HEINONLINE

Citation: 25 Notre Dame J.L. Ethics & Pub. Pol'y 143 2011

Content downloaded/printed from
HeinOnline (http://heinonline.org)
Wed Aug 17 17:07:30 2011

-- Your use of this HeinOnline PDF indicates your acceptance
of HeinOnline's Terms and Conditions of the license
agreement available at http://heinonline.org/HOL/License

-- The search text of this PDF is generated from
uncorrected OCR text.

-- To obtain permission to use this article beyond the scope
of your HeinOnline license, please use:

https://www.copyright.com/ccc/basicSearch.do?
&operation=go&searchType=0
&lastSearch=simple&all=on&titleOrStdNo=0883-3648

MEDIA CENSORSHIP AND ACCESS TO TERRORISM TRIALS: A SOCIAL ARCHITECTURE ANALYSIS

DERIGAN SILVER*

I. INTRODUCTION

Although censorship, in its most basic form, deals with prior restraints on the press, because of the judiciary's traditional antipathy toward prior restraints[1]—even when national security information is involved[2]—and the ease of dissemination brought about by the Internet, preventing the media from accessing information has become an alternative to outright media "censorship." For example, soon after the Pentagon first dealt with the dissemination of national security information via WikiLeaks,[3] Defense Secretary Robert Gates tightened media access to the Pentagon by requiring all department officials to notify the Department of Defense's Office of Public Affairs prior to any communication with the news media or the public.[4] Gates reminded government employees that revealing unclassified but "sensitive, pre-decisional or otherwise restricted information" to the press without approval was prohibited.[5] Similarly, recent terrorism trials have made the federal courts a battleground for access to information related to terrorism and a proxy for media censorship.

Although the U.S. Supreme Court has repeatedly found there is a First Amendment right of access to judicial proceedings for the press and the public,[6] the terrorist attacks of September 11, 2001 gave rise to new access controversies as the government

* Ph.D. Assistant Professor, Department of Media, Film and Journalism Studies, University of Denver.

1. *See, e.g.*, Org. for a Better Austin v. Keefe, 402 U.S. 415 (1971); Near v. Minnesota, 283 U.S. 697 (1931).

2. New York Times Co. v. United States, 403 U.S. 713 (1971).

3. *See* Stephanie Strom, *Pentagon Sees a Threat from Online Muckrakers*, N.Y. TIMES, Mar. 18, 2010, at A10.

4. Memorandum from Robert Gates, Sec'y of Def., to Deputy Sec. of Def. (July 2, 2010) (on file with author), *available at* http://www.rcfp.org/news items/docs/20100910_105806_dod_memo_2.pdf (regarding interations with the media).

5. *Id.*

6. *See, e.g.*, Press-Enter. Co. v. Riverside County. Superior Court, 478 U.S. 1 (1986) [hereinafter *Press-Enter. II*]; Press-Enter. Co. v. Riverside Cnty. Superior Court, 464 U.S. 501 (1984) [hereinafter *Press-Enter. I*]; Globe Newspaper Co. v.

sought to close judicial proceedings and seal records in cases with connections to terrorism. The first such controversy began just ten days after the attacks when Chief Immigration Judge Michael J. Creppy issued a directive mandating closure of all "special interest" immigration hearings.[7] In December, 2001, a Michigan immigration judge held a closed hearing to decide if Rabih Haddad, who had overstayed his tourist visa and was suspected of having connections to al-Qaeda, could be deported. Several media organizations, along with members of Haddad's family and the public, sued, contending the closed proceeding was unconstitutional. Both a federal trial court and the U.S. Court of Appeals for the Sixth Circuit agreed that the First Amendment right of access established in *Richmond Newspapers, Inc. v. Virginia*[8] applied, even though the immigration hearings were not actually court proceedings but administrative, quasi-judicial proceedings. The courts held that the Creppy directive requiring blanket closure of all "special interest" hearings was unconstitutional.[9] A few months later, however, in a case involving closed deportation hearings in Newark, New Jersey, the Third Circuit issued a contradictory decision, ruling 2-1 that there was no constitutional right of access to such proceedings.[10] In 2003, the U.S. Supreme Court refused to hear an appeal in the case, thereby failing to resolve the conflict between the two circuits.[11]

Five years later, the Court's 2008 ruling that foreign detainees at Guantánamo Bay have the right to challenge their imprisonment in civilian courts opened the door for more battles over government secrecy.[12] In more than 100 cases brought as a result of the ruling, the Justice Department filed unclassified documents under seal, thereby restricting access to judges, lawyers and government officials. The secrecy, the government said, was

---

Superior Court, 457 U.S. 596 (1982); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980).

7. E-mail from Michael Creppy, Chief Immigration Judge of the U.S., to all Immigration Judges (Sept. 21, 2001, 12:20 PM) (on file with author), *available at* http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/aclu/creppy092101memo.pdf. (regarding cases requiring special procedures). "Special interest" cases are those in which sensitive or national security information may be presented, including any information related to terrorist investigations.

8. 448 U.S. at 573.

9. Detroit Free Press v. Ashcroft, 195 F. Supp. 2d 948 (E.D. Mich.), *aff'd*, 303 F.3d 681 (6th Cir. 2002).

10. N.J. Media Group, Inc. v. Ashcroft, 308 F.3d 198 (3d Cir. 2002), *cert. denied*, 538 U.S. 1056 (2003).

11. N.J. Media Group, Inc. v. Ashcroft, 538 U.S. 1056 (2003).

12. Boumediene v. Bush, 553 U.S. 723 (2008).

necessary because some unclassified documents mistakenly contained classified information. On June 1, 2009, a federal district judge ruled the wholesale sealing of unclassified documents violated the public's First Amendment and common law right of access to judicial records.[13] "Public interest in Guantánamo Bay generally and these proceedings specifically has been unwavering. The public's understanding of the proceedings, however, is incomplete without the factual returns. Publicly disclosing the factual returns would enlighten the citizenry and improve perceptions of the proceedings' fairness," Judge Thomas Hogan wrote.[14] He gave the government until July 29 to make public the unclassified documents or request continued secrecy for specific words or lines highlighted in colored marker with an explanation of why the material should be protected.[15]

