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POWER, NATIONAL SECURITY AND TRANSPARENCY: JUDICIAL DECISION MAKING AND SOCIAL ARCHITECTURE IN THE FEDERAL COURTS

DERIGAN SILVER*

Even in a democratic society, the need for transparency must be balanced with an important countervailing interest: the occasional, legitimate need for government secrecy. This article, based on an examination of opinions in federal cases dealing with national security and transparency, explores how judges identified the main legal issues presented by a case and the legal factors or mode of legal interpretation used to reach or justify their conclusions. The article concludes that many of these opinions are as much about judges' attempts to balance the judicial branch's power with the powers of the executive and legislative branches as they are about national security and transparency. Furthermore, the article contends these opinions have created an "architecture of power" that determines how national security information is controlled. The final section also suggests that judges should be mindful of the original architecture of power established by the Constitution and the First Amendment when writing their opinions.

In the wake of the terrorist attacks of September 11, 2001, the United States government enacted sweeping legislation known as the USA PATRIOT Act.¹ In addition to many other things, the PATRIOT Act amended Section 2709 of Title 18 of the U.S. Code. Originally a part of the Electronic Communications Privacy Act of 1986, Section 2709 permitted the Federal Bureau of Investigation to subpoena records from electronic communication service providers upon *self-certification* that its request complied with statutory requirements. Both prior to and

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¹Pub. L. 107–56 (2001). The acronym stands for “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001.”

after the PATRIOT Act amended the section, FBI demands for information under Section 2709 were issued in the form of National Security Letters (NSLs). As amended by the PATRIOT Act, Section 2709 authorized the FBI to issue NSLs “to compel communications firms, such as internet service providers (ISPs) or telephone companies, to produce certain customer records whenever the FBI certifies that those records are ‘relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities.’”² In addition, Section 2709(c)³ categorically and permanently barred NSL recipients from ever disclosing the existence of an NSL inquiry in every case to any person — including counsel — in perpetuity, with “no vehicle for the ban to ever be lifted from the recipient or other persons affected, under any circumstances, either by the FBI itself, or pursuant to judicial process.”⁴ As Judge Victor Marrero of the Southern District of New York noted, NSLs are “a unique form of administrative subpoena cloaked in secrecy and pertaining to national security issues.”⁵ As Judge Marrero would later note, NSLs are also powerful tools for gathering information, especially when issued to ISPs.⁶

At some time prior to April 2004, an ISP, which would become known in court records as “John Doe,” received a NSL.⁷ In a document printed on FBI letterhead, Doe was directed to provide certain information to the government. In the NSL, the FBI “certif[ied] that the information sought [was] relevant to an authorized investigation to protect against

²*Doe v. Ashcroft*, 334 F. Supp. 2d 471, 474–75 (S.D.N.Y. 2005) (hereinafter *Doe I*) (quoting 18 U.S.C. § 2709 (Supp. 2003)). Previously, the act required Section 2709 inquiries to be relevant to investigations regarding “a foreign power.” As amended this standard was replaced “with a broad standard of relevance to investigations of terrorism or clandestine intelligence activities.” *Id.* at 479. Compare 18 U.S.C. § 2709 (2000) with 18 U.S.C. § 2709 (Supp. 2003).

³18 U.S.C. § 2709(c) (Supp. 2003) (“No wire or electronic communication service provider, or officer, employee, or agent thereof, shall disclose to *any person* that the Federal Bureau of Investigation has sought or obtained access to information or records under this section.”) (emphasis added).

⁴*Doe I*, 334 F. Supp. 2d, at 476.

⁵*Id.* at 475.

⁶*Doe v. Gonzales*, 500 F. Supp. 2d 379, 395 (S.D.N.Y. 2007) (hereinafter *Doe III*) (“Through the use of NSLs, the government can unmask the identity of internet users engaged in anonymous speech in online discussions. It can obtain an itemized list of all of the emails sent and received by the target of the NSL, and it can then seek information on individuals communicating with that person. It may even be able to discover the websites an individual has visited and queries submitted to search engines.”).

⁷*Doe I*, 334 F. Supp. 2d, at 475. The Southern District of New York granted a government motion to seal the record of the proceedings in order to prevent the disclosure of Doe’s identity or any other fact relating to Doe’s role in the controversy that arose surrounding the NSL that might have identified Doe or otherwise interfered with the underlying FBI activities. Although court records do not indicate when Doe received the NSL, Doe’s lawsuit was filed in April 2004.

international terrorism or clandestine intelligence activities.”⁸ Doe was “‘further advised’ that Section 2709(c) prohibited him, or his officers, agents, or employees, ‘from disclosing to *any person* that the FBI ha[d] sought or obtained access to information or records under” Section 2709.⁹ Doe was told to deliver the records “‘*personally*’ to a designated individual, and to not transmit the records by mail or even mention the NSL in *any* telephone conversation.”¹⁰ However, rather than comply with the NSL, Doe consulted lawyers with the American Civil Liberties Union and brought suit in federal district court contending Section 2709’s “broad subpoena power violate[d] the First, Fourth and Fifth Amendments of the United States Constitution, and that the non-disclosure provision violate[d] the First Amendment.”¹¹ Even though thousands of NSLs had been sent in the wake of 9/11, Doe’s lawsuit was the first challenging the constitutionality of Section 2709.¹²

In deciding the case, District Judge Marrero stated one of the key legal issues presented was the need to balance national security with the fundamental rights guaranteed by the Constitution. He wrote:

Like most of our constitutional law’s hardest cases, this dispute is about two fundamental principles: values and limits. It centers on the interplay of these concepts, testing the limits of values and the values of limits where their ends collide.

National security is a paramount value, unquestionably one of the highest purposes for which any sovereign government is ordained. Equally scaled among human endeavors is personal security, an interest especially prized in our system of justice in the form of the guarantee bestowed upon the individual to be free from imposition by government of unwarranted restraints on protected fundamental rights.¹³

⁸*Id.* at 478–79.

⁹*Id.* at 479 (quoting NSL received by Doe) (emphasis added by the court).

¹⁰*Id.* (quoting NSL received by Doe) (emphasis in the original NSL).

¹¹*Id.*

¹²*Id.* at 502. In September 2004, the Southern District of New York estimated that the government issued hundreds of NSLs between October 2001 and January 2003. However, in March 2007, the Department of Justice’s Office of the Inspector General (OIG) reported that according to FBI records, there were approximately 39,000 requests for NSLs in 2003, approximately 56,000 in 2004, and approximately 47,000 in 2005. The OIG also noted that the total number of NSL requests was underreported by the FBI database used to prepare the report. OFFICE OF THE INSPECTOR GENERAL, U.S. DEPARTMENT OF JUSTICE, A REVIEW OF THE FEDERAL BUREAU OF INVESTIGATION’S USE OF NATIONAL SECURITY LETTERS 120 (2007), *available at* <http://www.usdoj.gov/oig/special/s0703b/final.pdf>. The report also noted that after the PATRIOT Act amendments to Section 2709 there was a dramatic increase in NSLs. The FBI reported only approximately 8,500 NSL requests in 2000, the year prior to passage of the PATRIOT Act. *Id.*

¹³*Doe I*, 334 F. Supp. 2d, at 476.

In order to strike that balance, Judge Marrero called upon a wide range of precedents, as well as textual analysis and democratic theory. Marrero used these precedents to guide him as he attempted to correctly weigh national security concerns against freedom of expression values. However, almost all of the cases Marrero cited — and indeed most cases that deal with national security and transparency or freedom of expression — not only attempted to balance these two competing concepts, they also attempted to balance and define the role of the courts in national security information cases. These decisions were as much about power as they were about transparency.

When considering the PATRIOT Act for the first time, Marrero wrote that a separate issue before the court was the appropriate distribution of power among the branches of the federal government. Marrero wrote that there is a need for the judicial branch to have an active role in balancing national security issues and concluded that during times of war and national crisis it was especially important for the judiciary to remain vigilant of government attempts to curtail personal freedoms.¹⁴ When he considered changes made to the act after Congress passed the USA PATRIOT Improvement and Reauthorization Act of 2005,¹⁵ which mandated the level of judicial review necessary by stating that a court could only overturn the non-disclosure provision if it found there was “‘no reason to believe’ disclosure ‘may result’ in one or more of the Enumerated Harms,”¹⁶ Marrero scolded the legislative branch. While a discussion of constitutional roles of the branches of government might seem “like unnecessary rehashing” or “tedious repetition,” he wrote, “sometimes we are compelled to recite the obvious again because on occasion, counter to even the most constant refrain of the same theme, the message still goes unnoticed, or inadequately considered, perhaps ignored.”¹⁷

Thus, as the two NSL cases demonstrate, opinions written in cases involving national security information are often as much about power-distribution issues as they are about transparency. Drawing upon legal and political science literature on judicial decision making, this article examines opinions dealing with national security information that have considered prior restraints, post-publication punishments and access, and explores the legal frameworks and factors federal judges employ in deciding those cases. That is, the article examines both how individual judges identify the main legal issues present in a case or “frame the

¹⁴*Id.* at 478.

¹⁵Pub. L. No. 109–177, 120 Stat. 192 (Mar. 9, 2006).

¹⁶*Doe III*, 500 F.Supp. 2d 379, 389 (S.D.N.Y. 2007) (citing 18 U.S.C. § 3511(b)(2) (2006)).

¹⁷*Id.* at 409.

case”¹⁸ and the legal factors or modes of interpretation — such as precedent, framers’ intent/originalism, or textualism — they used to reach or justify their conclusions. Thus, it is an attempt to set out a framework for understanding how judges craft opinions in these cases rather than an analysis of the substantive history of this area of law.

The article begins by reviewing literature on judicial decision making and social architecture theory. It examines legalism or mechanical jurisprudence and the legal factors courts often rely upon to reach or justify decision, legal realism and research by positivist legal scholars, and explores how this research intersects with the foundations of social architecture theory. Next, it operationalizes definitions for the modes of legal analysis that judges turn to under mechanical jurisprudence. Third, it identifies and analyzes all federal court cases that have dealt with national security and prior restraints, post-publication punishments and access. Finally, it offers a number of conclusions about the main legal issues and factors judges have used in these opinions.

The article posits that most opinions dealing with national security and transparency are less about judges’ attempts to balance national security with transparency than they are about judges’ attempts to balance their own power with the powers of the executive and legislative branches. The article concludes that the judges identified separation of powers issues as the main legal conflict in these cases with equal or greater frequency as they identified the need to balance freedom of expression/transparency with national security concerns. The opinions often discussed the inherent power of the courts *vis-à-vis* the executive or legislative branch or grappled with how much deference the courts should give to the executive branch when dealing with national security information. This was particularly true in post-publication punishment and access cases, areas in which the Supreme Court of the United States has not established a jurisprudential regime strong enough to cross into national security information cases. In addition, while the research supports previous scholarship that has emphasized the importance of precedent in judicial decision making, the cases also demonstrate that jurists often use First Amendment and democratic theory to support or justify their decisions, especially in situations in which they cannot rely on textual analysis or framers’ intent.

Furthermore, the article contends, because the judges who decide these cases choose to make them about balancing power, the social

¹⁸As a number of scholars have noted, there is a difference between the cases courts decide and the issues they decide. According to these scholars, cases simply provide the factual framework in which legal issues are addressed. This article contends that judges have the ability to determine which specific issues to resolve in a case and determine which issues or problems are the salient ones that should be addressed in a decision. See *infra* notes 67–74 and accompanying text.

architecture metaphor — which focuses on how the law creates and distributes power between groups — is particularly well suited to understanding the importance of these cases. The ability to selectively identify which legal issue a case presents and selectively rely on some modes of legal interpretation while ignoring others gives judges a great deal of flexibility to mold law regarding national security information as they see fit and create an “architecture of power”¹⁹ that determines how our society controls national security information. While on the surface these cases are about balancing national security and transparency, a deeper analysis and comparison of the opinions across categories reveals that they establish how power is distributed between the legislative, executive and judicial branches and determine which branch has the power to control information. The final section also suggests that judges should be mindful of the original architecture of power established by the Constitution and the First Amendment.

JUDICIAL DECISION MAKING AND SOCIAL ARCHITECTURE THEORY

Faced with the difficult task of balancing transparency with national security, judges are called upon to make decisions and to interpret and create law that affects the flow of information in our democracy. How judges reach those decisions and what factors influence them are thus important to determining how the balance is struck between openness and secrecy or how power relationships are created among the branches of government. Most of the scholarship on judicial decision making is based on one of two presumptions: that the law decides cases or that the policy preferences of individual judges’ best predict and explain judicial behavior.²⁰ While legal formalism, also called “mechanical jurisprudence,” holds that there is one “correct” answer to a legal question, which

¹⁹Law professor Daniel J. Solove uses the term “architecture of power” to refer to a “particular power structure [created] . . . by the law.” Daniel J. Solove, *Digital Dossiers and the Dissipation of Fourth Amendment Privacy*, 75 S. CAL. L. REV. 1084, 1087 n.19 (2002).

²⁰See JEFFERY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 44–48 (2002) for a discussion of models of judicial decision making. Models of judicial decision making are attempts to reduce the many factors that contribute to judicial decisions to the ones that validly and reliably explain and predict judicial decisions. Models attempt to explain multiple decisions rather than analyze a single decision. No model attempts to take into account all factors, nor does any model perfectly explain all decisions. As political scientists Jeffery Segal and Harold Spaeth point out, the goal of a good model is to predict and explain a number of decisions better than competing models. *Id.* at 46.

can be “discovered” by a judge,²¹ other models suggest that while law is important, legal principles are malleable and jurists remain free to shape the law as they see fit.²² This work, which is grounded in the legal realism of the early twentieth century, holds that while jurists are not totally bound by the law, they do use it and are at times constrained by it. In addition, this line of scholarship serves as the foundation for social architecture theory.

