted to produce a foreordained result.[186] Given that the FDIC has the nearly unreviewable power to seize virtually any corporation it deems susceptible to its statutory powers, and considering that the FDIC can subsequently liquidate the corporation's property, the due process available under the circumstances is wholly inadequate.[187]

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the company satisfies the definitional requirement of a "covered financial company" was arbitrary and capricious).

[181] § 5382(a)(1)(B).

[182] Hollace T. Cohen, *Orderly Liquidation Authority: A New Insolvency Regime to Address Systematic Risk*, 45 U. RICH. L. REV. 1143, 1222 (2011) ("It appears that a judgment was made by Congress that senior executives and directors should be held responsible for the financial condition of the covered financial company . . . .").

[183] *See* Hanover Nat'l Bank v. Moyses, 186 U.S. 181, 190–91 (1902) (holding the Fifth Amendment requires notice in bankruptcy); *see also* Wright v. Union Cent. Life Ins. Co., 304 U.S. 502, 518 (1938) ("[I]f Congress is acting within its bankruptcy power, it may authorize the . . . court to affect . . . property rights, provided the limitations of the due process clause are observed.").

[184] *See* 12 U.S.C. § 5390(b)(4) (2006) (outlining the FDIC's powers in receivership, including the discretion to determine whether a creditor has a valid claim and the authority to treat similarly situated creditors inequitably).

[185] *See* Canada S. Ry. Co. v. Gebhard, 109 U.S. 527, 539 (1883) (holding that secured creditors have substantive due process rights in bankruptcy proceedings). This holding continues to influence due process jurisprudence despite the fact that *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), overturned *Lochner v. New York*, 198 U.S. 45 (1905), and its view of economic substantive due process. *See* KENNETH N. KLEE, BANKRUPTCY AND THE SUPREME COURT 142–43 (2008) (noting the current influence and validity of *Gebhard*'s holding despite limitations on economic substantive due process).

[186] *See* 12 U.S.C. § 5382(a)(1)(A)(iv) (2006) (stating that the reviewing court should consider the FDIC's petition for receivership under an "arbitrary and capricious" standard). This is a very deferential standard that will nearly always result in resolution in favor of the FDIC. *See supra* notes 61, 180–81 and accompanying text.

[187] The severity of the deprivation should require something stricter than "arbitrary and capricious" review. *See* Craig Boyd Garner, *Unconstitutional Regulatory Seizures Under the Federal Deposit Insurance Corporation Improvement Act of 1991: The Final Blow to the Business of National Banks*, 22 PEPP. L. REV. 131, 135 (1994) (arguing that the FDIC

1. Pre- and Post-Deprivation Rights to a Hearing

The application of due process "is not a technical conception with a fixed content unrelated to time, place, and circumstances."[188] Rather, "due process is flexible and calls for such procedural protections as the particular situation demands."[189] In determining the constitutional adequacy of due process, particularly in the administrative law context, courts must consider three factors. First, courts should consider "the private interest that will be affected by the official action."[190] Second, courts should consider "the risk of an erroneous deprivation of such interest through the procedures used," including the value of "additional or substitute procedural safeguards."[191] Third, courts should consider the government's fiscal and administrative interests that "additional or substitute procedural requirement[s]" would impose.[192]

In *Goldberg v. Kelly*,[193] the Supreme Court considered whether a state agency's termination of welfare benefits violated due process when the affected individual could not contest the agency's decision to terminate until benefits were actually terminated.[194] The applicable state regulation provided that the Commissioner of Social Services must notify a welfare recipient of the decision to terminate benefits seven days before the termination occurred.[195] Although the recipient could request that determination be reviewed and reconsidered, the recipient had no right to an evidentiary hearing until benefits were actually terminated.[196] In essence, the Court held that under the circumstances, summary and truncated administrative proceedings that deprived an often destitute recipient of his benefit lacked constitutional adequacy.[197]

The Court first noted that welfare benefits constituted a protected property interest that could not be taken from a private individual without due process.[198] Because these entitlements were granted and guaranteed by a state statute, the Court dismissed any contention that they could be considered anything less than a protected right.[199]

"remains virtually outside the realm of judicial scrutiny"). But even assuming the adequacy of that review, corporate executives cannot be expected to rebut the FDIC's determination in a hearing that takes place inside of twenty-four hours. *See* Peralta v. Heights Med. Ctr. Inc., 485 U.S. 80, 86–87 (1988) (holding that defendants lacking meritorious defenses are nonetheless entitled to adequate due process).