Unfortunately, these battles have continued well into 2010. In April, a federal appeals court judge abruptly closed the courtroom just one minute after arguments began in the case of a Guantánamo Bay detainee.[16] The move was particularly unsettling because the detainee's representative and the Justice Department had both consented to a public hearing. In May, the Pentagon barred four reporters from reporting on the military commission proceedings at Guantánamo Bay because they published articles identifying a witness whose identity had been protected by the presiding judge, even though the witness's name had already been released to the public on multiple occasions.[17] Although the Pentagon recently received praise from news organizations that had protested Guantánamo policies as unduly restrictive when the Department of Defense (DOD) revised its rules for reporters covering military trials at Guantánamo,[18] these incidents show that the battles over access and

13. *In re* Guantánamo Bay Detainee Litig., 624 F. Supp. 2d 27 (D.D.C. 2009).

14. *Id.* at 37.

15. *Id.* at 34. *See also* Parhat v. Gates, 532 F.3d 834, 853 (D.C. Cir. 2008) (ordering the government to "specifically explain[ ] why protected status is required for the information" it sought to keep secret).

16. *See* Nadia Tamez-Robledo, *D.C. Appeals Court Suddenly Closes Guantánamo Detainee Hearing*, REPS. COMMITTEE FOR FREEDOM PRESS (Apr. 5, 2010), http://www.rcfp.org/newsitems/index.php?i=11353.

17. *See* Jeff Stein, *Papers Protest Reporters' Ejection From Guantánamo*, WASH. POST SPYTALK (May 6, 2010), http://blog.washingtonpost.com/spy-talk/2010/05/papers_protest_reporters_eject.html.

18. *See* Rosemary Lane, *Pentagon Relaxes Reporter Guidelines at Guantánamo Bay*, REPS. COMMITTEE FOR FREEDOM PRESS, (Sept. 14, 2010, 6:19 PM), http://www.rcfp.org/newsitems/index.php?i=11555 (noting that new guidelines allowed media organizations to use edited photos and videos, narrowed the definition of "protected information," and provided for an appeals process in

media censorship are far from settled. In addition, they raise numerous important questions about the balance of power between the government, the people and the press in the United States of America.

This Article contends that using the social architecture metaphor—which focuses on how the law creates and distributes power between groups—is particularly well suited to understanding the importance of access to the trials of terrorist suspects. Specifically, the article argues it is important that the "architecture of power"[19] created by the U.S. Supreme Court in cases that have provided for a First Amendment right of access to criminal trials not be replaced with an architecture that more closely resembles cases that have dealt with access to national security information and locations. In these cases, rather than decide cases by focusing on the societal benefits of open government, courts have typically focused on the individual facts of each case without an eye toward the larger social architecture the decisions create. This article posits that an architecture of presumptive access that still allows for a case-by-case closure—as opposed to an architecture of presumptive secrecy with case-by-case disclosure—is consistent with the original architecture of the Constitution and First Amendment and advances trust in the government as it fights terrorism.

Part II discusses social architecture theory and the law, with a focus on how the theory has been applied to cases involving access to government information. Part III examines the social architecture of the Supreme Court's rulings in cases that have established a First Amendment right of access to judicial proceedings. Part IV describes cases in which courts have considered a First Amendment right of access to national security information and locations and the architecture—or lack of architecture—created by these cases.[20] Part V argues that if this architecture is applied to terrorism trials, it will breed distrust of the government and its handling of terrorism and undermine the independence of the judiciary. In addition, it argues that limit-

which organizations could challenge decisions to classify information as "protected"). *See also* U.S. DEP'T OF DEF., MEDIA GROUND RULES FOR GUANTÁNAMO BAY, CUBA (Sept. 10, 2010), http://www.defense.gov/news/d20100910ground rules.pdf [hereinafter GUANTÁNAMO MEDIA GROUND RULES].

19. Daniel J. Solove, *Digital Dossiers and the Dissipation of Fourth Amendment Privacy*, 75 S. CAL. L. REV. 1083, 1087 n.19 (2002) (the term "architecture of power" refers to a "particular power structure [created] . . . by the law.").

20. Because the Supreme Court has considered so few cases dealing with access to national security information, this section discusses both Supreme Court cases and lower court cases dealing with a First Amendment based right of access.

ing access to these proceedings is unnecessary because of the allowance for case-by-case closure and the ability of federal judges to use the Classified Information Procedures Act (CIPA),[21] which is designed to protect national security information during federal criminal proceedings. Finally, this Article contends that through the use of proper public policy, such as the Pentagon's new guidelines, judicial decisions and statutory law, such as CIPA, the architecture established by the Constitution, the First Amendment and the Court's judicial access jurisprudence can be used to reinforce the public's right to know about the prosecution of terrorists, advance the press' ability to report on matters of public concern and strengthen the independence of the judiciary.

II. SOCIAL ARCHITECTURE THEORY AND THE LAW

Several authors have used the social architecture metaphor to "emphasize that legal and social structures are products of design"[22] 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,[23] wrote that the metaphor captures how the law structures social control and freedom in a society.[24] Just as the architecture of a building can be designed to determine how people interact,[25] Solove and others suggest that social architecture can be designed by law to determine how groups interact in society.[26] Legal and computer science scholar Barbara van Schewick wrote, "Just as the architecture of a house describes its basic inner structure, the architecture of a complex system describes the basic inner structure of the system."[27] The term "architecture" has been used to describe how computer code can

21. 18 U.S.C. app. 3 §§ 1–16 (2006).

22. Daniel J. Solove, *Identity Theft, Privacy, and the Architecture of Vulnerability*, 54 HASTINGS L.J. 1227, 1239 (2003).