Models of Judicial Decision Making

According to legal scholars Lee Epstein and Joseph F. Kobylka, legalism assumes that jurists derive rules from precedents, statutes and the Constitution and then apply them to specific cases to reach decisions.²³ This approach views judges as “reasoning from determinate premises to determinate results.”²⁴ One aspect of interpreting the law under the legal model is plain meaning or textualism. Plain meaning or textualism dictates that the meaning of the Constitution and statutes should be construed from the “plain meaning of the words.” As a mode of constitutional interpretation,²⁵ a textualist approach holds that justices should create no new rights that are not explicitly guaranteed by the Constitution. As a mode of statutory interpretation, textualism suggests judges should defer to the text of a statute without resorting to extrinsic interpretive aids such as legislative histories.²⁶

²¹See, e.g., KENT GREENAWALT, *LAW AND OBJECTIVITY* (1992); RICHARD S. MARKOVITS, *MATTERS OF PRINCIPLE: LEGITIMATE LEGAL ARGUMENT AND CONSTITUTIONAL INTERPRETATION* (1998).

²²As noted below, the most extreme of these models is the attitudinal model, which holds that policy preferences are the only factor that needs to be considered when attempting to predict and explain Supreme Court decision making. See generally SEGAL & SPAETH, *supra* note 20, at 86–97.

²³LEE EPSTEIN & JOSEPH F. KOBYLKA, *THE SUPREME COURT AND LEGAL CHANGE: ABORTION AND THE DEATH PENALTY* 10–11 (1992).

²⁴Erwin Chemerinsky, *The Rhetoric of Constitutional Law*, 100 MICH. L. REV. 2008, 2012 n.24 (2002).

²⁵See PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 12–13 (1991) (identifying the dominant modes of constitutional interpretation as historical, textual, structural, doctrinal, ethical and prudential); Glenn A. Phelps & John B. Gates, *The Myth of Jurisprudence: Interpretive Theory in the Constitutional Opinions of Justices Rehnquist and Brennan*, 31 SANTA CLARA L. REV. 567, 581–84 (1991) (classifying the types of constitutional interpretive arguments as textual, structural, doctrinal, extrinsic and historical/intentional).

²⁶See, e.g., William N. Eskridge Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990) (discussing textual analysis and its return to prominence as a mode of statutory interpretation); Fredrick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. 231 (discussing the Supreme Court’s use of the Plain Meaning Rule in statutory interpretation).

Closely tied to textualism is “originalism” or “original intentalism,” a mode of constitutional interpretation which focuses on the framers of the Constitution. Under originalism, judges should construe statutes and the Constitution “according to the preference of those who originally drafted and supported them.”²⁷ According to constitutional scholar Erwin Chemerinsky, originalism has the appeal of making it seem that judicial decisions are not based on judges’ personal preferences but rather are solely the product of following the framers’ wishes.²⁸ Originalists are “committed to the view that original intent, or original meaning is not only relevant but also authoritative; that we are in some sense obligated to follow the intent, or plain meaning, of the framers.”²⁹ Supreme Court Justice Antonin Scalia has offered a variant of this idea, which he has described as “original meaning.” According to Scalia, jurists should focus on the practices at the time of the framing or attempt to discern what a rational person at the time of the framing of the Constitution would have taken the words of the Constitution to mean.³⁰ As with textualism, originalism holds that judges should add no new rights to the Constitution that were not expressly intended by the framers. As applied to statutes, this mode of interpretation is best described as “intentionalism” or the idea that when interpreting statutory meaning, courts should defer to legislative intent as evidenced in the legislative record or committee reports.³¹

A third aspect of the legal model of judicial decision making is rooted in the concept of *stare decisis*, which means “stand by the decision” and holds that basing decisions on precedent allows for the law to develop a quality of connectedness and appearance of stability. Precedent can appear to be a powerful predictor of judicial decisions. According to political scientists Jeffery A. Segal and Harold J. Spaeth, the frequency with which courts base decisions on precedent far surpasses any other aspect of the legal model.³² In addition, the Supreme Court is very reluctant

²⁷SEGAL & SPAETH, *supra* note 20, at 60. Normative debates for and against binding judicial interpretation of the Constitution to the intent of the framers became increasingly popular in the years following the Court’s decisions in abortion cases and comments made by Attorney General Edwin Meese in the 1980s. See Edwin Meese III, *Speech Before the American Bar Association* 53, in ORIGINALISM: A QUARTER-CENTURY OF DEBATE (Steven G. Calabresi ed., 2007).

²⁸Chemerinsky, *supra* note 24, at 2012.

²⁹Pamela C. Corley, Robert M. Howard & David C. Nixon, *The Supreme Court and Opinion Content: The Use of the Federalist Papers*, 58 POL. RES. Q. 329, 331 (2005).

³⁰See generally ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997).

³¹See Eskridge, *supra* note 26, at 630.

³²SEGAL & SPAETH, *supra* note 20, at 76. Segal and Spaeth noted that judges often use precedent to support their conclusions in tandem with plain meaning or intent. As a result, precedent becomes the most frequent way to justify a decision under the legal model.

to overturn its own precedent, and at times the justices go to great lengths to avoid doing so.³³ According to Segal and Spaeth's research, the Court overruled its own precedents only 128 times between 1953 and 2000, a period of time during which the Court ruled four times as many statutes unconstitutional.³⁴ Chemerinsky contended: "The rhetorical force of precedent is seen in how the Court writes its opinions when it does overrule earlier decisions. The Court describes the earlier rulings as aberrations and its current interpretation as the long-standing approach, even when that is not at all the case."³⁵ In addition, when the Court does overturn precedent, Segal and Spaeth's research has shown, it is often done *mirabile dictu*, or on the basis of a different precedent.³⁶ Chemerinsky also noted that opinions are written to appear consistent with precedent even when they are not.³⁷ For example, in the First Amendment case *Brandenburg v. Ohio*,³⁸ the Court clearly tried to present the incitement test used in the case as being well established law when, in fact, *Brandenburg* created a new standard.³⁹

Mechanical jurisprudence was a popular theory in the legal literature and law schools prior to and right after the beginning of the twentieth century. However, while opinions are still written in this style, few, if any, scholars still hold this view of legal decision making.⁴⁰ According to Chemerinsky, this approach was "put to rest" by the legal realists of the early twentieth century.⁴¹ In addition, the legal model of judicial decision making has numerous weaknesses as a predictive and explanatory tool.⁴² Considering textualism, Segal and Spaeth pointed out that a key problem with relying on plain meaning for constitutional and statutory interpretation is that English as a language lacks specificity and many words used in the Constitution or Bill of Rights are not explained in great detail.⁴³ A number of scholars have made compelling cases against originalism, pointing out numerous problems with using

³³See Chemerinsky, *supra* note 24, at 2017.

³⁴SEGAL & SPAETH, *supra* note 20, at 83.

³⁵Chemerinsky, *supra* note 24, at 2018.

³⁶SEGAL & SPAETH, *supra* note 20, at 84.

³⁷Chemerinsky, *supra* note 24, at 2015–19.

³⁸395 U.S. 444 (1969).

³⁹See Chemerinsky, *supra* note 24, at 2017 (arguing *Brandenburg's* approach was very different from any prior test for incitement, but the Court "did not acknowledge this; to the contrary, the Court made it seem that it was just following precedent").

⁴⁰See *id.* at 2012. See also Frank Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251, 255 (1997) (arguing that "most contemporary scholars no longer adhere to the strict determinate formalists model").

⁴¹*Id.*

⁴²For a summary of the legal realists' critiques of formalism, see MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960*, 182–230 (1992).

⁴³SEGAL & SPAETH, *supra* note 20, at 54.

it to reach judicial decisions and as a way to predict and explain judicial behavior.⁴⁴ Justice William J. Brennan Jr., for example, wrote that because the text of the Constitution is unclear and requires interpretation, efforts to discern its authors' intentions were "little more than arrogance cloaked as humility."⁴⁵ Brennan wrote, "It is arrogant to pretend that from our vantage we can gauge accurately the intent of Framers on application of principles to specific, contemporary questions."⁴⁶ Furthermore, although Justice Scalia argued that his judicial philosophy of "original meaning" corrected many of the problems associated with originalism and constitutional interpretation, it is as difficult to know what a "rational person" would have thought about a particular legal concept as it is to know what any particular framer would have thought.⁴⁷ Even Justice Scalia has noted these problems with applying originalism, writing that "sometimes there will be disagreement as to how the original meaning applies to new and unforeseen phenomena."⁴⁸ In addition, as it applies to statutory interpretation, Scalia has been a harsh critic of using legislative intent to reach decisions.⁴⁹ Finally, there are also problems with using precedent to predict and explain judicial decisions. Spaeth and Segal's research on precedent and *stare decisis* concluded that dissenting justices, even ones who elsewhere wrote of respecting precedent, rarely switch sides in later cases to support earlier majority opinions.⁵⁰ In addition, in almost all cases there is some precedent to support either side of a case⁵¹ and judges are able to distinguish precedent without having to actually overrule a precedent, by asserting that

⁴⁴See, e.g., William J. Brennan Jr., *Speech to the Text and Teaching Symposium* 58, in ORIGINALISM, *supra* note 27, at 45; Paul Best, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063 (1982); Jeffery Shaman, *The Constitution, the Supreme Court and Creativity*, 9 HASTINGS CONST. L.Q. 257 (1982); Larry G. Simon, *The Authority of the Framers of the Constitution: Can Originalist Interpretation Be Justified?*, 73 CAL. L. REV. 1482 (1985).

⁴⁵Brennan, *supra* note 44, at 58.

⁴⁶*Id.*

⁴⁷For a critique of original meaning see Erwin Chemerinsky, *The Jurisprudence of Justice Scalia: A Critical Appraisal*, 22 U. HAW. L. REV. 385, 391–401 (2000).

⁴⁸SCALIA, *supra* note 30, at 45.

⁴⁹See, e.g., *Edwards v. Aguillard*, 482 U.S. 578, 610–39 (1987) (Scalia, J., dissenting); *Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 452–55 (1987) (Scalia, J., concurring).

⁵⁰See HAROLD J. SPAETH & JEFFREY A. SEGAL, MAJORITY RULE OR MINORITY WILL: ADHERENCE TO PRECEDENT ON THE U.S. SUPREME COURT 287–302 (1999). See also SEGAL & SPAETH, *supra* note 20, at 76–85; Jeffery A. Segal & Harold J. Spaeth, *The Influence of Stare Decisis on the Votes of U.S. Supreme Court Justices*, 40 AM. J. POL. SCI. 971 (1996).

⁵¹SEGAL & SPAETH, *supra* note 20, at 77. See also Linda Greenhouse, *Precedent for Lower Courts: Tyrant or Teacher*, N.Y. TIMES, Jan. 29, 1988, at A12 (quoting judges from the U.S. Court of Appeals for the First and Seventh Circuits who argued that if precedent clearly governed a case, no litigant would ever appeal a lower court's decision).

the facts of the present case differ from the facts of the precedent. Judges often spend the first part of a decision discussing why the present case is similar to or different from preceding cases or alternative lines of precedent.⁵²

In sum, the legal model of judicial decision making has numerous weaknesses as a predictive and explanatory tool and, as noted, few scholars or judges believe or advocate that this is how judges come to decisions. Based on these weaknesses, scholars began theorizing about alternative models of judicial decision making. Beginning with the legal realism movement, which included the notion that law is constructed, and continuing with the research of positivist legal scholars and the new legal realism movement,⁵³ a number of new conceptualizations of how judges behave have been put forward over the last century. Legal realism, first advanced in the early twentieth century, held that law is vague, internally inconsistent, and revisable.⁵⁴ Justice Oliver Wendell Holmes was one of the first jurists to suggest that law was not a formal process of neutral application or logical deduction but a process of choosing among competing values.⁵⁵ Karl Llewellyn wrote that legal realism recognizes that “the law is in flux” and “moving,” and that judges create law.⁵⁶

Today, one of the leading models of judicial decision making is the attitudinal model, which has been described by Segal and Spaeth as a combination of legal realism, political science, psychology and economics.⁵⁷ This model holds that the personal policy preferences of Supreme Court justices can explain most, if not all, of their decisions. Although a great deal of empirical research supports the ability of the attitudinal model to predict and explain judicial decisions,⁵⁸ the model has numerous weaknesses. First, scholars have suggested that the attitudinal model critiques a legal model that is no longer widely held by anyone: the mechanical jurisprudential model.⁵⁹ Second, critics have contended that

⁵²See Chemerinsky, *supra* note 24, at 2019.

⁵³See Howard Erlanger et al., *Is It Time for a New Legal Realism?*, 2005 WIS. L. REV. 335, for a description of the methods and approach of the new legal realism movement and a summary of results of current legal realist research.

⁵⁴See Howard Gillman, *What's Law Got to Do With It? Judicial Behaviorists Test the "Legal Model" of Judicial Decision Making*, 26 LAW & SOC. INQUIRY 465, 468–69 (2001).

⁵⁵See, e.g., Oliver Wendell Holmes, *The Path of Law*, 10 HARV. L. REV. 457 (1897).

⁵⁶Karl N. Llewellyn, *Some Realism About Realism — Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1237 (1931). See also, Karl N. Llewellyn, *A Realistic Jurisprudence — The Next Step*, 30 COLUM. L. REV. 431 (1930).

⁵⁷SEGAL & SPAETH, *supra* note 20, at 86.

⁵⁸See, e.g., *id.* at 279–320; Lawrence Baum, *Measuring Policy Change in the U.S. Supreme Court*, 82 AM. POL. SCI. REV. 905 (1988); Jeffery A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557 (1989).

⁵⁹See, e.g., Tracey E. George & Lee Epstein, *On the Nature of Supreme Court Decision Making*, 86 AM. POL. SCI. REV. 323, 323–24 (1992); Gillman, *supra* note 54, at 471.

Segal and Spaeth's work not only attacks a model of legalism that is no longer widely accepted but also that their experimental designs purposefully set up legal model "straw men" that are easy to knock down and do not accurately represent the influence of the law on the Court.⁶⁰ For example, while political scientist Gregory Caldeira generally supported the work of Segal and Spaeth, he also argued that the two adopted an extreme version of competing explanations for judicial behavior and did not "set up any realistic competitor to their model of decision making."⁶¹ Finally, several scholars have argued that in reducing complex observations down to easily measurable variables, the attitudinal model does not accurately capture the complex influence of legal factors on judicial decision making.⁶²

A third model of judicial decision making, the strategic model, or a model based on rational choice theories, suggests that although judges, like other political actors, seek the implementation of personal policy preferences, they are limited by legal factors as well as the preferences of their fellow judges, the norms and authority of the judicial branch as an institution, and external political and societal factors.⁶³ This line of reasoning suggests that while judges are constrained by legal formalism's reliance on a limited number of legal arguments that can be used to reach — or ex-post facto justify — a decision, there remains a great deal of flexibility in how these arguments can be used. These theorists contend that while the law gives judges a great deal of room to maneuver they must also operate under rules governing their own actions and interactions, protect institutional legitimacy and sway their colleagues with persuasive legal arguments.⁶⁴ Thus, while judges might come to cases with preconceived legal and policy preferences, their opinion must contain legal rationales to sway their colleagues, the other institutions

⁶⁰See Gerald Rosenberg, *Symposium: The Supreme Court and the Attitudinal Model*, 4 LAW & COURTS 6, 7 (1994). See also Gillman, *supra* note 54, at 474–85, for a summary of critiques of Segal and Spaeth's conceptualization of judicial behavior.