188 Cafeteria & Rest. Workers Union v. McElroy, 367 U.S. 886, 895 (1961).

189 Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

190 Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

191 *Id.*

192 *Id.*

193 397 U.S. 254 (1970).

194 *Id.* at 255.

195 *Id.* at 258.

196 *Id.* at 259.

197 *Id.* at 268–69.

198 *Id.* at 262.

199 *Id.*

The Court then found the risk of erroneous deprivation of benefits to be too great to sustain the state agency's procedures.[200] Welfare recipients lack the resources to support themselves while they contest a deprivation of benefits.[201] This inability to provide for daily subsistence, the Court reasoned, made it difficult for the recipient to seek redress at all.[202]

Finally, the Court held that not only would additional procedures, which included a continuation of benefits until an evidentiary hearing, not be administratively or fiscally burdensome, they would actually be beneficial.[203] This was so because providing for private needs promoted the public's interest in securing the welfare of all individuals within the state.[204] To rectify the constitutional shortcomings, the Court ultimately required something less than a full evidentiary hearing prior to termination.[205] Essentially, the Court required simply that a recipient have "timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally."[206] So long as these requirements were somehow satisfied, the deprivation of benefits could withstand due process scrutiny.

In *Mathews v. Eldridge*,[207] the Supreme Court considered a similar question when a recipient of social security disability benefits challenged the Commissioner's denial of benefits without providing a pre-termination hearing.[208] Relying upon *Goldberg*'s three-pronged framework, the Court found this case distinguishable because the disability benefits recipient did not depend upon his benefits to the same degree as the welfare recipient.[209] Thus, under the circumstances, post-termination evidentiary hearings adequately protected the recipient's due process.

2. Post-Deprivation Hearings for Financial Institutions

Because the Fifth Amendment guarantees that no person shall be deprived of "property . . . without due process of law,"[210] a pre-deprivation hearing is generally required.[211] However, the Supreme Court has recognized that the public's interest in maintaining financial stability of the United States justifies a post-deprivation hearing after the appointment of a receiver.[212] In so holding, the Court noted that receivership

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[200] *Id.* at 264.
[201] *Id.*
[202] *Id.*
[203] *Id.* at 265.
[204] *Id.*
[205] *Id.* at 266–67.
[206] *Id.* at 267–68.
[207] 424 U.S. 319 (1976).
[208] *Id.* at 323.
[209] *Id.* at 335, 341–43.
[210] U.S. CONST. amend. V.
[211] *See supra* Part III.B.1.
[212] *See* Fahey v. Mallonee, 332 U.S. 245 (1947).

"is a heavy responsibility to be exercised with disinterestedness and restraint," but noted that the party challenging the adequacy of procedural due process had been accorded the opportunity to contest a financial regulator's decision to invoke its receivership power during adversarial administrative hearings.[213]

In *Collie v. Federal Home Loan Bank Board*,[214] a district court upheld as constitutional the post-deprivation hearing rights of a savings and loan association forced into receivership.[215] In considering the adequacy of procedural due process, the court noted the Federal Savings and Loan Insurance Corporation had determined the association's risk of insolvency after compiling a massive administrative record.[216] Moreover, the association had numerous opportunities to contest this finding during a series of administrative hearings.[217] Thus, because the association had ample opportunity to defend its rights, specifically with respect to its solvency—a necessary precondition to receivership—the agency's determination was entitled to a presumption of correctness.[218]

In *First National Bank & Trust v. Department of Treasury*,[219] the Ninth Circuit similarly upheld the constitutionality of procedures afforded to a bank subject to receivership.[220] In rejecting the bank's constitutional claims that the Comptroller of the Currency's decision to implement receivership denied the bank an adequate opportunity to contest the agency's findings, the court noted that the bank had a six-year period in which to defend itself in a series of adverse examinations.[221] At various points, the bank had the opportunity to respond to the agency's assertion that it violated cease-and-desist orders.[222] Furthermore, the court had before it a voluminous record on which to base its decision that the agency had accorded the bank with all the due process to which it was entitled.[223]

Dodd-Frank technically does grant an institution a pre-deprivation hearing before the district court once the FDIC invokes the OLA.[224] Proponents of the OLA would probably point to this fact and argue that an institution is better off because it gets the benefit of a judicial hearing before receivership occurs. But this temporal juxtaposition