23. Solove credited Lawrence Lessig and Joel R. Reidenberg for the idea that architecture refers to more than the design of physical spaces. *See* Solove, *supra* note 19, at 1087 n.19; Solove, *supra* note 22 at 1239.

24. Solove, *supra* note 22, at 1239.

25. *See 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).

26. Solove, *supra* note 22, at 1239.

27. BARABARA VAN SCHEWICK, INTERNET ARCHITECTURE AND INNOVATION 3 (2010).

determine whether the Internet is a vehicle for freedom of expression or an instrument of control,[28] to examine judicial behavior in a collegial context by exploring how judicial behavior is impacted by socially prominent and proximate jurists,[29] and to analyze the public policy and technological foundations of telecommunication and Internet companies and technologies that promote the dissemination of information by private citizens.[30]

Recently, social architecture theory has also been applied to laws governing access to government information,[31] congressional deliberations regarding a federal shield law,[32] and the power relationships created by cases dealing with national security information.[33] Professor Cathy Packer wrote that law is both the means and the product of a construction process and that legal analysis that goes beyond discussing individual cases by examining the architecture they create "brings a much clearer understanding of the impact of and solutions for a variety of legal problems."[34] 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."[35] 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. Sulli-*

28. *See, e.g.*, LAWRENCE LESSIG, CODE 2.0, at 2 (2006); SCHEWICK, *supra* note 27, at 3; 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); Timothy Wu, *Network Neutrality, Broadband Discrimination*, 2 J. ON TELECOMM. & HIGH TECH. L. 141 (2003).

29. *See* 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).

30. *See* Jack M. Balkin, *Media Access: A Question of Design*, 76 GEO. WASH. L. REV. 933 (2008).

31. *See* 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).

32. *See* 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).

33. *See* Derigan Silver, *Power, National Security and Transparency: Judicial Decision Making and Social Architecture in the Federal Courts*, 15 COMM. L. & POL'Y 129 (2010).

34. Packer, *supra* note 31, at 39.

35. Solove, *supra* note 19, at 1116.

van,[36] 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."[37] According to Packer, "[T]he social architecture created by *Sullivan* tipped the balance of power toward government critics and away from government officials."[38] Professor Jack Balkin, on the other hand, noted that *Sullivan* was just as important in that it created architecture that favored "powerful media organizations" increasing their private power without necessarily granting any power to private citizens.[39] Thus, the case is so important because it created an architecture of power that went beyond the protection of an individual right and created an architecture of power between the press and the government as well as between the press and the people.

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 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*.[40] 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.[41] 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

36. 376 U.S. 254 (1964).

37. Packer, *supra* note 31, at 33 n.23.

38. Packer, *supra* note 32, at 404.

39. Balkin, *supra* note 30, at 943. It is important to note that lower courts continue to struggle with who should receive protection in defamation cases. Although *Sullivan* focused on the identity of the plaintiff in a defamation suit and a later Supreme Court case, *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), focused on the subject matter of the defamatory statement, due to dicta in multiple Supreme Court opinions some lower courts still focus on the identity of the *defendant* in defamation cases. These courts continue to hold that private citizens are not granted the same level of protection—or architecture of power—as media defendants when sued for defamatory statements. *See* Ruth Walden & Derigan Silver, *Deciphering* Dun & Bradstreet*: Does the First Amendment Matter in Private Figure-Private Concern Defamation Cases?*, 14 COMM. L. & POL'Y 1, 31–34 (2009).

40. *See* THE FEDERALIST NOS. 47, 48, 51 (James Madison).

41. Packer, *supra* note 32, at 398.

judiciary must actively balance their desires with the powers and desires of other government institutions.[42] 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.

III. ACCESS TO THE COURTS

A. *Supreme Court Cases*

The U.S. Supreme Court has found that the First Amendment guarantees a broad right of access to criminal judicial proceedings and documents. It is important to note, however, that the Court did not initially frame access to the judiciary as a First Amendment issue. Although the Court addressed judicial secrecy in a number of cases between 1947 and 1966,[43] the Court discussed access in terms of the Sixth Amendment, not the First, and said the Sixth Amendment right to a public trial belonged to the accused, rather than the public or the press.[44] For example, in a 1979 case involving a pretrial evidence suppression hearing, the Court wrote, "The Constitution nowhere mentions any right of access to a criminal trial on the part of the public; its guarantee, like the others enumerated, is personal to the accused."[45]

In 1978, the Court considered a right of access to judicial documents in *Nixon v. Warner Communications, Inc.*,[46] when television networks appealed an order of the U.S. District Court for

42. *See* LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE 10 (1998). *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'Y REV. 87 (1996).

43. *See, e.g.*, Sheppard v. Maxwell, 384 U.S. 333, 349–50 (1966) (stating that the Supreme Court has traditionally been unwilling to place direct limitations on the freedom of the news media to report on courtroom proceedings); Estes v. Texas, 381 U.S. 532, 538–39 (1965) (discussing the importance of public trials); *In re* Oliver, 333 U.S. 257, 268–69 (1948) (discussing the "Anglo-American distrust for secret trials"); Craig v. Harney, 331 U.S. 367, 374 (1947) ("A trial is a public event. What transpires in the court room is public property.").

44. *See, e.g., In re Oliver*, 333 U.S. at 266–68 (discussing the purpose of the Sixth Amendment).