⁶¹Gregory Caldeira, *Review of the Supreme Court and the Attitudinal Model*, 88 AM. POLI. SCI. Q. 485, 485 (1994). To answer these criticisms Segal and Spaeth designed and conducted quantitative research that used precedents to predict and explain decision making. However, this model was also criticized as being simplistic and not representing the complexities of law. See Gillman, *supra* note 54, at 476–85.

⁶²See, e.g., Gillman, *supra* note 54, at 476–85.

⁶³See LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* (1998); EPSTEIN & KOBYLKA, *supra* note 23; WALTER F. MURPHY, *ELEMENTS OF JUDICIAL STRATEGY* (1964); Kevin T. McGuire & Barbara Palmer, *Issues, Agendas, and Decision Making on the Supreme Court*, 90 AM. POL. SCI. REV. 853 (1996).

⁶⁴See, e.g., Forrest Maltzman & Paul J. Wahlbeck, *Strategic Policy Considerations and Voting Fluidity on the Burger Court*, 90 AM. POL. SCI. REV. 581, 581 (1996) (contending that because justices are willing to change their votes between their original vote at conference and the final vote on the merits of a case, this provides evidence that justices can be susceptible to the persuasive arguments and efforts of other justices).

of government and public opinion.⁶⁵ For example, strategic theorists who focus on the judicial branch as an institution examine judicial decision making through the lens of courts' institutional position in relation to the other branches of government.⁶⁶

One way judges have the ability to influence case outcomes is by strategically identifying what legal issues are presented by a case or "framing" the case. Kevin T. McGuire and Barbara Palmer noted there is a difference between the cases courts decide and the legal issues they decide. They wrote: "[C]ases simply provide the framework in which issues are addressed. . . . [T]he cases themselves do little more than provide a kind of legal architecture for the principles of law that they represent."⁶⁷ Judges have the ability to determine which specific issues to resolve in a case and determine which issues or problems are the salient ones.⁶⁸ These authors suggest that because judges have a great deal of flexibility in identifying the key legal issue presented by a case they have a great deal of flexibility to create and interpret law. As McGuire and Palmer noted, because of "the malleability inherent in questions of law," there is often a difference between the issues courts are *asked* to decide and those they ultimately *choose* to decide.⁶⁹ According to McGuire and Palmer, courts can expand the issues in a case — termed "issue discovery" — as well as ignore issues raised by either side — known as "issue suppression."⁷⁰ Lee Epstein and Joseph F. Kobylka used the term "framing" to describe the process of understanding how the legal arguments judges hear and make shape judicial behavior.⁷¹ This conceptualization of issue selection and fluidity, which forms the foundation of this article, is similar to the concept of framing in communication research, which focuses on how issues are presented.⁷² While applying social science based communication research to legal scholarship might seem novel, as Chemerinsky suggested, a great deal can be learned about law by viewing opinions as communications from

⁶⁵See generally FORREST MALTZMAN, JAMES F. SPRIGGS & PAUL J. WAHLBECK, *CRAFTING LAW ON THE SUPREME COURT: THE COLLEGIAL GAME* (2000).

⁶⁶See, e.g., Frank B. Cross & Blake J. Nelson, *Strategic Institutional Effects on Supreme Court Decisionmaking*, 95 NW. U. L. REV. 1437, 1452 (2001) (contending the even the Supreme Court must consider how Congress might react to decisions).

⁶⁷McGuire & Palmer, *supra* note 63, at 692.

⁶⁸See S. Sidney Ulmer, *Issue Fluidity in the U.S. Supreme Court*, in *SUPREME COURT ACTIVISM AND RESTRAINT* 691 (Stephen C. Halpern & Charles M. Lambe eds., 1982).

⁶⁹McGuire & Palmer, *supra* note 63, at 691.

⁷⁰*Id.* at 692.

⁷¹EPSTEIN & KOBYLKA, *supra* note 23, at 302.

⁷²See, e.g., TODD GITLIN, *THE WHOLE WORLD IS WATCHING: MASS MEDIA IN THE MAKING AND UNMAKING OF THE NEW LEFT* (1980); Robert M. Entman, *Framing: Toward a Clarification of a Fractured Paradigm*, 43 J. COMM. 51 (1993); Douglas M. McLeod & Benjamin H. Detenber, *Framing Effects of Television News Coverage of Social Protest*, 49 J. COMM. 3 (1999).

courts to specific audiences in an attempt to influence those audiences through reasoned arguments.⁷³ He wrote that judicial opinions are written to make results appear to be determinate and value-free, rather than indeterminate and value-based; consistent with precedent, even when they are not; and to make decisions seem restrained, rather than activist. On the other hand, dissents criticize decisions as activist and not restrained.⁷⁴ Understood this way, opinions can be examined for internally oriented strategies — those designed to persuade other jurists deciding a case — or externally oriented strategies — those designed to persuade the other branches of government, lower courts, or the public.

Social Architecture Theory and the Law

Against this backdrop of research into judicial decision making, several authors have used the social architecture metaphor to “emphasize that legal and social structures are products of design”⁷⁵ and judicial decisions create architectures of power that can determine who controls information. Applying the concept to privacy law, Daniel J. Solove, one of the first scholars to apply the term “social architecture” to refer to the social structures created by law,⁷⁶ wrote that the metaphor captures how the law structures social control and freedom in a society.⁷⁷ Just as the architecture of a building can be designed to determine how people interact,⁷⁸ Solove and others suggest that social architecture can be designed by law to determine how groups interact in society.⁷⁹ Scholars have used the term “architecture” to describe how computer code can determine whether the Internet is a vehicle for freedom of expression

⁷³Chemerinsky, *supra* note 24, at 2007–09.

⁷⁴*Id.* at 2010. Although Chemerinsky wrote about the Supreme Court and focused solely on constitutional law, he also argued that many of the same characteristics that applied to the Supreme Court’s constitutional interpretations also applied to lower courts and statutory interpretation.

⁷⁵Daniel J. Solove, *Identity Theft, Privacy, and the Architecture of Vulnerability*, 54 HASTINGS L. J. 1127, 1239 (2003).

⁷⁶Solove credited Lawrence Lessig and Joel R. Reidenberg for the idea that architecture refers to more than the design of physical spaces. Solove, *supra* note 19, at 1087 n.19.

⁷⁷Solove, *supra* note 75, at 1239.

⁷⁸See generally THOMAS A. MARKUS, BUILDINGS AND POWER: FREEDOM AND CONTROL IN THE ORIGIN OF MODERN BUILDING TYPES (1993) (describing how architecture can be used to influence social structure); Neal Kumar Katyal, *Architecture as Crime Control*, 111 YALE L. J. 1039 (2002) (describing how the way that neighborhoods and buildings are designed can affect criminal behavior).

⁷⁹Solove, *supra* note 75, at 1239.

or an instrument of total and complete control⁸⁰ and to examine judicial behavior in a collegial context by exploring how judicial behavior is impacted by socially prominent and proximate jurists.⁸¹

Recently, Cathy Packer has applied social architecture theory to laws governing access to government information⁸² and congressional deliberations regarding a federal shield law.⁸³ Like the legal realists before her, Packer argued that law is both the means and the product of a construction process and that analysis that goes beyond examining individual cases into the architecture they create “brings a much clearer understanding of the impact of and solution for a variety of legal problems.”⁸⁴ The key idea behind the social architecture metaphor is that creating an architecture of power is about “the common good as much as it is about individual rights.”⁸⁵ Packer wrote that when courts discuss the distribution of power between groups they are actively creating architecture, whether they acknowledge it or not, in addition to deciding individual cases. For example, Packer wrote, “[O]ne of the clearest examples of a court constructing social architecture” is *New York Times v. Sullivan*,⁸⁶ in which “the Court empowered the media to scrutinize the behavior of government officials by creating a constitutional defense against libel suits filed by public officials.”⁸⁷ According to Packer, “[T]he social architecture created by *Sullivan* tipped the balance of power toward government critics and away from government officials.”⁸⁸ Thus, the case is so important because it created an architecture of power that went beyond the protection of an individual right.

In addition to providing a metaphor for how law structures the power relationship between individuals or groups and the government, social architecture theory is an excellent conceptual framework for examining how power is distributed among the branches of government. In

⁸⁰See, e.g., LAWRENCE LESSIG, CODE 2.0 2 (2006); Joel R. Reidenberg, *Lex Informatica: The Formulation of Information Policy and Rules Through Technology*, 76 TEX. L. REV. 553, 553–55 (1998); Joel R. Reidenberg, *Rules for the Road for Global Electronic Highways: Merging Trade and Technical Paradigms*, 6 HARV. J.L. & TECH. 287, 296 (1999).

⁸¹See Daniel M. Katz, Derek K. Stafford, & Eric Provins, *Social Architecture, Judicial Peer Effects and the Evolution of the Law: Toward a Positive Theory of Judicial Social Structure*, 24 GA. ST. U. L. REV. 977 (2008).

⁸²See Cathy Packer, *Don't Even Ask! A Two-Level Analysis of Government Lawsuits Against Citizen and Media Access Requestors*, 13 COMM. L. & POL'Y 29 (2008).

⁸³See Cathy Packer, *The Politics of Power: A Social Architecture Analysis of the 2005–2008 Federal Shield Law Debate in Congress*, 31 HASTINGS COMM. & ENT. L.J. 395 (2009).

⁸⁴Packer, *supra* note 82, at 39.

⁸⁵Solove, *supra* note 19, at 116.

⁸⁶376 U.S. 254 (1964).

⁸⁷Packer, *supra* note 82, at 33 n.23.

⁸⁸Packer, *supra* note 83, at 404.

this way, social architecture is simply a new way to describe the important concept of separation of power outlined by individuals such as James Madison, who wrote at length about the distribution of power in *The Federalist Papers*.⁸⁹ As Packer noted, “While the social architecture metaphor is new in the law, the idea that law distributes power” was a key issue for the Framers of the Constitution.⁹⁰ In addition, political scientists have noted that the power structures established by the Constitution are the beginning of the process, rather than the end. For example, although they did not use the term social architecture, basing their analysis on the strategic account of judicial decision making, Lee Epstein and Jack Knight wrote that members of the judiciary must actively balance their desires with the powers and desires of other government institutions.⁹¹ They argued that judges must be strategic actors who consider the preferences of other actors and the institutional context in which they act. According to this line of reasoning, judges must be cognizant of the power structure that exists between the branches of government and behave strategically when making decisions that alter or affect that architecture. As noted, because many of the judges in national security and transparency cases determine through issue selection and the framing of the legal issues presented by a case to make their opinions about power, this metaphor becomes especially useful when discussing how these cases should be decided.

In sum, this research makes apparent that understanding how courts come to decisions is a complicated affair. The research of political scientists and law professors who attempt to examine the way values, institutions and law structure, inhibit and influence the decisions of judges presents compelling descriptions and explanations of the judicial decision making process. Research indicates that the way issues are identified and framed by the courts and litigants as well as aspects of legalism influence and structure the decisions of individual judges and affect the outcomes of cases. In addition, research suggests that individual cases create patterns and regimes that influence the way similar cases are treated and ultimately create architecture that defines power and controls information.

⁸⁹See ALEXANDER HAMILTON, JAMES MADISON & JOHN JAY, *THE FEDERALIST* (J.R. Pole ed., 2005) (1788).

⁹⁰Packer, *supra* note 83, at 398.

⁹¹EPSTEIN & KNIGHT, *supra* note 63, at 10. See also Robert Lowry Clinton, *Game Theory, Legal History, and the Origins of Judicial Review: A Revisionist Analysis of Marbury v. Madison*, 38 AM. J. POLI. SCI. 285 (1994); Lori Hausegger & Lawrence Baum, *Inviting Congressional Action: A Study of Supreme Court Motivations in Statutory Interpretation*, 43 AM. J. POLI. SCI. 162 (1999); Jack Knight & Lee Epstein, *On the Struggle for Judicial Supremacy*, 30 LAW & SOC. REV. 87 (1996).

THE ARCHITECTURE OF NATIONAL SECURITY AND TRANSPARENCY CASES

The ability of the government to control information related to national security has been examined by the judiciary in several types of cases. Broadly categorized, these are cases that have addressed the ability of the federal government to keep national security information secret and cases that have addressed the government's ability to punish the unauthorized disclosure of such information.⁹² The cases were divided into three distinct categories: national security and prior restraint cases;⁹³ national security and post-publication punishment cases;⁹⁴ and, finally, national security and access cases.⁹⁵ Twenty-one cases involving national security and transparency spanning the years 1959 to 2007 were identified and analyzed.

Individual opinions were examined to determine how judges identified the core legal question(s), principle(s) of law, or issue(s) of a case, and which mode of legal analysis or which legal factors were used to support a decision.⁹⁶ In addition, based on the existing literature on

⁹²Cases for analysis were identified using Westlaw Key Number and the KeySearch system. Westlaw is an online database of legal documents maintained by the West Publishing Company. KeySearch organizes all legal issues into thirty topics, which are broken down into subtopics. The resulting list of cases was then manually searched to identify cases related to the research. In addition, any additional citations in the cases identified through the Westlaw Key Number system were reviewed to determine if they were relevant to the study.

⁹³National security information and prior restraint cases were identified by using Key Numbers 92k1525, "Prior Restraints," and 393k41, "Duties of Officers and Agents and Performance Thereof."

⁹⁴National security information and post-publication sanction cases were identified by using Key Number 92k2038 k. "Freedom of Speech, Expression, Press, Civilian Employees," and a KeyCite search on *United States v. Morrison*, 844 F.2d 1057 (4th Cir. 1988), a case involving the conviction of government employee Samuel Morrison under sections 793(d) and (e) of the Espionage Act for giving national security information to the British magazine *Jane's Fighting Ships*.