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[213] *Id.* at 253–54.
[214] 642 F. Supp. 1147 (N.D. Ill. 1986).
[215] *Id.* at 1152.
[216] *Id.* at 1149.
[217] *Id.* at 1151.
[218] *Id.*
[219] 63 F.3d 894 (9th Cir. 1995), *cert. denied*, 517 U.S. 1233 (1996).
[220] *Id.* at 899–900.
[221] *Id.* at 898.
[222] *Id.* at 895, 898.
[223] *See id.* at 898–99 ("At every turn the Bank had the opportunity to respond to the Comptroller's concerns. The Bank received the Comptroller's unfavorable examination reports, it had discussions with Comptroller personnel, and prior to the conservator's appointment, it was given the opportunity to respond to the Comptroller's findings.").
[224] *See* 12 U.S.C. § 5382(a)(1)(A)(I) (2006).

of hearing rights ignores the fact that an institution never has the opportunity at all to contest a finding of systemic risk, nor does it account for the fact that the punitive aspect of the statute coerces executives into acquiescence. Neither of these factors presented themselves in *Collie* or *First National Bank and Trust*.[225] And in neither case was the court required to pass on the agency's decision inside of twenty-four hours.[226]

a. Corporations and Their Executives Have a Protected Property Interest at Stake Under Orderly Liquidation Authority Proceedings

It cannot be seriously contended that corporations, corporate executives, and corporate creditors do not have property interests at stake when the FDIC seeks to exercise its liquidation authority. As a threshold matter, the protected property interest at stake in Dodd-Frank's OLA proceedings is materially distinguishable from those in *Goldberg*[227] and *Mathews*.[228] In the latter cases, the protected property interest was a financial benefit created by statute and provided by the government.[229] In effect, the government sought to take away only that which it had provided.

By contrast, when the FDIC seeks to place a corporation into receivership, it seeks to deprive a corporation and its stakeholders of property obtained wholly independent of any government action.[230] In practice, it is tantamount to placing a corporation into summary involuntary Chapter 7 bankruptcy in order to dispose of its private property, sometimes to the detriment of its creditors.[231]

In *Board of Regents v. Roth*,[232] Justice Stewart remarked that, "[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it."[233]

Without question, the corporate and individual interest in property that the FDIC seeks to displace in orderly liquidation proceedings constitutes a "legitimate claim

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[225] *See generally* First Nat'l Bank & Trust v. Dep't of Treasury, 63 F.3d 894 (9th Cir. 1995); Collie v. Fed. Home Loan Bank Bd., 642 F. Supp. 1147 (N.D. Ill. 1986).

[226] *See generally First Nat'l Bank & Trust*, 63 F.3d at 894; *Collie*, 642 F. Supp. at 1147.

[227] 397 U.S. 254 (1970) (welfare benefits).

[228] 424 U.S. 319 (1976) (social security disability benefits).

[229] *Id.* at 323; *Goldberg*, 397 U.S. at 255.

[230] Unlike in *Goldberg* and *Mathews*, the government is not seizing property granted to the corporation from the government. *See* 12 U.S.C. § 5381(b) (2006) (describing revenue sources of financial companies covered by the OLA).

[231] Chapter 7 bankruptcy actually provides the corporate debtor with more protection than an OLA proceeding; in the former case, the debtor may obtain dismissal of the involuntary bankruptcy petition if debts have been paid as they become due. *See* 11 U.S.C. § 303(h)(2) (2006). It therefore appears that the FDIC can simply override this traditional check on insolvency proceedings by invoking the more favorable OLA, which provides for no such requirement. *See* 12 U.S.C. § 5382 (2006).

[232] 408 U.S. 564 (1972).

[233] *Id.* at 577.

of entitlement,"[234] the deprivation of which mandates the application of procedural due process.

b. The FDIC's Unilateral Determination of Systemic Risk and the Concomitant Deferential Judicial Review of That Determination Creates a Risk of Erroneous Deprivation of Protected Property Interests

A covered financial company's, and the relevant corporate executives', opportunity for a hearing fails to satisfy basic notions of due process because the statutory limitations on judicial review reduce the court's role to a "rubber stamp."[235] "The fundamental requisite of due process of law is the opportunity to be heard,"[236] and the hearing must be "at a meaningful time and in a meaningful manner."[237]

OLA provides regulators with radical powers necessary to liquidate a company that, pursuant to an ex ante determination of systemic risk, subjectively poses a danger of default.[238] This is an uncomfortably low standard, particularly given the deferential review. Whether a company qualifies as a financial company under Dodd-Frank is readily discernable,[239] but whether the company is in danger of default is not.[240] At least, given the financial complexities of covered entities, it is not the type of finding that directors and officers could effectively rebut inside of a twenty-four hour secret hearing.