45. Gannett Co. v. DePasquale, 443 U.S. 368, 379–80 (1979).

46. 435 U.S. 589 (1978).

the District of Columbia that held that the networks could not make copies of tape recordings made by the Nixon administration and introduced into evidence at the Watergate criminal trials. Although the Court acknowledged a common law right of access to documents in the possession of the judiciary,[47] instead of framing the question in terms of access, the Court ducked the question of a right of access and took a position that was not argued by either side or contained in any brief.[48] Instead of ruling on the existence of a right of access, the Court held that the release of the records would ultimately be controlled by the Presidential Recordings Act.[49] Writing for the Court, Justice Lewis F. Powell, Jr. justified this rationale by relying on a textual analysis of the Act[50] and the reasoning that courts were not as well equipped to handle the details of access to presidential records as were the other two branches of government.[51] The Court failed to address any of the major legal issues raised by either side in a meaningful way, dismissing any access arguments in one short section by citing *Saxbe v. Washington Post Co.*, *Pell v. Procunier* and *Zemel* for the proposition that the press had no greater rights of access than the public.[52]

One year later, in *Gannett Co. v. DePasquale*,[53] the Court once again dismissed the First Amendment claims of the press, focusing on the Sixth Amendment instead. *Gannett* involved the closure of a courtroom during a pretrial hearing to suppress evidence in a murder case.[54] Although the trial judge indicated there was a constitutional right of access to judicial proceedings, he concluded that such a right had to be balanced with the

47. *Id.* at 597.

48. *Id.* at 602–03 ("At this point, we normally would be faced with the task of weighing the interests advanced by the parties in light of the public interest and the duty of the courts. . . . We need not decide how the balance would be struck if the case were resolved only on the basis of the facts and arguments reviewed above. There is in this case an additional, unique element that was neither advanced by the parties nor given appropriate consideration by the courts below.").

49. *Id.* at 603. The Presidential Recordings Act is currently codified at 44 U.S.C. §§ 2201–2207 (2006).

50. *Nixon*, 435 U.S. at 603 n.15. Both sides argued that the Act did not apply to the records. The Court quoted from the text of the Act to support its ruling that it did.

51. *Id.* at 606.

52. *Id.* at 608–10 (citing Estes v. Texas, 381 U.S. 532, 589 (1965) (Harlan, J., concurring); Saxbe v. Washington Post Co., 417 U.S. 843 (1974); Pell v. Procunier, 417 U.S. 817 (1974); Zemel v. Rusk, 381 U.S. 1, 16–17 (1965)).

53. 443 U.S. 368 (1979).

54. *Id.* at 375.

accused's right to a fair trial.[55] Relying upon *In re Oliver*[56] and *Estes v. Texas*[57] to support its argument, the Court ruled that the "constitutional guarantee of a public trial is for the benefit of the accused."[58] Although Justice Potter Stewart's majority opinion discussed the need for transparency in a democracy,[59] ultimately Stewart concluded that "[r]ecognition of an independent public interest in the enforcement of Sixth Amendment guarantees is a far cry . . . from the creation of a constitutional right on the part of the public."[60] Stewart avoided discussing Gannett's claim that the order violated the First Amendment by noting even if there was such a right,[61] the trial judge had already dealt with the issue by weighing the competing societal interests involved.[62]

Despite these rulings, in 1980—just one year after *Gannett*—the Court limited the ability of judges to bar the public from attending trials based on the First Amendment in *Richmond Newspapers, Inc. v. Virginia*[63] and began the process of creating an architecture of presumptive access. *Richmond* began when a judge ordered a courtroom closed during a murder trial.[64] Although the trial was over, in a seven-to-one decision that produced seven different opinions, the Court reversed the order for closure, holding that the First Amendment prohibited closing a criminal trial to the public "[a]bsent an overriding interest articulated in findings."[65]

The various opinions in *Richmond* focused heavily on historical and structural/functional analyses of the First Amendment's role in self-governance. In part, *Gannett* explains this—because the Court had just ruled the previous term there was no constitutional right of access to trials under the Sixth Amendment, the justices had to distinguish *Richmond* by finding a right of access in

55. *Id.* at 392–93.
56. 333 U.S. 257 (1948).
57. 381 U.S. 532 (1965).
58. *Gannett*, 443 U.S. at 381.
59. *Id.* at 383.
60. *Id.* Furthermore, the Court noted that even if there had been a common law right to attend trials that was intended to be incorporated by the Sixth Amendment, there was certainly no evidence there had ever been a common law right to attend pretrial hearings. *Id.* at 387–89.
61. *Id.* at 392. ("We need not decide in the abstract, however, whether there is any such constitutional right. For even assuming, *arguendo*, that the First and Fourteenth Amendments may guarantee such access in some situations, a question we do not decide, this putative right was given all appropriate deference by the state *nisi prius* court in the present case.").
62. *Id.* at 392–93.
63. 448 U.S. 555 (1980).
64. *Id.* at 559.
65. *Id.* at 581.

the First Amendment. Although Chief Justice Warren Burger's plurality opinion distinguished *Richmond* from *Gannett* because it dealt with *trials* as opposed to *pretrial hearings*,[66] as Justice Harry Blackmun pointed out in his concurring opinion, the *Gannett* majority wrote twelve separate times that its opinion applied "to the *trial* itself."[67] Thus, as Justice Byron White noted in his concurring opinion, because of *Gannett* the Court was "required" to make *Richmond* a First Amendment case.[68]

Chief Justice Burger's plurality spent ten pages discussing "the history of criminal trials being presumptively open" and the benefits openness brings to society.[69] Considering the benefits of transparency, Burger wrote that "[p]eople in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing."[70] Justice William Brennan's concurring opinion also delved deeply into historical analysis, examining the "legacy of open justice" to conclude that "[a]s a matter of law and virtually immemorial custom, public trials have been the essentially unwavering rule in ancestral England and in our own Nation."[71]

Chief Justice Burger's plurality also included a functional analysis of the First Amendment, discussing the "right of access," the "right to gather information," and the "right to receive information and ideas," all rights he found in the First Amendment.[72] Burger went on to examine "constitutional structure" and the Framers' intent, reasoning that even though the Constitution contained no provision explicitly guaranteeing the right to attend criminal trials, the Court had recognized that some unenumerated fundamental rights were "indispensable to the enjoyment of rights explicitly defined."[73]

Justice Brennan's concurrence also discussed democratic theory, the structural benefits of openness to society,[74] how dif-

66. *Id.* at 564.