⁹⁵National security and access cases were identified using Key Numbers 402k37, "Powers of the Executive," and 402k48.1, "Access to Secrets or Classified Information; Security Clearances."

⁹⁶This research has several limitations that are important to note. The primary purpose of this article is to identify the frames and legal justifications stated by federal judges when they balance transparency and secrecy in national security cases. While there is reliable data regarding the political ideology of Supreme Court justices, no such database exists for the lower court judges who authored opinions in this study. See Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557 (1989). Therefore, no attempt was made to compare case outcomes to the political ideologies or ideological preferences of the judges. In addition, research has documented the influence of numerous other factors on judicial decision making such as the identity of the litigants, public opinion, oral arguments, the influence of other judges, or the presence of amicus briefs. See, e.g., Edward L. Carter &

judicial decision making, the following definitions were used to identify justifications based on the legal model:

- Textualism, according to John B. Gates and Glenn A. Phelps, is “characterized by an appeal to the plain meaning of the words.”⁹⁷ Therefore, references in opinions to the meaning of words, including the use of legal or regular dictionaries to interpret the meaning of words in the Constitution or statutes, were identified as the use of textualism.
- Originalists hold the view that original intent, or original meaning, is authoritative in interpreting the Constitution.⁹⁸ Gates and Phelps defined intentionalist arguments as those that relied on some understanding of some authoritative work of an original framer.⁹⁹ Based on earlier work by law professor James G. Wilson,¹⁰⁰ Pamela C. Corley, Robert M. Howard and David C. Nixon identified a number of “originalist” citations used by courts. These include the *Federalist Papers*, *Story’s Commentaries*, Hamilton’s works, Madison’s papers, and *Kent’s Commentaries*.¹⁰¹ In addition, Wilson argued that references to historical events and studies constitute originalist interpretations.¹⁰² Therefore, originalist justifications as they relate to constitutional interpretations were identified by references and citations to the intent of the framers or other important historical documents such as the

James C. Phillips, *Justices Treat Newspapers Differently in Oral Argument*, 29 NEWS-PAPER RES. J. 90 (2008); Gregg Ivers & Karen O’Connor, *Friends or Foes: The Amicus Curiae Participation and Effectiveness of the American Civil Liberties Union and the Americans for Effective Law Enforcement in Criminal Cases, 1969–1982*, 9 LAW AND POL’Y 161 (1987); Timothy R. Johnson, Paul J. Wahlbeck & James F. Spriggs II, *The Influence of Oral Arguments on the U.S. Supreme Court*, 100 AM. POLI. SCI. REV. 99 (1998); Forrest Maltzman & Paul J. Wahlbeck, *May it Please the Chief? Opinion Assignments in the Rehnquist Court*, 40 AM. J. POLI. SCI. 421 (1996); Kevin T. McGuire & James A. Stimson, *The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences*, 66 J. POLI. 1018 (2004). However, it is beyond the scope of this study to measure the correlation between such factors and judicial decision making. Finally, because cases were identified using the Westlaw Key Number system, cases identified were only those that Westlaw editors labeled as addressing the appropriate legal issues. In addition, because of the search technique, cases analyzed were limited to only those that were reported in the Westlaw database. *See also* the limitation addressed in n.106 *infra*.

⁹⁷John B. Gates & Glenn A. Phelps, *Intentionalism in Constitutional Opinions*, 49 POL. RES. Q. 245, 248 (1996). *See also* Eskridge, *supra* note 26, at 650–66, for a description of textualist approaches to statutory interpretation.

⁹⁸*See* BOBBITT, *supra* note 25, at 12–13; Phelps & Gates, *supra* note 25, at 581–84.

⁹⁹Gates & Phelps, *supra* note 97, at 248.

¹⁰⁰James G. Wilson, *The Most Sacred Text: The Supreme Court’s Use of the Federalist Papers*, 1985 BYU L. REV. 65, 129–35 (1985).

¹⁰¹Corley, Howard & Nixon, *supra* note 29, at 330.

¹⁰²Wilson, *supra* note 100, at 68.

Federalist Papers. Intentionalist justifications as they relate to statutory interpretation were identified by references to legislative intent or the legislative record.

- While almost every opinion has multiple citations to previous cases, a rationale was categorized as being based on precedent when a court clearly justified its holding by primarily citing to a precedent as controlling or discussed the role of precedent in the decision making process. In addition, because judges can deviate from precedent by distinguishing a precedent or limiting a precedent in principle or avoid following precedent in the present case by declaring the reasoning as being contained only in dicta,¹⁰³ these rationales were also placed in this category.

In addition, because judicial opinions often rely on rhetorical devices to reach or justify decision making, two factors were developed based on the use of rhetorical arguments related to First Amendment theory and liberal democratic theory. Arguments and justifications in opinions that discussed the role of the First Amendment in self-government or as a check on government or invoked other values of freedom of expression in a democracy were categorized as “First Amendment theory.” Arguments and justifications that discussed the structure or function of government, democracy, the relationships between the people and government, or the duty of the government to provide for national security in a democracy were classified as democratic theory. Finally, other factors used sporadically but specifically addressed in the text of an opinion that did not fit into any of the factors outlined above were described as closely as possible in the language used by the judge.

National Security and Prior Restraints

Federal courts have heard eleven cases dealing with prior restraints and national security information. These included two famous cases, *New York Times Co. v. United States*,¹⁰⁴ also known as the “Pentagon Papers case,” and *United States v. Progressive Magazine*,¹⁰⁵ which dealt with prior restraints aimed at preventing the media from publishing national security information; six cases involving government employees; and three recent cases in which the constitutionality of certain provisions of the USA PATRIOT Act were considered.¹⁰⁶ While *New York*

¹⁰³See SEGAL & SPAETH, *supra* note 20, at 82–84.

¹⁰⁴403 U.S. 713 (1971).

¹⁰⁵467 F. Supp. 990 (W.D. Wis. 1979).

¹⁰⁶The primary purpose of this article is to examine how individual judges justify decisions through issue selection and the selective use of modes of legal analysis. Therefore, for purposes of this research, the weight of a court’s opinion was not considered and

Times and *Progressive* respectively dealt with the ability to publish a history of the Vietnam conflict and instructions on how to construct a hydrogen bomb, the six cases involving government employees primary focused on the government's ability to prevent an employee from disclosing classified or classifiable information.¹⁰⁷ Decided between 1972 and 2007, *United States v. Marchetti*,¹⁰⁸ *Alfred A. Knopf, Inc. v. Colby*,¹⁰⁹ *Snepp v. United States*,¹¹⁰ *McGehee v. Casey*,¹¹¹ *National Federation of Federal Employees v. United States*¹¹² and *Stillman v. CIA*¹¹³ were all challenges brought by government employees, employee unions or publishers working with former government employees over government contract non-disclosure provisions. The final three cases involving prior restraint and national security all dealt with National Security Letters (NSLs) issued under the PATRIOT Act. As noted above, as originally amended by the PATRIOT Act, Title 18, Section 2709(c) of the U.S. Code prohibited recipients of NSLs from ever disclosing to anyone that they received NSLs or that the FBI sought access or obtained information or records through the use of NSLs.¹¹⁴

First, in *Doe v. Ashcroft*,¹¹⁵ or *Doe I* as it was called in later cases, an Internet service provider challenged Section 2709 in the Southern District of New York in 2004. Next, in 2005, four Connecticut librarians, who were initially described in court documents as simply an "entity with library records," challenged the non-disclosure provision in the United States District Court of Connecticut in *Doe v. Gonzales*¹¹⁶ (*Doe II*). Finally, in 2007, in *Doe v. Gonzales*¹¹⁷ (*Doe III*), the Southern District of New York heard the issue one more time after its decision in *Doe I* was remanded by the Second Circuit for further consideration in light

dissenting opinions were analyzed as well as majority opinions. That is, the article addresses how judges, regardless of the judicial hierarchy of the court in which they preside, craft their individual opinions and justify their decisions.

¹⁰⁷In *Alfred A. Knopf, Inc. v. Colby*, 509 F.2d 1362, 1368–69 (4th Cir. 1975), the Fourth Circuit Court of Appeals ruled that in order to prevent a former CIA agent from disseminating information the government did not need to show the information was classified or secret, only that it was potentially classifiable.

¹⁰⁸446 F.2d 1309 (4th Cir. 1972).

¹⁰⁹509 F.2d 1362 (4th Cir. 1975).

¹¹⁰444 U.S. 507 (1980).

¹¹¹718 F.2d 1137 (D.C. Cir. 1983).

¹¹²695 F. Supp. 1196 (D.D.C. 1988).

¹¹³517 F. Supp. 2d 32 (D.D.C. 2007).

¹¹⁴18 U.S.C. § 2709(c) (Supp. 2003) ("No wire or electronic communication service provider, or officer, employee, or agent thereof, shall disclose to any person that the Federal Bureau of Investigation has sought or obtained access to information or records under this section.")

¹¹⁵*Doe I*, 334 F. Supp. 2d 471 (S.D.N.Y. 2004).

¹¹⁶*Doe v. Gonzales*, 386 F. Supp. 2d 66 (D. Conn. 2005) (hereinafter *Doe II*).

¹¹⁷*Doe III*, 500 F. Supp. 2d 379 (S.D.N.Y. 2007).

of changes in the provisions made by the USA PATRIOT Improvement and Reauthorization Act of 2005.

In the national security and prior restraint cases, the opinions discussed the cases in three ways. First, some identified the key legal issue as dealing with the First Amendment or national security without analyzing the strength of the other interest. Second, some focused on the need to balance freedom of expression with national security. Finally, a number of cases framed the cases as primarily dealing with separation of powers issues.

Only three opinions invoked freedom of expression without expressly stating it needed to be balanced with national security. The opinions that focused on the First Amendment without discussing national security, such as Justice William Brennan's opinion in *New York Times v. United States*,¹¹⁸ discussed the role freedom of expression plays in a democracy or emphasized the high standard the First Amendment places on the government to justify a prior restraint. In his short concurring opinion, Brennan emphasized his belief that "every restraint issued in this case, whatever its form, has violated the First Amendment — and not less so because that restraint was justified as necessary to afford the courts an opportunity to examine the claim more thoroughly."¹¹⁹ Disregarding discussions of separation of powers issues, Brennan emphatically declared, "[T]he First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result"¹²⁰ and "[t]he chief purpose of (the First Amendment's) guaranty (is) to prevent previous restraints upon publication."¹²¹

In addition to Brennan's concurrence in the Pentagon Papers case, the only opinions to frame a case in terms of the First Amendment without attempting to balance freedom of expression with national security were Justice Potter Stewart's dissent in *United States v. Snepp*¹²² and Judge Janet C. Hall's opinion in *Doe II*.¹²³ Similarly, there were only two opinions that invoked the government's need for secrecy without also discussing the First Amendment implications of a case. Only the Supreme Court's opinion in *Snepp*¹²⁴ and the D.C. District Court's opinion in

¹¹⁸403 U.S. 713, 727 (1971) (Brennan, J., concurring).

¹¹⁹*Id.* (Brennan, J., concurring).

¹²⁰*Id.* at 725–26 (Brennan, J., concurring) (citing *Freedman v. Maryland*, 380 U.S. 51 (1965); quoting *Roth v. United States*, 354 U.S. 476, 481 (1957)).

¹²¹*Id.* at 726 (Brennan, J., concurring) (quoting *Near v. Minnesota*, 283 U.S. 697, 713 (1931)).

¹²²444 U.S. 507, 519–22 (1980) (Stewart, J., dissenting).

¹²³386 F. Supp. 2d 66 (D. Conn. 2005).

¹²⁴444 U.S. 507 (1980).

*Stillman v. CIA*¹²⁵ referenced the need to protect national security information without discussing the First Amendment, freedom of expression or government transparency. The opinions issued in *United States v. Progressive Magazine*,¹²⁶ *United States v. Marchetti*,¹²⁷ *McGehee v. Casey*,¹²⁸ *National Federation of Federal Employees v. United States*,¹²⁹ *Doe I*,¹³⁰ *Doe III*,¹³¹ and several opinions issued in the Pentagon Papers case — including Stewart’s concurrence,¹³² Chief Justice Warren Burger’s dissent¹³³ and Justice Harry Blackmun’s dissent¹³⁴—focused on balancing First Amendment or freedom of expressions claims with national security.

Many of the opinions discussed the relative powers of all three branches of the federal government. The most prominent opinions to focus on the relative powers of the courts and Congress were the concurring Pentagon Paper opinions by Justices Hugo Black,¹³⁵ William O. Douglas,¹³⁶ Stewart,¹³⁷ Byron White¹³⁸ and Thurgood Marshall¹³⁹ that discussed Congress’ role in creating laws that might be used to prevent the *New York Times* and *Washington Post* from publishing. In addition, *Doe III* contained a long and detailed discussion of the limits of congressional power, taking the legislative branch to task for overstepping its authority when Congress revised the PATRIOT Act.¹⁴⁰

In *Doe III*, the court concluded that the most troubling issue presented by the case was Congress’ attempt to mandate the standard of judicial review required, which offended “the fundamental constitutional principles of checks and balances and separation of powers.”¹⁴¹ In a scolding tone, Marrero began by noting that while his discussion might seem “like unnecessary rehashing” or “tedious repetition,” “sometimes we are compelled to recite the obvious again because on occasion, counter to even the most constant refrain of the same theme, the message still

¹²⁵517 F. Supp. 2d 32, 33 (D.D.C. 2007).

¹²⁶467 F. Supp. 990 (W.D. Wis. 1979).

¹²⁷446 F.2d 1309 (4th Cir. 1972).

¹²⁸718 F.2d 1137 (D.C. Cir. 1983).

¹²⁹695 F. Supp. 1196 (D.D.C. 1988).

¹³⁰334 F. Supp. 2d 471 (S.D.N.Y. 2004).

¹³¹500 F. Supp. 2d 379 (S.D.N.Y. 2007).

¹³²403 U.S. 713, 728 (1971) (Stewart, J., concurring).

¹³³*Id.* at 748 (Burger, C.J., dissenting).

¹³⁴*Id.* at 761 (Blackmun, J., dissenting).

¹³⁵*Id.* at 718. (Black, J., concurring).