That the OLA limits judicial review to whether a company satisfies the definition of a financial company and poses a danger of default underscores the contention that receivership is all but a foregone conclusion. The FDIC will be accorded great latitude in its determination on these two issues, both of which necessarily entail some statutory interpretation.[241] Thus, the FDIC should always—or nearly always—prevail, and

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[234] *Id.*

[235] Horton, *supra* note 13, at 887–88.

[236] Grannis v. Ordean, 234 U.S. 385, 394 (1914).

[237] Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

[238] *See* 12 U.S.C. § 5383(a)(2) (2006).

[239] *See* 12 U.S.C. § 5381(a)(11) (2006). The statute provides that a corporation will be considered a financial company when, inter alia, it is predominantly engaged in financial activities that account for at least eighty-five percent of its consolidated revenue. § 5381(b). Thus, whether a company meets the statutory definition of a financial company should be objectively ascertainable. *See* Cohen, *supra* note 182, at 1155–57 (describing the requirements for classification as a "financial company" under 12 U.S.C. § 5381).

[240] *See supra* notes 172–73 and accompanying text.

[241] *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984) (holding agency interpretation of ambiguous statutory provision will be upheld if the interpretation is permissible); *see also* Bankr. Estate of United Shipping Co., Inc. v. Gen. Mills, Inc., 34 F.3d 1383 (8th Cir. 1994) (holding that deference to an agency decision is particularly appropriate when the proceeding involves review of an agency's interpretation of its own statute); Fort Mill Tel. Co. v. FCC, 719 F.2d 89, 91 (4th Cir. 1983) (stating that courts must defer to agency's decision if it is "supported by a rational basis in the record").

the judicial review of the FDIC's determination represents a mere formality that fails to satisfy the requirement that hearings be conducted in a "meaningful manner."[242]

Logically, the FDIC's determination that a company poses a systemic risk to the financial condition of the United States is a central precondition to OLA's application; otherwise, the OLA would not be necessary. But the statute is notably silent with respect to judicial review of this determination.[243] Apparently, Congress appears to have vested the FDIC with the unreviewable discretion to determine which companies are systemically important and therefore subject to the OLA. To be sure, the FDIC will defend its action on exactly those grounds.[244]

However, the fact that no explicit statutory grounds exist for directors or officers to challenge this finding of systemic risk should not be preclusive.[245] A finding of systemic importance is so crucial to OLA's application that there should be some review of that finding, particularly given the stakes to corporations with multitudes of stakeholders that stand to be adversely affected by the invocation of any resolution authority.[246] Indeed, some commentators believe that "[t]he prospect of stopping even the most outrageous invocation of the new rules is close to nil. Once the company is in resolution, the FDIC has total control."[247]

The OLA's effects are coercive with respect to the corporate executives; given the specter of personal liability and the nearly insurmountable proceedings by which they can avoid placing the company in receivership, the executives can always be expected to acquiesce.[248] But equally disconcerting is the coercive effect on the court; there is simply no time for the court to conduct a meaningful review.[249] Rather, the OLA abuses the judicial review process as a mechanism to summarily ratify its earlier summary proceedings and determinations.[250]

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242 *Armstrong*, 380 U.S. at 552.

243 *See* 12 U.S.C. § 5382(a)(2) (2006) (stating that judicial review, through all phases of appeal, shall be limited to whether the agency's determination that a company satisfies the definition of a financial company and is in default or danger of default is arbitrary and capricious).

244 *See* 5 U.S.C. § 706 (2006) (stating that a reviewing court should set aside an agency action except when the action is committed to agency discretion by law).

245 *See* Angleton v. Pierce, 574 F. Supp. 719, 729–30 (D.N.J. 1983), *aff'd*, 734 F.2d 3 (3d Cir. 1984), *cert. denied*, 469 U.S. 880 (1984) (stating that judicial review is not completely foreclosed by the fact that an agency decision is committed to its discretion by law, and that a reviewing court must be able to consider whether the agency violated its constitutional mandate).

246 *See* Lee, *supra* note 25, at 774–75 (describing enhanced regulatory requirements for "systemically important" institutions).

247 SKEEL, *supra* note 9, at 139.

248 *See* Cohen, *supra* note 182, at 1222 (describing the power of the Dodd-Frank Act over executive officers).