67. *Id.* at 601–02 (Blackmun, J., concurring).

68. *Id.* at 581–82 (White, J., concurring) ("This case would have been unnecessary had [*Gannett*] construed the Sixth Amendment to forbid excluding the public from criminal proceedings except in narrowly defined circumstances. But the Court there rejected the submission of four of us to this effect, thus *requiring* that the First Amendment issue involved here be addressed." (emphasis added)).

69. *Id.* at 564–75 (plurality).

70. *Id.* at 572.

71. *Id.* at 590–93 (Brennan, J., concurring).

72. *Id.* at 576 (plurality). Ultimately, Burger concluded it was not crucial how the right was described. *Id.*

73. *Id.* at 580.

74. *Id.* at 593–97 (Brennan, J., concurring).

ferent First Amendment theories or values might support a right of access, and the "countervailing interests" that might justify restricting access.[75] While Justice John Paul Stevens also discussed how to balance access and other interests,[76] he wrote that the case represented a landmark First Amendment decision that newsgathering was protected. Stevens wrote: "This is a watershed case. Until today the Court has accorded virtually absolute protection to the dissemination of information or ideas, but never before has it squarely held that the acquisition of newsworthy matter is entitled to any constitutional protection whatsoever."[77] Importantly, Justice Stevens' opinion suggested the case was about a broad right of access that included—but might not be limited to—access to the judiciary,[78] a fact that would later be discussed by several cases dealing with access to national security information.

Two years after *Richmond*, the Court continued to expand access to the judiciary based on the First Amendment. In *Globe Newspaper Co. v. Superior Court*[79] the Court held unconstitutional a Massachusetts statute[80] that had been construed as *requiring* trial judges to exclude the press and public from trials for sexual offenses involving a victim under the age of 18 during the testimony of the victim. Writing for the six-to-three majority, Justice Brennan held that a court could only deny the constitutional right of access to trials on a case-by-case basis when the denial was necessary to advance a compelling governmental interest and was narrowly tailored to serve that interest.[81]

In *Globe*, Brennan elaborated on the structural benefits transparency brings. Although Brennan was quick to acknowledge that the right of access to the judiciary was not explicitly mentioned in the First Amendment, he relied on the Framers' intent to support his claim that there was a broad constitutional right of access. He wrote:

> [T]he Framers were concerned with broad principles, and wrote against a background of shared values and practices. The First Amendment is thus broad enough to encompass those rights that, while not unambiguously enumerated in

75. *Id.* at 597–600.

76. *Id.* at 583 (Stevens, J., concurring).

77. *Id.* at 582.

78. *Id.* at 584 ("[T]he First Amendment protects the public and the press from abridgment of their rights of access to information about the operation of their government").

79. 457 U.S. 596 (1982).

80. MASS. GEN. LAWS ANN., ch. 278, § 16A (West 1981).

81. *Globe*, 457 U.S. at 607.

> the very terms of the Amendment, are nonetheless necessary to the enjoyment of other First Amendment rights.[82]

Brennan went on to cite and quote previous decisions that supported the idea that a right of access was protected by the First Amendment because access was necessary to protect the free flow of information about government in order to ensure the proper functioning of a democratic society.[83] Brennan also wrote that the right of access was protected by the Amendment both because of the history of open judicial proceedings and the "particularly significant role" a right of access to the judiciary "play[ed] . . . in the functioning of the judicial process and the government as a whole."[84] Thus, like Stevens' concurring opinion in *Richmond*, Brennan's language suggested that access to the judiciary was just one part of a broader constitutional right of access.

The Court continued to expand access to courtrooms in the 1980s, consistently deciding the cases based on a First Amendment right of access, or at least a need to balance access with the proper functioning of the judicial system. In 1984, in *Press-Enterprise Co. v. Riverside County Superior Court* (*Press-Enterprise I*),[85] the Court ruled that as an integral part of a criminal trial, jury selection was subject to the First Amendment presumption of openness. In the opinion of the Court, Burger used both the historical arguments[86] he articulated in previous cases and Brennan's discussion of the structural benefits openness brings to the justice system.[87] Perhaps the most detailed First Amendment argument came in Justice Stevens' concurring opinion. Once again, the language of Stevens' opinion was not limited to the benefits of transparency in the judicial process. Returning to his focus on democratic theory and the benefits of open government, Stevens wrote that access to the judiciary was simply a part of a greater right of access to information held by the government.[88]

---

82. *Id.* at 604.

83. *Id.* at 604–05 (quoting Mills v. Alabama, 384 U.S. 214, 218 (1966), and citing Thornhill v. Alabama, 310 U.S. 88, 95 (1940); *Richmond*, 448 U.S. at 587–88 (Brennan, J., concurring); *id.* at 575 (plurality) (the "expressly guaranteed freedoms" of the First Amendment "share a common core purpose of assuring freedom of communication on matters relating to the functioning of government")).

84. *Id.* at 606.

85. 464 U.S. 501 (1984).

86. *Id.* at 506–08.

87. *Id.* at 508–10.