¹³⁶*Id.* at 721 (Douglas, J., concurring).

¹³⁷*Id.* at 728 (Stewart, J., concurring).

¹³⁸*Id.* at 731 (White, J., concurring).

¹³⁹*Id.* at 742 (Marshall, J., concurring).

¹⁴⁰500 F. Supp. 2d 379, 409–15 (S.D.N.Y. 2007).

¹⁴¹*Id.* at 395.

goes unnoticed, or inadequately considered, perhaps ignored.”¹⁴² After discussing framers’ intent and citing the *Federalists Papers*, *Marbury v. Madison*¹⁴³ and, finally, *Hamdi v. Rumsfeld*,¹⁴⁴ Marrero concluded that the act was an unconstitutional violation of long established principles:

Against this backdrop of history and constitutional premises, § 3511(b) is invalid because it does not reflect full account of these controlling principles and the long-standing national experience from which their force derives. That provision amounts to a significant congressional incursion, one with profound implications, into exclusive jurisdictional ground the Constitution reserves for the judiciary’s role in our government.¹⁴⁵

Marrero also admonished Congress for its foray into judicial powers, warning of the consequences of such actions even in the wake of the terrorist attacks of 9/11:

As *Doe I* noted, the Court recognized the “heavy weight” of September 11, 2001, “a murderous attack of international terrorism, unparalleled in its magnitude, and unprecedented in America’s national security,” that looms over this proceeding. Its effect is still felt and acknowledged by this Court, which sits just a few blocks from where the World Trade Center towers fell. . . . However, new methods of protecting and combating threats that result in asserted expansions of executive power underscore the courts’ concerns of the dangers in suffering any infringement on their essential role under the Constitution. The Constitution was designed so that the dangers of any given moment would never suffice as justification for discarding fundamental individual liberties or circumscribing the judiciary’s unique role under our governmental system in protecting those liberties and upholding the rule of law.¹⁴⁶

The second set of discussions involving separation of powers issues in the cases was focused on balancing the judiciary’s and executive’s power to control and/or review national security information decisions. These opinions included Douglas’,¹⁴⁷ Stewart’s,¹⁴⁸ White’s¹⁴⁹ and

¹⁴²*Id.* at 409.

¹⁴³5 U.S. 137 (1803).

¹⁴⁴542 U.S. 507 (2004).

¹⁴⁵*Doe III*, 500 F. Supp. 2d 379, 411 (S.D.N.Y. 2007).

¹⁴⁶*Id.* at 415 (citation and footnotes omitted).

¹⁴⁷403 U.S. 713, 721 (1971) (Douglas, J., concurring).

¹⁴⁸*Id.* at 728–30 (Stewart, J., concurring);

¹⁴⁹*Id.* at 732 (White, J., concurring);

Marshall's¹⁵⁰ concurrences and John Marshall Harlan's dissent in Pentagon Papers;¹⁵¹ *United States v. Marchetti*;¹⁵² *Alfred A. Knopf, Inc. v. Colby*;¹⁵³ *McGehee v. Casey*;¹⁵⁴ and *Stillman v. CIA*.¹⁵⁵ While some of the opinions suggested the executive branch had a great deal of power in national security matters, they also frequently expressed the belief that this power was shared with the other branches of government. For example, in the Pentagon Papers case, Douglas wrote that although the text of the Constitution granted the executive branch "war powers," because this power was tied to a state of war and Congress had not declared war, there was no need to discuss the extent of either the executive or legislative branch's war powers.¹⁵⁶ Similarly, while Stewart concluded "as a matter of sovereign prerogative . . . not of law" the power and responsibility to protect national security information rested solely with the executive branch¹⁵⁷ he also reasoned that the Court's holding against the government was inevitable because Congress had enacted no law allowing for prior restraints.¹⁵⁸

Other opinions, however, took a far more deferential approach to the executive branch. Dissenting in Pentagon Papers, Harlan wrote that although "[c]onstitutional considerations forbid 'a complete abandonment of judicial control,'"¹⁵⁹ the Court's only roles in matters related to national security information were to determine if the dispute involved national security and that disclosure decisions were made by the proper official.¹⁶⁰ To Harlan, beyond these two functions, the Court had no role. Harlan quoted precedent to reinforce this conclusion:

"[T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and

¹⁵⁰*Id.* at 741–42 (Marshall, J., concurring).

¹⁵¹*Id.* at 756 (Harlan, J., dissenting).

¹⁵²446 F.2d 1309 (4th Cir. 1972).

¹⁵³509 F.2d 1362 (4th Cir. 1975).

¹⁵⁴718 F.2d 1137 (D.C. Cir. 1983).

¹⁵⁵517 F. Supp. 2d 32, 33 (D.D.C. 2007).

¹⁵⁶403 U.S. 713, 721 (1971) (Douglas, J., concurring).

¹⁵⁷*Id.* at 728–30 (Stewart, J., concurring).

¹⁵⁸*Id.* at 730 (Stewart, J., concurring).

¹⁵⁹*Id.* at 757 (Harlan, J., dissenting) (quoting *United States v. Reynolds*, 345 U.S. 1, 8 (1953)).

¹⁶⁰*Id.* (Harlan, J., dissenting).

have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.”¹⁶¹

Harlan’s ideas were echoed in later opinions considering the powers of the federal branches of government as well. In *United States v. Marchetti*, based on the text of the Constitution,¹⁶² as well as on practical concerns related to the ability of judges to determine what information might harm national security,¹⁶³ the Fourth Circuit concluded the only questions fit for a judge to answer in cases dealing with national security information were “whether or not the information was classified and, if so, whether or not, by prior disclosure, it had come into the public domain.”¹⁶⁴

A final discussion of the power of the three branches of government was found in *Doe II*, which discussed the power of the courts to intervene in national security cases and the general concept of all three branches having power in national security cases without explicitly referencing a balance of power with the executive or legislative branches. In the case, the U.S. District Court for Connecticut considered the government’s contention that even if the section of the PATRIOT Act which prevented a recipient from disclosing the receipt of a NSL was a prior restraint, it met strict scrutiny because it was narrowly tailored to meet a compelling government interest, a determination that should be left to the executive branch. Although the court “recognize[d] the defendants’ expertise in the area of counter-terrorism” and was “inclined to afford their judgments in that area deference, those judgments remain[ed] subject to judicial review.”¹⁶⁵ To support this, the Court quoted the Supreme Court’s recent decision in *Hamdi v. Rumsfeld* that “the United States Constitution . . . most assuredly envisions a role for all three branches when individual liberties are at stake”¹⁶⁶ and a Fourth Circuit case¹⁶⁷ that warned of the historical dangers of deferring too much to national security concerns.¹⁶⁸

¹⁶¹*Id.* at 757–58 (Harlan, J., dissenting) (quoting *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103, 111 (1948)).

¹⁶²446 F.2d 1309, 1317 (4th Cir. 1972) (contending that because Article II § 2 conferred broad powers on the president in the conduct of national defense, the decision to classify information was not a role for the judiciary).

¹⁶³*Id.*

¹⁶⁴*Id.* at 1318.

¹⁶⁵*Doe II*, 386 F. Supp. 2d 66, 75 (D. Conn. 2005).

¹⁶⁶*Id.* at 76 (quoting *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004)).

¹⁶⁷*In re* Washington Post, 807 F.2d 383 (4th Cir. 1986).

¹⁶⁸*Doe II*, 386 F. Supp. 2d at 76 (quoting *In re* Washington Post, 807 F.2d at 391–92 (“History teaches us how easily the spectre of a threat to ‘national security’ may be used to justify a wide variety of repressive government actions. A blind acceptance by the courts of the government’s insistence on the need for secrecy, without notice to others, without argument, and without a statement of reasons, would impermissibly compromise the independence of the judiciary and open the door to public abuse.”)).

Many of the opinions relied on similar legal factors and frequently cited the same precedents. Some of the cases also provided excellent examples of the strategic use of democratic theory, with a number of the opinions relying on democratic theory to underscore the importance of national security, even in democratic systems of government. The most frequently discussed legal modes of interpretation were precedent (sixteen opinions), followed by originalism/framers' intent (six opinions), democratic theory (six opinions), statutory textual analysis (five opinions), First Amendment theory (five opinions), legislative history/intent (five opinions) and constitutional textualism (three opinions). In addition to these more common factors, two other factors were relied upon by courts to reach and/or justify their conclusions. First, in *Alfred A. Knopf, Inc. v. Colby*,¹⁶⁹ Chief Judge Clement Haynsworth cited the practical problems associated with the judiciary and national security information as reasons the court should not exercise its right to review national security information decisions. Rather than rely upon precedent or interpretations of the constitutional power of courts, Haynsworth simply concluded that courts were "ill-equipped" to deal with national security information.¹⁷⁰ Second, the Supreme Court's majority opinion in *Snepp* relied upon a blend of the law of contracts and trusts to support its conclusion that Snepp had violated his confidentiality agreement and a trust could be set up for the government's benefit.¹⁷¹

Most of the cases relied upon multiple factors to support their conclusions. Fifteen of the twenty-one opinions relied upon at least two factors. Douglas' opinion in the Pentagon Papers case relied upon the most, discussing six different factors — statutory textual analysis, legislative intent, precedent, constitutional text, framers' intent and democratic theory. Interestingly, the six opinions that primarily relied upon one factor all relied upon precedent. They were a combination of Supreme Court and lower court decisions. The Supreme Court opinions included Brennan's, Blackmun's and Burger's opinions in Pentagon Papers and Stewart's dissent in *Snepp*.

National Security and Post-publication Punishment

Only three federal cases have dealt with attempts to impose post-publication punishments on the press or government employees for the dissemination of national security information. The first, a 1981 Supreme Court decision, *Haig v. Agee*,¹⁷² considered whether the

¹⁶⁹509 F.2d 1362 (4th Cir. 1975).

¹⁷⁰*Id.* at 1369.

¹⁷¹444 U.S. 507 (1980).

¹⁷²453 U.S. 280 (1980).

revocation of a passport for disseminating information about the Central Intelligence Agency violated the First Amendment rights of a former CIA employee. The second, *United States v. Morison*,¹⁷³ was a 1988 decision from the United States Court of Appeals for the Fourth Circuit involving former U.S. Navy analyst Samuel Morison, who was convicted of violating 18 U.S.C. § 641 and two subsections of the Espionage Act, 18 U.S.C. § 7939(d) and (e), for giving national security information to one “not entitled to receive it.” The final case, *United States v. Rosen*,¹⁷⁴ was an attempt by the administration of George W. Bush to prosecute two former lobbyists for the American Israel Public Affairs Committee (AIPAC) for violating the Espionage Act.¹⁷⁵

As in the prior restraint cases, the courts most frequently identified the need to balance national security with freedom of expression and separation of powers issues as the two key issues presented by the cases, with many of the cases discussing both issues. In addition, the most commonly relied upon legal factor used to reach or justify decisions was precedent. However, this only presents a partial picture of the opinions. Although there were only a limited number of cases identified that considered post-publication punishments, the opinions were notably complex, many relying on a multitude of legal factors. The cases demonstrate that, unlike prior restraints, the Supreme Court has yet to articulate an approach to post-publication punishment cases that lower courts can consistently follow.

Separation of powers issues were discussed in every opinion except for the Fourth Circuit’s majority opinion in *Morison v. United States*,¹⁷⁶ which framed the case entirely in terms of the government’s ability to punish employees for disseminating national security information, and Judge T.S. Ellis’ opinion in *United States v. Rosen*,¹⁷⁷ which identified the need to balance national security and freedom of expression as the sole legal issue presented by the case. The need to balance national security concerns with freedom of expression was discussed in every opinion except the Supreme Court’s majority opinion in *Haig v. Agee*,¹⁷⁸

¹⁷³844 F.2d 1057 (4th Cir. 1988).

¹⁷⁴445 F. Supp. 2d 602 (E.D. Va. 2006).

¹⁷⁵On May 1, 2009, the government effectively ended the prosecution of the lobbyists when it filed a motion to dismiss the charges, citing concerns over disclosure of classified information, damage to national security from disclosure and the likelihood of the government prevailing. See Motion to Dismiss Superseding Indictment, *United States v. Rosen*, (No. 1:05CR225) (May 1, 2009), available at <http://www.fas.org/sgp/jud/aipac/dismiss.pdf>.

¹⁷⁶844 F.2d. 1057 (4th Cir. 1988).

¹⁷⁷445 F. Supp. 2d 602 (E.D. Va. 2006).

¹⁷⁸453 U.S. 280 (1980).

which framed the issues entirely in terms of separation of powers, Justice Harry Blackmun's opinion in *Agee*¹⁷⁹ and Judge James Phillips' concurring opinion in *Morison*,¹⁸⁰ both discussing the First Amendment without examining the need for national security, and the Fourth Circuit's majority opinion in *Morison*.

Although there were only a few cases identified by the research that considered post-publication punishments and national security information, the opinions relied upon a multitude of modes of legal analysis. Precedent was relied on to reach a decision in all seven opinions; however, only Blackmun's concurrence in *Agee* focused exclusively on precedent, accusing the majority of diverting from precedent without expressly acknowledging it.¹⁸¹ All of the other opinions relied on a variety of factors to support their arguments. In addition to precedent, the opinions relied on statutory textual analysis (four opinions), legislative history/intent (three opinions), First Amendment theory (three opinions), originalism/framers' intent (two opinions) and democratic theory (two opinions). Judge Ellis' opinion in *Rosen* was particularly wide-ranging in the factors it discussed.¹⁸² Ellis cited democratic theory, First Amendment theory, original intent, statutory textual analysis, legislative history/intent and precedent.

National Security and Access

Ten federal cases have dealt with access and national security. The cases can be divided into two distinct categories. First, six cases have addressed access to national security information. These are *Greene v. McElroy*;¹⁸³ *Zemel v. Rusk*;¹⁸⁴ *Brunnenkant v. Laird*,¹⁸⁵ a relatively obscure and rarely cited case;¹⁸⁶ *United States v. AT&T*,¹⁸⁷ *Department of Navy v. Egan*,¹⁸⁸ and *Stehney v. Perry*.¹⁸⁹ *Greene*, *Brunnenkant*, *Egan* and *Stehney* involved individuals who sued when their security clearances were revoked or denied. *United States v. AT&T*, decided by the D.C. Circuit in 1977, arose out of a congressional investigation into "the

¹⁷⁹*Id.* at 310 (Blackmun, J., concurring).