249 *See* 12 U.S.C. § 5382(a)(1)(A)(v) (2006) (requiring judicial resolution within twenty-four hours of receipt of petition).

250 *See* United States v. Will, 449 U.S. 200, 217–18 (1980) ("A Judiciary free from control by the Executive and the Legislature is essential if there is a right to have claims decided by judges who are free from potential domination by other branches of government.").

c. Additional or Substitute Procedural Requirements Would Be Neither Unduly Burdensome Nor Unreasonably Expensive

The current procedural mechanisms inherently lack adequate constitutional safeguards of due process because the FDIC could employ additional procedures without compromising OLA's objectives. Whether "additional or substitute procedural safeguards [are required depends in part on the degree of] the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[251] Expanding the time allotted for judicial review from twenty-four hours to something more manageable—say, three days—should not be unduly burdensome or any more expensive. On the contrary, it may actually alleviate the burden on already-constrained judicial resources.[252]

IV. ALTERNATIVES TO THE ORDERLY LIQUIDATION AUTHORITY

During legislative debates prior to Dodd-Frank's enactment, many critics believed that ad hoc regulation too casually disregarded the rule of law.[253] To them, the traditional bankruptcy process represented a desirable alternative as a "predictable, transparent, [and] rule-oriented . . . process."[254] It may well be, and some observers have recommended a new type of bankruptcy—Chapter 14—to deal with systemically important financial institutions.[255]

Proponents point out that a Chapter 14 proceeding, based on the traditional bankruptcy code, would reduce reliance on agency decisions (in this case, the FDIC) reached behind closed doors.[256] Additionally, private enforcement would necessarily supplant governmental enforcement as creditors and counterparties would closely monitor transactional risk-taking by the firm.[257] Further, creditors could transact with a firm knowing where they fall on the claim priority spectrum.[258] Even if the government intervened in order to acquire or guarantee claims, the process itself would be more transparent—and thus subject the executive branch to political accountability—than would the OLA.[259]

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[251] Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (citing Goldberg v. Kelly, 397 U.S. 254, 263–71 (1970)).

[252] *See* Catherine T. Struve, *Time and the Courts: What Deadlines and Their Treatment Tell Us About the Litigation System*, 59 DEPAUL L. REV. 601, 611 (2010) ("Short time limits on court action . . . may limit courts' ability to thoroughly consider the merits of a given matter.").

[253] SKEEL, *supra* note 9, at 10.

[254] *Id.*

[255] *See* Kenneth E. Scott, *A Guide to the Resolution of Failed Financial Institutions: Dodd-Frank Title II and Proposed Chapter 14*, *in* RESOLUTION OF FAILED FINANCIAL INSTITUTIONS: ORDERLY LIQUIDATION AUTHORITY AND A NEW CHAPTER 14, at 1-1 (2011), *available at* http://media.hoover.org/sites/default/files/documents/Resolution-Project-Booklet.pdf.

[256] *Id.* at 1-7.

[257] *Id.* at 1-3, 1-6.

[258] *Id.* at 1-6.

[259] *Id.* at 1-13.

Others persuasively argue that Chapter 14 could be used to supplement or supplant entirely the OLA, with the result that a clearly defined set of existing rules would provide creditors and other stakeholders with predictable allocation of losses in the event of a company's failure.[260] In addition, the bankruptcy code provides an excellent starting point because its procedures are robust and courts have systematically interpreted its crucial provisions.[261] Finally, and perhaps more importantly, the bankruptcy code allows for either a liquidation or reorganization, depending on the circumstances.[262] All of this procedure, of course, would be open to the public.

From a practical standpoint, replacing the OLA with the existing bankruptcy code could be just as effective;[263] perhaps Congress erred by departing from well-established practice which provided those subject to its provisions with transparency, notice, and other procedures commensurate with the rule of law. David Skeel points out that despite popular notions to the contrary, bankruptcy worked rather well for Lehman.[264] Two important observations undergird his assertion. First, bankruptcy law facilitated Lehman's sale to Barclays that would not have otherwise occurred outside bankruptcy, particularly given Barclays's reservations about some of Lehman's illiquid assets.[265] Second, Chapter 11 provided a speedy sale of Lehman's viable assets.[266] This shows that in addition to providing the public and interested parties with constitutional guarantees of both access and due process, bankruptcy law can be equally effective as any alternative. Consequently, this erodes the FDIC's view that circumstances can justify a secret and skewed process to deal with financial institutions.[267]

Assuming OLA's superiority to bankruptcy from an economic-regulatory perspective, its provisions must be aligned with constitutional requirements. This is not only possible, but readily achievable with minimal invasiveness to existing operative provisions. In order to bring the OLA into constitutional conformity, Congress should amend the statute in three ways.[268] The first deals with a right of public access, while the latter two are inexorably related and concern due process.