88. *Id.* at 517 (Stevens, J., concurring) (quoting *Richmond*, 448 U.S. at 575 (plurality opinion); *id.* at 584 (Stevens, J., concurring)). In addition, Stevens

In 1986, in *Press Enterprise v. Riverside County Superior Court (Press-Enterprise II)*,[89] the Court held that a First Amendment-based presumption of openness extended to criminal pretrial hearings as well. Writing for the majority once again, Chief Justice Burger used both historical and structural arguments to establish a test for deciding when a particular type of judicial proceeding was presumptively open. Under the so-called "experience and logic" test, if a court proceeding was traditionally open to the public and "public access play[ed] a significant positive role in the functioning of the particular process in question," the proceeding was presumptively open to the public.[90]

Interestingly, using historical analysis and First Amendment theory to support his arguments, Justice Stevens dissented. Although Stevens again clearly stated his belief that "a proper construction of the First Amendment embraces a right of access to information about the conduct of public affairs,"[91] he disagreed that preliminary hearings in criminal trials should be open. Citing his own dissent in *Globe* as well as his own concurring opinion in *Richmond*, Stevens wrote, "[T]he freedom to obtain information that the government has a legitimate interest in not disclosing . . . is far narrower than the freedom to disseminate information, which is 'virtually absolute' in most contexts."[92] Stevens contended that the majority's historical analysis did not support a constitutional right of access because Burger's discussion focused on common law access[93] while its structural analysis would go too far, requiring almost all judicial proceedings, including civil and grand jury proceedings, to be open to the public.[94] Although Stevens reaffirmed his belief in a constitutional right of access, he wrote that in the situation at hand, "The constitutionally grounded fair trial interests of the accused if he is bound over for trial, and the reputation interests of the accused if he is not, provide a substantial reason for delaying access to the transcript for at least the short time before trial."[95]

---

cited two cases, *Zemel v. Rusk*, 381 U.S. 1, 17 (1966) and *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972), in which, according to Stevens, the Court had "implicitly endorsed" a right of access.

89. 478 U.S. 1 (1986).

90. *Id.* at 8.

91. *Id.* at 18 (Stevens, J., dissenting).

92. *Id.* at 20.

93. *Id.* at 24–25.

94. *Id.* at 26–28.

95. *Id.* at 29.

IV. ACCESS TO NATIONAL SECURITY INFORMATION AND LOCATIONS

A. *Supreme Court Cases*

Although there is evidence that military documents were marked "secret" as early as the Revolutionary War, the official system that controls classified information in the United States traces its origins to an executive order[96] issued by Franklin D. Roosevelt in March 1940.[97] The system was modified shortly after the conclusion of World War II,[98] and important changes came again in an executive order issued in September 1951.[99] Nineteen years after President Roosevelt created the modern classification system, the Supreme Court first reviewed the executive's ability to classify national security information in a case involving the government's revocation of a civilian contractor's security clearance in *Greene v. McElroy*.[100] Although on the surface the case was not about access to national security information, an important dissent in the case made it the first time a member of the Supreme Court wrote about the power of the executive branch to prevent access to national security information.

In 1951, William L. Greene was vice president and general manager of Engineering and Research Corporation (ERCO), a company that developed and manufactured various mechanical and electronic products for the armed forces.[101] While working on classified projects, Greene was denied a renewal of his security clearance based on information indicating he had associated with Communists, visited officials of the Russian Embassy, and

96. Exec. Order No. 8,381, 3 C.F.R. 634 (1938–1943).

97. HAROLD C. RELYEA, CONG. RES. SERVICE, SECURITY CLASSIFIED AND CONTROLLED INFORMATION: HISTORY, STATUS, AND EMERGING MANAGEMENT ISSUES 2 (2008), http://www.fas.org/sgp/crs/secrecy/RL33494.pdf.

98. Exec. Order No. 10,104, 3 C.F.R. 299 (1949–1953), *reprinted as amended in* 18 U.S.C. § 795 (1970).

99. Exec. Order No. 10,290, 3 C.F.R. 789 (1949–1953). There were three "sweeping innovations" introduced in Executive Order 10,290. First, because the order indicated the Chief Executive was relying upon "the authority vested in [him] by the Constitution and statutes, and as President of the United States," it strengthened the President's discretion to make official secrecy policy. Second, information was now classified in the interest of "national security" rather than in the interest of "national defense." Finally, the order extended classification authority to nonmilitary entities throughout the executive branch so long as they had "some role in 'national security' policy." *See* RELYEA, *supra* note 97, at 3. For a discussion of the evolution of the ability to classify information from 1953 to 2008, see *id.* at 3–5.

100. Greene v. McElroy, 360 U.S. 474 (1959).

101. *Id.* at 475.

attended a dinner given by an allegedly Communist front organization.[102] Although the court of appeals recognized that Greene had suffered substantial harm from having his security clearance revoked, it held that Greene's suit presented no justiciable controversy. That is, the court held there was no controversy present "which the courts can finally and effectively decide, under tests and standards which they can soundly administer within their special field of competence."[103] The court concluded the executive branch alone was responsible for the classification of national security information.[104]

Although the case presented issues related to the inherent powers of Congress and the President to control national security information, avoiding the larger issues presented by the case, the Supreme Court identified the principle question of law as 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."[105] The Court held that without explicit authorization from either the President or Congress, the DOD was not empowered to create a security clearance program "under which affected persons may lose their jobs and may be restrained in following their chosen professions on the basis of fact determinations concerning their fitness for clearance made in proceedings in which they are denied the traditional procedural safeguards of confrontation and cross-examination."[106] Thus, the majority was very clear that it was steering away from legal questions of access and executive power.[107]

---

102. *Id.* at 478.

103. Greene v. McElroy, 254 F.2d 944, 953 (D.C. Cir. 1958) ("Greene makes no claim of lack of compliance by the Government with its own regulations. He attacks the Secretary's decision on its merits and as a matter of constitutional right. But for a court to hear de novo the evidence as to Greene's fitness to be assigned to a particular kind of confidential work would be a bootless task, involving judgments remote from the experience and competence of the judiciary.").

104. *Id.* ("[A]ny meaningful judgment in such matters must rest on considerations of policy, and decisions as to comparative risks, appropriate only to the executive branch of the Government. It must rest also on a mass of information, much of it secret, not appropriate for judicial appraisal." (citing Dayton v. Dulles, 254 F.2d 71 (D.C. Cir. 1958), *rev'd on other grounds*, 357 U.S. 144 (1958))).

105. *Greene*, 360 U.S. at 492.

106. *Id.* at 493.