¹⁸⁰844 F.2d at 1087 (Phillips, J., concurring).

¹⁸¹453 U.S. 280, 310 (1980) (Blackmun, J., concurring).

¹⁸²445 F. Supp. 2d 602 (E.D. Va. 2006).

¹⁸³360 U.S. 474 (1959).

¹⁸⁴318 U.S. 1 (1965).

¹⁸⁵360 F. Supp. 1330 (D.D.C. 1973).

¹⁸⁶Westlaw.com's "Citing References" function reported only a single, unreported case that cited *Brunnenkant*, Pamella M. Doviak v. Dep't of the Navy, 1987 WL 908627 (E.E.O.C. 1987).

¹⁸⁷567 F.2d 121 (D.C. Cir. 1977).

¹⁸⁸484 U.S. 518 (1988).

¹⁸⁹907 F. Supp. 806 (D.N.J. 1995).

nature and extent of warrantless wiretapping” being conducted by the federal government.¹⁹⁰ In the course of an investigation into the Justice Department’s wiretapping program, the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce issued a subpoena for all national security request letters in the possession of the American Telephone & Telegraph Co. The Justice Department sued to enjoin AT&T from complying with the subpoena on the grounds “that compliance might lead to public disclosure of the documents, with adverse effect on national security.”¹⁹¹ Finally, in *Zemel*, the Supreme Court was asked to determine if Louis Zemel had a First Amendment right to travel to Cuba in order to “satisfy [his] curiosity about the state of affairs in Cuba and make [himself] a better informed citizen.”¹⁹²

Second, four cases have considered whether the First Amendment includes a right of access to locations dealing with national security. These are *Sherrill v. Knight*,¹⁹³ which consider a right of access to the White House, and *Nation Magazine v. Department of Defense*,¹⁹⁴ *Getty Images v. Department of Defense*¹⁹⁵ and *Flynt v. Rumsfeld*,¹⁹⁶ cases that all involved access to military installations or battlefields. *Nation Magazine* involved a 1991 challenge by various members of the press to Department of Defense regulations governing media access during “Desert Shield” (American military presence in the Persian Gulf) and “Desert Storm” (open hostilities). *Getty Images* involved access to the U.S. government’s detention center at Guantanamo Bay Naval Base in Cuba. Finally, *Flynt* was a suit initiated by *Hustler Magazine* regarding the DOD’s use of press pools to determine which members of the press were to accompany American ground forces in Afghanistan.

Even though the cases considered different kinds of access rights, the opinions followed similar patterns. Although many of the opinions engaged in detailed discussions of a First Amendment right of access or discussed how to balance national security with transparency, in the forty-four years between the Supreme Court’s decision in *Greene v. McElroy*¹⁹⁷ and the D.C. District Court’s opinion in *Flynt v. Rumsfeld*¹⁹⁸ the opinions frequently identified the key legal issue in the case as the

¹⁹⁰567 F.2d at 123.

¹⁹¹*Id.* at 123–24.

¹⁹²318 U.S. 1, 4 (1965).

¹⁹³569 F.2d 124 (D.C. Cir. 1977).

¹⁹⁴762 F. Supp. 1558 (S.D.N.Y. 1991).

¹⁹⁵193 F. Supp. 2d 112 (D.D.C. 2002).

¹⁹⁶245 F. Supp. 2d 94 (D.D.C. 2003).

¹⁹⁷360 U.S. 474 (1959).

¹⁹⁸245 F. Supp. 2d. 94 (D.D.C. 2003).

justiciability of the case,¹⁹⁹ the political question doctrine,²⁰⁰ the power of courts to intervene in national security information cases, the wisdom of intervening, or separation of powers issues. Even when the courts discussed how to balance national security with transparency, they also discussed power issues. In addition, overall, many of the courts were reluctant to inject themselves into disputes about access.

Zemel v. Rusk,²⁰¹ *United States v. AT&T*,²⁰² both the majority opinion and White's dissent in *Department of Navy v. Egan*,²⁰³ *Stehney v. Perry*,²⁰⁴ *Nation Magazine v. Department of Defense*²⁰⁵ and *Flynt v. Rumsfeld*,²⁰⁶ all discussed the powers of the branches of the federal government, justiciability, mootness or the political question doctrine. In *Zemel*, the Supreme Court identified three legal issues presented by the case, one involving the powers of the executive branch of the government, one involving due process, and one involving the First Amendment.²⁰⁷ In *AT&T*, the court squarely framed the case as dealing primarily with the political question doctrine and separation of powers issues. First, the court addressed what it considered the "primary issue"²⁰⁸ of the case, the political question doctrine, citing the Supreme Court's 1962 decision in *Baker v. Carr*²⁰⁹ for the proposition that simply because a political controversy or conflict existed between the other two branches of government did not inherently mean the issue was beyond the competency of the judiciary to decide.²¹⁰ The court then discussed at length which branch had the constitutional authority to control information classified for national security purposes. The court focused on framers' intent, the text of the Constitution, as well as the Supreme Court's decision in *Youngstown Sheet & Tube Co. v. Sawyer*²¹¹ to reach

¹⁹⁹A justiciable case is one that is "capable of being disposed of judicially." BLACK'S LAW DICTIONARY 882 (8th ed. 2004).

²⁰⁰A political question is one "that a court will not consider because it involves the exercise of discretionary power by the executive or legislative branch." BLACK'S LAW DICTIONARY 1197 (8th ed. 2004).

²⁰¹318 U.S. 1 (1965).

²⁰²567 F.2d 121 (D.C. Cir. 1977).

²⁰³484 U.S. 518 (1988); *id.* at 534 (White, J., dissenting).

²⁰⁴907 F. Supp. 806 (D.N.J. 1995).

²⁰⁵762 F. Supp. 1558 (S.D.N.Y. 1991).

²⁰⁶245 F. Supp. 2d 94 (D.D.C. 2003).

²⁰⁷318 U.S. 1, 7–13 (1965) (discussing whether Congress had given the Secretary of State the power to grant and validate passports); *id.* at 15 (discussing whether *Zemel*'s due process rights had been violated); *id.* at 15–17 (discussing *Zemel*'s claim that there was a First Amendment right to travel to Cuba to gather information).

²⁰⁸567 F.2d 121, 125–26 (D.C. Cir. 1977).

²⁰⁹369 U.S. 186, 217 (1962).

²¹⁰567 F.2d at 126.

²¹¹343 U.S. 579 (1952). *Youngstown* involved an executive order issued in response to a strike called by the American Steel Workers Union in the latter part of 1951. The order

the conclusion that no one branch of the federal government had absolute authority over any area of governance.²¹²

Egan and *Stehney*, cases involving decisions not to grant security clearances to government contractors, invoked discussions of which branch of government had the power to control access to national security. In *Egan*, Justice Harry Blackmun's majority opinion focused on the power of the executive to protect national security information, beginning his analysis by noting, "It should be obvious that no one has a 'right' to a security clearance."²¹³ Blackmun continued:

The President, after all, is the "Commander in Chief of the Army and Navy of the United States." His authority to classify and control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position in the Executive Branch that will give that person access to such information flows primarily from this constitutional investment of power in the President and exists quite apart from any explicit congressional grant.²¹⁴

Although White's dissent in *Egan* also focused on the control of national security information, White attempted to balance multiple interests. He discussed the legislative intent of the statute that was used to dismiss *Egan* and focused his analysis on the powers of the legislative branch, writing the majority's decision to allow the executive branch to unilaterally determine *Egan* should not be granted a security clearance without a meaningful hearing before a board created by federal statute "frustrate[d] . . . congressional intent."²¹⁵

However, while these cases specifically framed the issues in terms of justiciability, mootness, the political question doctrine, or the need to balance the powers of the branches of government, *Greene v. McElroy*²¹⁶ was notable in that the Supreme Court evaded the issues completely. In *Greene*, although the court of appeals stated the main legal argument in the case involved separation of powers and issues of justiciability,²¹⁷ the Court chose to decide a far narrower issue. Instead of addressing the larger issue of classifying and accessing national security information

directed the secretary of commerce to take possession of most of the steel mills in the country and keep them running. The Supreme Court held that the seizure order was not within the constitutional power of the president.

²¹²567 F.2d at 126–28.

²¹³484 U.S. 518, 528 (1988).

²¹⁴*Id.* at 527.

²¹⁵*Id.* at 534 (White, J., dissenting).

²¹⁶360 U.S. 474 (1959).

²¹⁷*Greene v. McElroy*, 254 F.2d 944, 952–53 (D.C. Cir. 1958) (holding that the case involved making judgments "remote from the experience and competence of the judiciary").

or deciding the case based on separation of powers concerns, the Court wrote the principle question of law in the case was whether Greene had been denied due process. In an opinion by Chief Justice Earl Warren, the Court validated Greene's claim that the DOD had "denied him 'liberty' and 'property' without 'due process of law' in contravention of the Fifth Amendment."²¹⁸ Although the issue was presented repeatedly by the solicitor general,²¹⁹ the majority refused to address anything related to the executive branch's power to control national security information or the existence of a right to government information.

Only three of the access opinions — the majority opinion and White's dissent in *Egan*, and the Southern District of New York's decision in *Nation Magazine* — specifically focused on the need to balance national security with the First Amendment and transparency concerns and used these discussions to help reach or support a conclusion. While the *Nation Magazine* court was particularly clear that the case was about balancing the national security and transparency, as noted above, the court also considered separation of powers issues. It stated that in addition to balancing the benefits of transparency with the needs of national security, it needed to consider if and when the judicial branch should strike the balance between these two competing interests:

At issue in this action are important First Amendment principles and the countervailing national security interests of this country. This case presents a novel question since the right of the American public to be informed about the functioning of government and the need to limit information availability for reasons of national security both have a secure place in this country's constitutional history. In short, this case involves the adjudication of important constitutional principles. The question, however, is not only which principles apply and the weighing of the principles, but also when and in what circumstances it is best to consider the questions.²²⁰

Thus, even when an opinion clearly stated that a case was about balancing transparency and national security, it was difficult or impossible to not consider the legal issues related to separation of powers concerns or the propriety of judicial intervention. In addition, although *Sherill*,²²¹ *Getty Images*²²² and *Flynt*²²³ all discussed balancing the benefits of transparency with some other factor, as discussed below, the opinions

²¹⁸360 U.S. at 492.

²¹⁹See Brief for the United States at 2, 17, 19, 29, 59, *Greene v. McElroy*, 360 U.S. 474 (1959).

²²⁰762 F. Supp. 1558, 1571 (S.D.N.Y. 1991).

²²¹569 F.2d 124, 129–30 (D.C. Cir. 1977).

²²²193 F. Supp. 2d 112, 124 (D.D.C. 2002).

²²³245 F. Supp. 2d 94, 108–09 (D.D.C. 2003).

relied on practical considerations rather than on philosophical or legal discussions of the importance of keeping national security information secret or balancing security with transparency.

Only two opinions discussed the First Amendment without explicitly discussing a need to balance it with national security concerns or the government's right to keep information secret. These were Douglas' dissent in *Zemel*,²²⁴ which did not involve any secret information, and the D.C. District Court's opinion in *Brunnenkant v. Laird*.²²⁵ Furthermore, although he did not support such a right, Tom C. Clark's dissent in *Greene* clearly stated the main legal issue in the case was the existence of a constitutional right of access to information.²²⁶ While, as noted, the majority opinion in *Greene* avoided the issue, Clark wrote that the case presented a "clear and simple" legal question: Was there a constitutional right of access to government information?²²⁷ Adopting the key legal issue advanced by the Solicitor General's brief,²²⁸ Clark was critical of the majority's framing of the issue as well as its reasoning. Comingling a statement about the power of the executive branch with discussion of transparency, Clark argued that the Court was ignoring "the basic consideration in the case . . . that no person, save the President, has a constitutional right to access to governmental secrets."²²⁹

In addition to separation of powers issues, a First Amendment-based right to know and the need to balance national security with transparency, at least two legal issues that were relatively absent from the other cases analyzed took center stage. First, the majority opinions in *Greene*, *Egan* and *Zemel* focused extensively on due process and/or procedural questions, issues that were not discussed at great length in any of the prior restraint or post-publication punishment cases with the exception of *Morison* and *Rosen*. Second, because *Sherrill*, *Nation Magazine*, *Getty Images* and *Flynt* all discussed practical problems associated with making a decision in the case as factors that led to or supported their decisions, it was difficult to determine on which legal issues the courts were focusing. While the *Sherrill* court discussed the practical needs of the Secret Service to keep the president safe, *Nation Magazine*, *Getty* and *Flynt* all discussed the practical problems related

²²⁴318 U.S. 1, 23 (1965) (Douglas, J., dissenting).

²²⁵360 F. Supp. 1330 (D.D.C. 1973).

²²⁶360 U.S. 474, 524 (1959) (Clark, J., dissenting).

²²⁷*Greene v. McElroy*, 360 U.S. 474, 510–11 (1959) (Clark, J., dissenting).

²²⁸*Id.* at 511 n.1 (Clark, J., dissenting) ("My brother Harlan very kindly credits me with 'colorful characterization' in stating this as the issue. While I take great pride in authorship, I must say that in this instance I merely agreed with the statement of the issue by the Solicitor General and his co-counsel in five different places in the Brief for the United States.")

²²⁹*Id.* at 513 (Clark, J., dissenting).

to a court considering largely hypothetical claims related to the undeveloped constitutional doctrine of the right to know. Thus, even though the cases discussed the existence of a First Amendment based right to know, it was not totally clear what legal issue(s) the courts were most focused on or would have based a decision on had the cases been more fully developed.

In the access cases, all thirteen opinions written in the ten cases relied heavily on precedent to justify or support their conclusions. Precedent was followed by First Amendment theory (five opinions), constitutional textual analysis (four opinions), practical or pragmatic reasons related to the undeveloped nature of a case (four opinions), legislative history/intent (three opinions), statutory textual analysis (three opinions), and framers' intent/originalism (one opinion). As noted, the cases that discussed pragmatic or practical concerns — *Nation Magazine*, *Getty Images* and *Flynt* — focused on the undeveloped nature of the claims or on pragmatic concerns related to deciding an important constitutional question based on speculative claims without the clear guidance of a Supreme Court precedent. Not only did the courts present this as the main legal issue in the case, they based their decision on the argument rather than some other legal factor.