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260 *See* Thomas H. Jackson, *Bankruptcy Code Chapter 14: A Proposal*, *in* RESOLUTION OF FAILED FINANCIAL INSTITUTIONS: ORDERLY LIQUIDATION AUTHORITY AND A NEW CHAPTER 14, at 2-1 (2011), *available at* http://media.hoover.org/sites/default/files/documents/Resolution-Project-Booklet.pdf.

261 *Id.* at 2-4 to 2-5.

262 *Id.* at 2-5.

263 SKEEL, *supra* note 9, at 150 (noting that bankruptcy still allows for liquidation, but that OLA's mandatory liquidation "increases the potential for value to be squandered").

264 *Id.* at 30.

265 *Id.*

266 *Id.*

267 *The Orderly Liquidation of Lehman Brothers Holdings Inc. Under the Dodd-Frank Act*, 5 FDIC Q. 31, 48 (2011) (arguing that the circumstances surrounding the Lehman Brothers collapse would have been better suited to the OLA process).

268 Indeed, an outright repeal of Dodd-Frank is probably politically unachievable. *See* Scott, *supra* note 255, at 1-13.

First, Congress should allow public access to the hearing in which the district court must determine whether to place a company into FDIC's receivership. True, markets may react if information of an orderly liquidation petition is made public. However, as has been shown, market reaction may not be any more severe than if the FDIC were to salvage the institution by infusing additional capital.[269] Rather, the FDIC should factor market reaction into its calculus when determining whether to invoke the OLA in the first instance, thereby supporting OLA's use only when its benefits outweigh its burdens.

Second, Congress must define "systemic risk to the financial condition of the United States" within the meaning of § 5382.[270] As a close corollary, it should also expand judicial review to this finding as well. This would provide fair notice to all participants and market predictability, and elevates judicial review beyond a mere rubber stamp.

CONCLUSION

The Panic of 2008 represented the greatest financial catastrophe since the Great Depression.[271] Unsurprisingly, most legislators, regulators, and financial industry observers are in accord that these events mandated meaningful and impactful reforms.[272] In retrospect, however, perhaps the urgency to act overpowered the need to reflect on the cause of the crisis and the necessary steps that could be taken to avoid another. The result was one that disregarded fundamental ideals of due process and access to government in order to advance some compelling interest.

To be sure, financial institutions—both bank and non-bank alike—have become too big to fail.[273] Consequently, the survival (or at least the orderly failure) of these institutions is a compelling state interest when one firm's failure can disrupt the entire American economy. But an approach that allows regulatory bodies to disregard First and Fifth Amendment rights in the name of dealing with systemic risk gives short shrift to the importance of fundamental freedoms. This is particularly so when the government takes a paternalistic approach when there are other viable (and existing) alternatives to accomplish the same goals.

As previously discussed, bankruptcy can be an effective tool for expeditiously dealing with a failing firm.[274] Relying on existing bankruptcy law further provides

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269 *See supra* notes 166–69 and accompanying text.

270 Cohen, *supra* note 182, at 1155 (noting that systemic risk determinations are made by the Treasury Secretary and President and are "based on criteria that, for the most part, are not subject to judicial review").

271 Bruce Miller, *The Place of Law in Ivan Illich's Vision of Social Transformation*, 34 W. NEW ENG. L. REV. 507, 509 (2012).

272 *See* Porter, *supra* note 2, at 10.

273 *See, e.g.*, Cohen, *supra* note 182, at 1143, 1147 (noting that TARP funds were used to bail out automotive manufacturers deemed "too big to fail").

274 SKEEL, *supra* note 9, at 30 (noting that bankruptcy allowed Lehman to stay in business).

benefits by providing market participants with a clear set of rules and procedure; if nothing else, parties can forge transactions with some degree of certainty about what type of law will apply, and when. If OLA is not any more effective than bankruptcy, then there cannot be any good reason why it should have been enacted in order to replace it. The glaring differences seem to be only truncated procedures and review, more governmental discretion, secrecy, and mandated liquidation. It gives the appearance that government seeks a new authority in order to alter creditors' rights and influence the market with impunity, while mollifying those who demand some type of government intervention to prevent market collapse.