107. *See id.* at 508 (reiterating that the Court was not deciding "whether the President has inherent authority" to create a program that suspended due

Justice Tom C. Clark, however, wrote an important dissenting opinion, which argued the case presented a "clear and simple" legal question: was there a constitutional right of access to government information?[108] Taking this characterization of the case directly from the Solicitor General's brief,[109] Clark was critical of the majority's narrowing of the issue as well as its reasoning. He 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."[110] Clark wrote that although the majority's opinion *claimed* to avoid answering the constitutional question of the executive branch's ability to classify information, its decision was actually establishing a dangerous precedent during a dangerous time. Alluding to the Cold War, Clark wrote that the Court's decision to strike down the program "for lack of specific authorization" was "indeed strange, and hard for me to understand at this critical time of national emergency."[111] In addition, although the majority opinion never mentioned a "right of access" and Clark's dissent did not specifically mention a First Amendment right of access to government information, Clark concluded that the majority opinion would be read to guarantee some sort of broad right of access in the future.[112]

In *Zemel v. Rusk*, a case which would later be cited by a number of access cases, the 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."[113] In 1962, roughly one year after the United States broke diplomatic ties with Cuba and declared U.S. passports invalid for travel to Cuba "unless specifically endorsed for such travel under the authority of the Secretary of State,"[114] Zemel filed a suit seeking a judgment declaring that he was "entitled under the Constitution and laws of the

process, "whether congressional action" was necessary to create such a program, or even "what the limits on executive or legislative authority may be").

108. *Id.* at 510–11 (Clark, J., dissenting).

109. *Id.* at 511 n.1 ("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.").

110. *Id.* at 513.

111. *Id.* at 515.

112. *Id.* at 524.

113. 381 U.S. 1, 4 (1965).

114. *Id.* at 3.

United States to travel to Cuba and to have his passport validated for that purpose."[115]

Although the Court acknowledged that banning travel to Cuba and "the Secretary's refusal to validate passports for Cuba renders less than wholly free the flow of information concerning that country," it refused to acknowledge the existence of a First Amendment issue.[116] Instead, relying on a First Amendment theory that did not embrace newsgathering, the Court concluded, "The right to speak and publish does not carry with it the unrestrained right to *gather* information."[117]

While the majority did not agree there was a First Amendment issue at stake, a dissent authored by Justice William O. Douglas and joined by Justice Arthur Goldberg identified a "peripheral" First Amendment issue presented by the case. Relying on *Kent v. Dulles*,[118] Douglas concluded the Court had already established that the right to travel both at home and overseas was protected by the Constitution.[119] Delving deeper into First Amendment theory, Douglas used a classic marketplace of ideas approach to support his contention that although the Secretary could prevent travel to dangerous locations, Cuba did not qualify as such a location.

> [T]he only so-called danger present here is the Communist regime in Cuba. The world, however, is filled with Communist thought; and Communist regimes are on more than one continent. They are part of the world spectrum;

---

115. *Id.* at 4.

116. *Id.* at 16–17. ("We must agree that the Secretary's refusal to validate passports for Cuba renders less than wholly free the flow of information concerning that country. While we further agree that this is a factor to be considered in determining whether appellant has been denied due process of law, we cannot accept the contention of appellant that it is a First Amendment right which is involved. For to the extent that the Secretary's refusal to validate passports for Cuba acts as an inhibition (and it would be unrealistic to assume that it does not), it is an inhibition of action. There are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow.").

117. *Id.* at 17 (emphasis added).

118. 357 U.S. 116 (1958).

119. *Zemel*, 381 U.S. at 23–24 (Douglas, J., dissenting) ("We held in *Kent v. Dulles* that the right to travel overseas, as well as at home, was part of the citizen's liberty under the Fifth Amendment. That conclusion was not an esoteric one drawn from the blue. It reflected a judgment as to the peripheral rights of the citizen under the First Amendment. The right to know, to converse with others, to consult with them, to observe social, physical, political and other phenomena abroad as well as at home gives meaning and substance to freedom of expression and freedom of the press.").

> and if we are to know them and understand them, we must mingle with them . . . .
>
> The First Amendment presupposes a mature people, not afraid of ideas. The First Amendment leaves no room for the official, whether truculent or benign, to say nay or yea because the ideas offend or please him or because he believes some political objective is served by keeping the citizen at home or letting him go.[120]

Douglas concluded his opinion: "Restrictions on the right to travel in times of peace should be so particularized that a First Amendment right is not precluded unless some clear countervailing national interest stands in the way of its assertion."[121]

In 1988, a majority opinion finally addressed a right of access when the Court, in *Department of Navy v. Egan*,[122] ruled that it was solely the executive's role to classify and protect information and make decisions about access to national security information. In 1983, Thomas M. Egan lost his position at the Trident Naval Refit Facility in Bremerton, Washington when he was denied a required security clearance.[123] Egan appealed the decision to the Merit Systems Protection Board as provided by the section of the U.S. Code under which he was dismissed.[124] Although Egan initially won his appeal to the head of the Board, after the full Board ruled it had no power to review security clearance decisions, he appealed to the Court of Appeals for the Federal Circuit. The court of appeals, by a divided vote, reversed the full Board's decision that the Board had no authority to review the merits of a security-clearance decision.[125]

Identifying two legal issues presented—the right of access to information and the power of the executive branch—in a five-to-three decision, the Court reversed. Justice Blackmun's majority opinion began by noting, "It should be obvious that no one has a 'right' to a security clearance."[126] Blackmun wrote that although the statutory language of § 7513, which granted the power to review employment decisions to the Board was important, the

---

120. *Id.* at 25–26.

121. *Id.* at 26.

122. 484 U.S. 518 (1988).

123. *Id.* at 520. Egan was denied clearance based upon California and Washington state criminal records for assault and being a felon in possession of a gun and for his failure to disclose on his application for federal employment two earlier convictions for carrying a loaded firearm. *Id.* at 521.

124. 5 U.S.C. § 7513 (1982).