The cases differed from prior restraint and post-publication punishment cases in that First Amendment theory and constitutional textual analysis were relied upon more heavily. This is perhaps because many of the cases were discussing a constitutionally based right of access or right to know. Because the right to know has not been as well defined by the Supreme Court as the standards associated with prior restraints or post-publication punishments, the lower courts were left to define the existence or extent of a constitutional right to know through means other than simply citing a directly on target precedent. It is interesting to note, however, that this did not lead the judges to focus on framers' intent/originalism. It appears the judges did not look to historical evidence to shed light on the existence of a right to know. The only case to discuss framers' intent was *United States v. AT&T*,²³⁰ which did so to illuminate its discussion of separation of powers.

Instead, the opinions in these cases often discussed the Supreme Court's conflicting precedents regarding access in an attempt to determine if there was a right of access that extended to national security information. For example, when considering *Nation Magazine's* First Amendment claims, Judge Leonard B. Sand of the Southern District of New York began his opinion by citing the Supreme Court precedents that had previously established "there is no right of access of the press

²³⁰567 F.2d 121 (D.C. Cir. 1977).

to fora which have traditionally been characterized as private or closed to the public, such as meetings involving the internal discussions of government officials,”²³¹ and limitations may be “placed on access to government controlled institutions.”²³² However, continuing to focus on precedent, the opinion next cited a number of cases that supported a First Amendment right to know. First, it discussed two cases dealing with a First Amendment access to judicial proceedings — *Richmond Newspapers, Inc. v. Virginia*²³³ and *Globe Newspaper Co. v. Superior Court*²³⁴ — as examples of the Supreme Court’s support for a right to know and the checking function of the press.²³⁵ In addition, the opinion suggested that in *Globe Newspaper Co.* the Court implied access to other situations might also be included in the Amendment²³⁶ and pointed out that the Supreme Court held the right to be informed about government operations was important “even when the government has suggested that national security concerns were implicated.”²³⁷

DISCUSSION AND CONCLUSION

Through the examination of such a wide range of opinions dealing with prior restraints, post-publication punishments and access to national security information and locations, an overall approach to national security information begins to take shape. Moving beyond the level of analyzing an individual legal complaint — or even a series of complaints about a particular aspect of national security information such as prior restraints *or* post-publication punishments *or* access — a picture of the underlying relationships and power structures that govern the control of national security information across these categories emerges. While the individual cases record a fascinating history of our courts’ national security jurisprudence, the issues they attempt

²³¹762 F. Supp. 1558, 1571 (S.D.N.Y. 1991) (citing *United States v. Nixon*, 418 U.S. 683, 705 n.15 (1974)).

²³²*Id.* (citing *Houchins v. KQED, Inc.*, 438 U.S. 1, 16 (1978); *Greer v. Spock*, 424 U.S. 828, 838 (1976); *Saxbe v. Washington Post Co.*, 417 U.S. 843, 850 (1974); *Pell v. Procunier*, 417 U.S. 817, 828 (1974)).

²³³448 U.S. 555 (1980).

²³⁴457 U.S. 596 (1982).

²³⁵*Nation Magazine*, 762 F. Supp. at 1572.

²³⁶*Id.* (“In recent times the Supreme Court has been particularly generous in interpreting the scope of the public’s right under the First Amendment to know about government functioning, at least in such fora as a criminal trial. *See Richmond Newspapers, Inc.*, 448 U.S. at 564. In these cases, there appears to be some indication that the basis for such a right of access could apply more broadly. *See Globe Newspaper Co. v. Superior Court for County of Norfolk*, 457 U.S. 596, 606 (1982).”).

²³⁷*Id.* (citing *New York Times Co. v. United States*, 403 U.S. 713, 728 (1971) (Stewart, J., concurring)).

to resolve and the way the opinions' have framed those issues are the truly interesting aspects. As Kevin T. McGuire and Barbara Palmer wrote, individual cases simply provide the vehicle, framework or "legal architecture" for the principle of law they represent.²³⁸ Through the examination of a large body of individual opinions and looking for the underlying principles shared among them, it is possible to understand the broader, re-occurring legal issues these cases represent and see the social and power structures advanced by judges.

In sum, it appears as if the courts are identifying a number of reoccurring legal issues in national security and transparency cases. While balancing national security and freedom of expression/transparency and balancing the roles of the different branches of government appear to be the most common legal issues the courts addressed, it is important to recognize that individual judges are capable of framing similar cases — or even the same case — in a variety of ways. Perhaps the best example of this comes from the individual opinions in *New York Times v. United States*.²³⁹ In that case, the individual justices were clearly free to argue the case was about the First Amendment *or* separation of powers *or* some combination of the two issues. Unfortunately, because frames can be introduced during oral arguments, by the litigants in briefs, or by third parties in amici briefs, and these documents were not always readily available for the lower court cases identified by this research, it was difficult to determine the origin of some of these frames. While some of the opinions clearly stated they were taking their frames from arguments presented by one of the litigants or were addressing issues not present at the lower court level or argued by either side,²⁴⁰ it was beyond the scope of this article to track each individual frame through

²³⁸McGuire & Palmer, *supra* note 63, at 692.

²³⁹403 U.S. 713 (1971).

²⁴⁰For example, in *New York Times v. United States*, 403 U.S. 713 (1971), the *New York Times*' deliberate attempt to frame the case in terms of the First Amendment and separation of powers was adopted by the courts. See John Anthony Maltese, *National Security v. Freedom of the Press: New York Times v. United States*, in *CREATING CONSTITUTIONAL CHANGE: CLASHES OVER POWER AND LIBERTY IN THE SUPREME COURT* 233, 234 (Gregg Ivers & Kevin T. McGuire eds., 2004) (describing the decision by the *Times*' lawyer, Alexander Bickel, to advance the separation of powers frame in district court). See also Brief for Petitioner New York Times Co. at 2, *New York Times Co. v. United States*, 403 U.S. 713, No. 1873 (1971) ("Questions presented . . . 3. Whether, consistent with the First Amendment and the principle of separation of powers, the Court of Appeals may adopt a standard which permits the Executive to obtain injunctive relief against publication by a newspaper of articles relating to public affairs, in the absence of any statute enacted by Congress."). In *Greene v. McElroy*, 360 U.S. 474 (1959), although the majority credited Justice Tom Clark for framing the cases "colorfully," Clark in fact took the frame directly from the solicitor general, while in *Department of Navy v. Egan*, 484 U.S. 518, 527 (1988), the majority of the Court adopted a frame advanced by the solicitor general.

the litigation process to determine where the decision to present or focus on a specific legal issue originated.

In addition to the legal issues the opinions cited, there were a number of legal factors or modes of interpretation the courts used to reach and/or justify their conclusions. It is important to remember in any discussion of the law that judges and the lawyers who argue before them are trained to approach problems in a specific way and to find solutions to those problems by thinking about the law. “Legalism” is the primary way jurists structure and explain their opinions. Thus, legal factors or modes of legal interpretation — such as precedent, original intent, and textualism, for example — exert a unique influence on the mindset of judges and work as a constraint on policy making as well as serve as a way to ex post facto justify policy preferences.

As could be expected, in all three types of cases, precedent was the legal factor the opinions most frequently used to justify or reach decisions. Precedent was cited in thirty-six opinions, followed by First Amendment theory (thirteen), statutory textual analysis (twelve), legislative history/intent (eleven), originalism/framers intent (nine), democratic theory (eight), constitutional textualism (seven), and practical/pragmatic issues (five). These findings are consistent with earlier research. As noted previously, political scientists Jeffery Segal and Harold Spaeth argued that precedent is often a powerful predictor of judicial decisions and that the frequency with which courts base decisions on precedent far surpasses any other aspect of the legal model.²⁴¹ This was true of Supreme Court cases as well as lower court cases, a finding consistent with the writings of Erwin Chemerinsky. While the Supreme Court is arguably less tied to precedent than lower courts, as Chemerinsky wrote, “A significant portion of almost every Supreme Court opinion is about how the decisions fit within, and flow from, the earlier case.”²⁴² It is important to note, however, that precedent included discussions of precedents being improperly used. The concurring and dissenting opinions in the cases analyzed were often critical of the majorities’ uses of or reliance on precedent. This finding is also consistent with the writings of Segal and Spaeth and Chemerinsky.

Significantly, although references did not reach the frequency of precedent, a number of opinions discussed First Amendment theory, and it appears that theory is an important way courts determine and/or justify exactly what conduct or actions are supported by the First Amendment. In prior restraint and post-publication punishment cases, these discussions most frequently focused on the role of a free press or freedom of expression in self-government or as a check on government abuse

²⁴¹SEGAL & SPAETH, *supra* note 20, at 76.

²⁴²Chemerinsky, *supra* note 24, at 2019.

while in the access cases they often focused on the possible existence of a constitutional right to know. It appears, then, that in addition to relying on more traditionally recognized legal factors, many judges are also attempting to use First Amendment and democratic theory to make decisions and/or justify their decisions to others. This suggests that First Amendment theory is an important component of a jurist's toolbox of legal factors and is a mode of constitutional interpretation that should be further explored.

A final factor related to the time in which a decision was made — or the context of the decision — was referenced in several cases and deserves mention. This reference to time and/or events suggests that judges are aware of historical factors that may impact or limit the power of their decisions. In both *Doe I* and *Doe III*, Judge Marrero was careful to reference the temporal and geographic proximity of the events of 9/11.²⁴³ Similarly, the “critical time of national emergency” brought about by the Cold War was clearly on Justice Clark's mind when he wrote the executive branch had sole control over national security information in *Greene*.²⁴⁴

In addition to answering questions related to the frames and legal factors the courts used in these cases, one of the primary purposes of this article was to catalog the overall architecture created by the cases. As Cathy Packer wrote, it is only by studying the societal implications of a body of case law that scholars can “fully comprehend the impact of . . . [individual] disputes on both individuals and society.”²⁴⁵ A number of broader theoretical observations about the architecture of power the courts have created can be made.

First, the analysis identified a great deal of similarity in the treatment of prior restraint cases, early signs of national security access cases recognizing some sort of qualified constitutional right of access, and a lack of similarity across post-publication punishment cases. This indicates that while judges have a well-developed approach to prior restraint cases, they are struggling to develop a consistent approach to post-publication punishment and access cases. Mark J. Richards and Herbert M. Kritzer used the term “jurisprudential regime” to refer to a key precedent, or a set of related precedents, that structure the way courts evaluate key elements of cases in a particular legal area.²⁴⁶ This research suggests that the judiciary's antipathy toward prior

²⁴³*Doe I*, 334 F. Supp. 2d 471, 477–78 (S.D.N.Y. 2004); *Doe III*, 500 F.Supp. 2d 379, 415 (S.D.N.Y. 2007).

²⁴⁴360 U.S. 474, 515 (1959) (Clark, J., dissenting).

²⁴⁵Packer, *supra* note 82, at 32.

²⁴⁶Mark J. Richards & Herbert M. Kritzer, *Jurisprudential Regimes in Supreme Court Decision Making*, 96 AM. POL. SCI. REV. 305, 315–16 (2002).

restraints — established in *Near v. Minnesota*,²⁴⁷ *Organization for a Better Austin v. Keefe*,²⁴⁸ and *New York Times Co. v. United States*²⁴⁹ — has become well enough established that lower courts are easily applying the standard, even when the governmental interest at stake is as important as national security. The right to know appears at best to be a developing regime — well-established in judicial access cases such as *Richmond Newspapers v. Virginia*²⁵⁰ and *Globe Newspaper Co. v. Superior Court*²⁵¹ — but undeveloped elsewhere. Thus, while lower courts in national security access cases frequently cited the Supreme Court's decisions in judicial access cases that would establish a right-to-know regime, the lower courts struggled to apply that regime outside the judicial context. In contrast, post-publication punishment cases, perhaps because of the limited number of cases the Supreme Court has considered, instead relied on case-by-case determinations. This conclusion comes with an important caveat, however.

The ability to selectively frame cases and choose which modes of legal analysis to use allows judges and litigants to find ways around jurisprudential regimes. That is, while a judge will be more constrained by the strength of the Court's prior restraint jurisprudential regime, the ability to choose the legal issue to be decided and selectively use some legal factors over others leaves jurists with at least some room to maneuver. For example, the dissenting justices in the Pentagon Papers case retained the ability to selectively argue the case was about the power of the executive branch, whereas the government in the PATRIOT Act cases — *Doe I*, *Doe II* and *Doe II* — strenuously argued the restrictions were not truly prior restraints in order to avoid having to overcome the presumption against prior restraints.²⁵² It was important for the dissenting justices in *New York Times Co. v. United States* to focus on separation of powers arguments and the government in the PATRIOT Act cases to argue the cases weren't really about prior restraints because the prohibition

²⁴⁷283 U.S. 697 (1931).

²⁴⁸402 U.S. 415 (1971).

²⁴⁹403 U.S. 713 (1971).

²⁵⁰448 U.S. 555 (1980).

²⁵¹457 U.S. 596 (1982).

²⁵²See *Doe I*, 334 F. Supp. 2d 471, 513 (S.D.N.Y. 2004) (discussing the government's argument that the non-disclosure provision was not a prior restraint because it did not create a licensing system, arguing that section 2709(c) did not "authorize any government official to grant a speaker permission to make any particular disclosure. Rather, the statute simply prohibit[ed] certain disclosures."); *Doe II*, 386 F. Supp. 2d 66, 74 (D. Conn. 2005) (discussing the government's argument that argument that § 2709 was not a prior restraint because, typically, prior restraints were court orders or licensing schemes); *Doe III*, 500 F. Supp. 2d 379, 389 (S.D.N.Y. 2007) (discussing why the non-disclosure provision was still a prior-restraint even though the government argued that changes made by Congress dealt with the prior restraint issues raised by the court in *Doe I*).

against prior restraints is so well established it would have made it very difficult to win once the cases were cast in that light.

Second, the research demonstrates that First Amendment and democratic theory are important rhetorical tools that can be used in conjunction with more traditional legal factors such as precedent or originalism to help jurists reach and justify conclusions. In addition, it appears as if there was a heavy reliance on First Amendment and democratic theory when breaking new legal ground. That is, judges can rely on First Amendment or democratic theory to establish new jurisprudential regimes or in combination with precedent to justify a decision that might not be specifically supported by the precedent, textualism or originalism. For example, it is noteworthy that the access cases relied more heavily on democratic theory than the other category of cases. The judges who considered access claims certainly could not turn to textualism or the confusing precedents of the Supreme Court and instead needed to justify why a right of access was inherent in the First Amendment. Future research would be greatly informed by looking for such rhetorical devices in opinions in addition to textualism, originalism and precedent.

Third, even though some scholars have suggested national security might be used as a trump card to avoid judicial scrutiny,²⁵³ it appears that this is not necessarily always true. While some opinions — such as Harlan’s Pentagon Paper dissent,²⁵⁴ Clark’s dissent in *Greene*²⁵⁵ or the Fourth Circuit’s opinion in *Marchetti*²⁵⁶ — went to great lengths to express the need to defer almost entirely to the executive branch in matters of national security, most judges were unwilling to abdicate their judicial function and took their duty to protect civil liberties seriously, often attempting to balance transparency with national security. There are, however, at least some ways in which national security cases are very different from other kinds of cases that attempt to balance freedom of expression with some other competing societal or government interests.

It is clear that national security information cases are very much about creating and managing power structures between the competing branches of government. As noted, a great number of the opinions discussed the inherent power of the courts *vis-à-vis* the executive or legislative branch or grappled with how much deference the courts should

²⁵³See, e.g., FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 197 (1982) (contending national security “is often thought to be a trump card in free speech disputes”); Alasdair Roberts, *National Security and Open Government*, 9 *GEO. PUB. POL’Y REV.* 69, 70 (2004) (writing that the tendency to defer to secrecy and national security was especially strong in times of fear and uncertainty).

²⁵⁴*New York Times Co. v. United States*, 403 U.S. 713, 741 (Harlan, J., dissenting).

²⁵⁵360 U.S. 474, 510 (1959) (Clark, J., dissenting).

²⁵⁶446 F.2d 1309 (4th Cir. 1972).

give to the executive branch in determining what information should be classified. There are a number of explanations for this. It is possible that this emphasis is related to legitimate constitutional questions and concerns. Several of the cases focused on which branch of government was given the power to control national security information by the Constitution or focused on framers' intent to determine who should have the power. For example, in *Department of Navy v. Egan*, Justice Harry Blackmun wrote that the authority to protect national security information flowed directly from the Constitution and fell on the president "as head of the Executive Branch and as Commander in Chief."²⁵⁷ It is impossible to know if the courts were legitimately concerned with these questions or simply looking to support their conclusions through textual citations.

The concern with separation of powers issues could also be related to practical concerns with the ability and/or expertise of the courts to deal with national security information. Several of the opinions focused on the judiciary's inability to know what information might be dangerous to national security or the inability of courts to properly control and house national security information.²⁵⁸ In addition, in the national security cases it is possible the courts gave considerable consideration to the dangers of making a wrong decision involving national security information. Although few of the opinions stated the stakes as bluntly as District Judge Robert Willis Warren's opinion in *United States v. Progressive Magazine*,²⁵⁹ all of the jurists had to be aware of the potential results of allowing national security information to be disseminated. As Warren wrote:

A mistake in ruling against *The Progressive* will seriously infringe cherished First Amendment rights. . . . It will curtail defendants' First Amendment rights in a drastic and substantial fashion. It will infringe upon our right to know and to be informed as well.

A mistake in ruling against the United States could pave the way for thermonuclear annihilation for us all. In that event, our right to life is extinguished and the right to publish becomes moot.²⁶⁰

Finally, it is possible that the courts' focus on the issue was related to inter-institutional constraints placed on the judiciary. As noted, scholars who advance strategic models of judicial decision making have argued that judges are strategic actors who must consider the preferences of

²⁵⁷484 U.S. 518, 527 (1988).

²⁵⁸*See, e.g.*, *Alfred A. Knopf, Inc. v. Colby*, 509 F.2d 1362, 1369 (4th Cir. 1975).

²⁵⁹467 F. Supp. 990 (W.D. Wis. 1979).

²⁶⁰*Id.* at 995–96.

other actors and institutions and the institutional and historical context in which they act.²⁶¹

Regardless of why the courts focused so heavily on separation of powers issues in these cases, it is clear that the issue is a concern for judges at all levels of the judiciary when dealing with national security information. Citing a number of Supreme Court precedents, Justice Blackmun concluded in *Egan*, “[U]nless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs.”²⁶² In his concurring opinion in *United States v. Morison*, Judge Harvie Wilkinson summed up this idea: “In short, questions of national security and foreign affairs are ‘of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.’”²⁶³

National security and transparency cases thus serve as an important reminder that the judiciary is but one part of our governmental structure that must take into account the desires and powers of the other branches of government, a key focus of social architecture theory. While the ratification of the Constitution set out the powers of each branch, as scholars have noted, this was only the beginning of a long process by which political institutions take shape²⁶⁴ and it is through law that society structures “the power relationships among people, institutions and the government.”²⁶⁵ Rather than being static, the powers of our political institutions are defined through “sequences of events . . . either unanticipated by the framers or unspecified” in the Constitution.²⁶⁶

Under the conceptual framework offered by social architecture theory, it is clear that in national security cases the courts are creating and managing power relationships while being mindful of the desires and powers of other political institutions. Such a finding should not come as a surprise to observers of the court system. The courts of today are not far removed from the constitutional battles between President

²⁶¹See, e.g., EPSTEIN & KNIGHT, *supra* note 63, at 9–18; Clinton, *supra* note 91, at 300; Hausegger & Baum, *supra* note 91, at 181–82; Knight & Epstein, *supra* note 91, at 90–92.

²⁶²*Egan*, 484 U.S. at 530 (citing *Chappell v. Wallace*, 462 U.S. 296 (1983); *Schlesinger v. Councilman*, 420 U.S. 738, 757–58 (1975); *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973); *Burns v. Wilson*, 346 U.S. 137, 142, 144 (1953); *Orloff v. Willoughby*, 345 U.S. 83, 93–94 (1953)).

²⁶³844 F.2d 1057, 1083 (4th Cir. 1988) (Wilkinson, J., concurring) (quoting *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948)).

²⁶⁴*Knight & Epstein*, *supra* note 91, at 88.

²⁶⁵*Packer*, *supra* note 82, at 35.

²⁶⁶*Knight & Epstein*, *supra* note 91, at 88.

Franklin Roosevelt and the Supreme Court, which resulted in the president's Court-packing plan and cast doubt on the future of the Court as a powerful political institution.²⁶⁷ Undoubtedly, all of the jurists who wrote the opinions outlined above were well aware of Roosevelt's Court-packing plan and other battles.²⁶⁸

All cases involving national security currently working their way through the judicial system, such as those dealing with access to terrorist trials or the appropriate reach of the PATRIOT Act, will certainly have to deal with social architecture in one form or another. Any case that calls for balancing national security with a civil liberty, be it privacy, habeas corpus, or the right to a public trial of terrorists suspects, will have to focus on the architecture of power that exists between the three branches of government as well as the values judges are attempting to balance. Thus, in deciding such cases, it will be important for judges to be cognizant of the nation's original social architecture, as established by the Constitution and the First Amendment. The framers of the Constitution were acutely aware of the dangers of the accumulation of power in the same hands.²⁶⁹ Although James Madison and others never specifically defined the concept of separation of powers, it is clear they saw the need for a government in which powers were divided in order to preserve individual liberty.²⁷⁰ As Solove wrote, ideally, the law should be used to establish an architecture of power that maintains the appropriate balance of power in relationships.²⁷¹ Discussing the need for social architecture in privacy law, Solove wrote that too often the law only works at the surface of a problem, "dealing with the overt abuses and injuries that may arise in specific instances. But thus far the law does not do enough to redefine the underlying relationships that cause those symptoms."²⁷² Similarly, although many of the cases outlined above are clear examples of judges discussing architecture, they too are frequently decided on issues related to specific circumstances of the cases.

²⁶⁷See Gregory Caldeira, *Public Opinion and the U.S. Supreme Court: FDR's Court Packing Plan*, 81 AM. POL. SCI. REV. 1139 (1987), for an analysis of the battles between FDR and the Supreme Court.

²⁶⁸The first — and one of the most widely written about — confrontations between the executive and the Supreme Court was, of course, *Marbury v. Madison*, 5 U.S. 137 (1803).

²⁶⁹See, e.g., *The Federalist No. 47*, at 261 (James Madison) (J.R. Pole ed., 2005) (1788) (writing the accumulation of power "in the same hands . . . may justly be pronounced the very definition of tyranny").

²⁷⁰See Larry D. Kramer, "The Interest of the Man": James Madison, *Popular Constitutionalism, and the Theory of Deliberative Democracy*, 41 VAL. U. L. REV. 697, 734–35 (2006).

²⁷¹Solove, *supra* note 19, at 1087.

²⁷²DANIEL J. SOLOVE, *THE DIGITAL PERSON* 100 (2004).

For example, referring to an architecture of power that went beyond a focus on the individual complaint, the court wrote in *United States v. AT&T*²⁷³ that the framers expected that when “conflicts in scope of authority arose between the coordinate branches, a spirit of dynamic compromise would promote resolution of the dispute in the manner most likely to result in efficient and effective functioning of our governmental system.”²⁷⁴ The court further admonished that “each branch should take cognizance of an implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation” in order to avoid “the mischief of polarization.”²⁷⁵ Focusing on the architecture of national security cases, the court wrote:

The executive would have it that the Constitution confers on the executive absolute discretion in the area of national security. This does not stand up. While the Constitution assigns to the President a number of powers relating to national security, including the function of commander in chief and the power to make treaties and appoint Ambassadors, it confers upon Congress other powers equally inseparable from the national security, such as the powers to declare war, raise and support armed forces and, in the case of the Senate, consent to treaties and the appointment of Ambassadors.²⁷⁶

In addition, when they move beyond separation of powers concerns to focus on balancing national security and transparency, judges can still focus on architecture. It is important to remember the framers were heavily influenced by the writings of John Locke, a seventeenth century Enlightenment philosopher who proposed a government based on the consent of the governed in his book the *Second Treatise of Government*.²⁷⁷ Locke was concerned with what form a legitimate government should take and how to establish the conditions necessary for peace and security. Locke focused on the restriction of state power to create private spheres of civil liberty.²⁷⁸ He based his understanding of the social contract on the pre-existing rights of the individual, which were retained even when the individual entered into the collective. To Locke, because government existed solely based on the consent of the governed, the government could not take away pre-existing rights, such as the right to

²⁷³567 F.2d 121 (D.C. Cir. 1977).

²⁷⁴*Id.* at 127.

²⁷⁵*Id.*

²⁷⁶*Id.* at 128.

²⁷⁷JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* (1980) (1690).

²⁷⁸*See, e.g., id.* at 32 (“The end of law is not to abolish or restrain, but to preserve and enlarge freedom.”).

free expression. Although Locke did not explicitly say so, historians have argued that to Locke a free and open press was the best way to guarantee citizens protection from government tyranny that may impinge on these natural rights,²⁷⁹ government should be judged by the governed through the free exchange of ideas,²⁸⁰ and citizens need as much information about their government as possible in order to function in a democracy.²⁸¹ In terms of social architecture theory, Locke “proposed a social architecture in which power ultimately belonged to citizens, not those who governed them.”²⁸²

Therefore, judges must keep in mind the balance of power between the branches and the architecture created by the First Amendment even when considering cases under the backdrop of events like the terrorist attacks of September 11. While it is true that in Lockean philosophy government’s central purpose is to protect each individual’s rights against invasion *and* to protect “the entire society from having the rights of its members robbed from them by another nation’s war-launching invasion,”²⁸³ it is important to remember that these two values must *always* coexist. As Judge Marrero wrote in *Doe III*, the Constitution was designed so that even in dangerous times both civil liberties and “the judiciary’s unique role under our governmental system in protecting . . . liberties and upholding the rule of law” would not be circumscribed.²⁸⁴ Thus, advocating for an architecture of power that embraces these notions goes beyond arguing that courts should recognize the individual rights of the plaintiffs in these cases. It advocates decisions that go across categories of cases to empower both the courts and society in a broad and meaningful way.

In conclusion, the law concerning information — like all law — is malleable. Through their ability to focus on specific legal issues while ignoring others, as well as their capacity to reach or *ex post facto* justify decisions based on different legal factors, courts do more than just apply the law, they make law. In the area of national security information, it is apparent that through framing and the selective use of precedent, framers’ intent, First Amendment and democratic theory, or even practical issues related to the undeveloped nature of a case, judges

²⁷⁹FREDRICK SEATON SIEBERT, *FREEDOM OF THE PRESS IN ENGLAND 1476–1776* 261 (1965).

²⁸⁰DAVID A. COPELAND, *THE IDEA OF A FREE PRESS* 92 (2006).

²⁸¹*Id.*

²⁸²Packer, *supra* note 83, at 401.

²⁸³Thomas B. McAfee, *Restoring the Lost World of Classical Legal Thought: The Presumption in Favor of Liberty Over Law and the Court Over the Constitution*, 75 U. CIN. L. REV. 1499, 1507 (2007).

²⁸⁴500 F. Supp. 2d 379, 415 (S.D.N.Y. 2007) (citation and footnotes omitted).

have the ability to shape and manage the way society controls information. While this is certainly not a new finding — the legal realists first advanced the idea that the law is vague, internally inconsistent, and revisable in the early twentieth century — the area of information control is a particularly important place to study it. As Packer wrote, disputes about the distribution of information are about “the fundamental relationship among the government, the media and the public” because “[i]nformation is power, and the proper sharing of this power source is critical to the proper operation of a democratic government.”²⁸⁵ Because the courts must strike a balance between national security and transparency *as well as* between the separate branches of government in national security information cases, it is obvious that although opinions are written in the legal formalist tradition, the law alone does not decide cases. Justice Oliver Wendell Holmes was one of the first jurists to suggest that law was not a formal process of neutral application or logical deduction but a process of choosing among competing values.²⁸⁶ When courts are asked to balance national security with freedom of expression, they must apply the law, choose among competing core democratic values and keep in mind the proper balance of power outlined in the Constitution.

²⁸⁵Packer, *supra* note 82, at 33.

²⁸⁶See Holmes, *supra* note 55, at 465–68.