125. Egan v. Dep't of Navy, 802 F.2d 1563 (Fed. Cir. 1986).

126. *Egan*, 484 U.S. at 528.

statute did not fundamentally alter the power of the executive under the Constitution to control national security information:

> 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.[127]

Next, Blackmun wrote there was a compelling need to keep information secret and the executive branch had the unique ability to decide what should be kept secret, noting that the Court had long "recognized the Government's 'compelling interest' in withholding national security information from unauthorized persons in the course of executive business."[128] He wrote that "'for reasons . . . too obvious to call for enlarged discussion,' the protection of classified information must be committed to the broad discretion of the agency responsible"[129] and it was "the generally accepted view that foreign policy was the province and responsibility of the Executive."[130] In conclusion he wrote, "Thus, unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs."[131]

B. *Lower Court Cases*

In 1973, in *Brunnenkant v. Laird*,[132] a relatively obscure and rarely cited case,[133] the D.C. District Court ruled that the First Amendment prevented the government from removing Siegfried

---

127. *Id.* at 527.

128. *Id.* (citing Snepp v. United States, 444 U.S. 507, 509 n.3 (1980); United States v. Robel, 389 U.S. 258, 267 (1967); United States v. Reynolds, 345 U.S. 1, 10 (1953); Totten v. United States, 9 U.S. 105, 106 (1876)).

129. *Id.* at 529 (quoting CIA v. Sims, 471 U.S. 159, 170 (1985)).

130. *Id.* (quoting Haig v. Agee, 453 U.S. 280, 293–94 (1981)).

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

132. 360 F.Supp. 1330 (D.D.C. 1973).

133. Westlaw.com's "Citing References" function reported only a single, unreported case that cited *Brunnenkant*, Doviak v. Dep't of the Navy, Appeal No. 01860381, 1987 WL 908627 (E.E.O.C. 1987).

Brunnenkant's security clearance solely for voicing his social and political opinions.[134] Although the court noted that in most cases involving national security the key legal issue was to balance competing interests, it wrote there was no need to engage in balancing here because the evidence overwhelmingly showed that Brunnenkant, a resident alien in the employ of a private contractor working for the U.S. government, lost his security clearance solely for voicing "heterodox political, social and economic views."[135] Relying upon the Supreme Court's ruling in *Bridges v. California*[136] and "other opinions too numerous to cite,"[137] District Judge John H. Pratt granted Brunnenkant's request for declaratory and injunctive relief. Although Pratt mentioned "balancing" competing interests in his opinion, he did not address any separation of powers issues. At no point did he mention deferring to the executive in matters of national security, hint that the court might be exercising its power in an area in was not meant to, or even cite *Greene*.[138]

Four years later, in 1977, the D.C. Circuit Court of Appeals heard two access cases. The first, *United States v. American Telephone & Telegraph, Co.*,[139] addressed national security information and the inherent power of both the executive and legislative branches of government. 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. (AT&T). 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."[140]

The court focused almost entirely on the separation of powers issues. First, the court addressed what it considered the "primary issue"[141] of the case, the political question doctrine.[142]

134. *Brunnenkant*, 360 F.Supp. at 1332. ("[T]he withdrawal of plaintiff's security clearance, as a result of his expressions of opinion, is an unconstitutional invasion of his rights under the First Amendment.").

135. *Id.*

136. 314 U.S. 252 (1942).

137. *Brunnenkant*, 360 F.Supp. at 1332.

138. The entire opinion only cites one case other than *Bridges*, United States v. Robel, 389 U.S. 258 (1967).

139. 567 F.2d 121 (D.C. Cir. 1977).

140. *Id.* at 123–24.

141. *Id.* at 125–26.

142. The political question doctrine deals with the appropriateness of having a case decided by a court. A political question is one "that a court will

Both the legislative branch and the executive branch claimed in their briefs that the court did not have the authority to make a "determination of the propriety of [their] acts."[143] While Congress based its claim of "absolute discretion" on the Speech or Debate Clause,[144] the executive relied "on its obligation to safeguard the national security."[145]

The court disagreed with both parties, holding that "neither the traditional political question doctrine nor any close adaptation thereof is appropriate where neither of the conflicting political branches has a clear and unequivocal constitutional title, and it is or may be possible to establish an effective judicial settlement."[146] Citing the U.S. Supreme Court's 1962 decision in *Baker v. Carr*,[147] the court noted 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.[148] Instead, the court wrote, the political question doctrine applied when only one branch had the "constitutional authority" to make a decision that would settle the dispute.[149]

The court then discussed at length which branch had the constitutional authority to control information classified for national security purposes. The court relied on the Framers' intent and the text of the Constitution, in combination with the Supreme Court's decision in *Youngstown Sheet & Tube Co. v. Sawyer*,[150] to reach its conclusion. First, the court concluded that the

---

not consider because it involves the exercise of discretionary power by the executive or legislative branch." BLACK'S LAW DICTIONARY 1197 (8th ed. 2004).

143. *AT&T*, 567 F.2d at 127.

144. U.S. CONST. art. I, § 6, cl. 1.

145. *AT&T*, 567 F.2d at 127 n.17.

146. *Id.* at 127.

147. 369 U.S. 186, 217 (1962).

148. *AT&T*, 567 F.2d at 126.

149. *Id.* In addition, in a footnote the court cited a number of cases to support its conclusion that "disputes concerning the allocation of power between the branches have often been judicially resolved." *Id.* at n.13 (citing United States v. Nixon, 418 U.S. 683 (1974); Humphrey's Ex'r v. United States, 295 U.S. 602 (1935); Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579 (1952); Myers v. United States, 272 U.S. 52 (1926); Campaign Clean Water, Inc. v. Train, 489 F.2d 492 (4th Cir. 1973), *vacated on other grounds*, 420 U.S. 136 (1975); State Highway Comm'n v. Volpe, 479 F.2d 1099 (8th Cir. 1973)).

150. *Youngstown*, 343 U.S. 579. *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 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.

Framers did not intend for absolute authority over any area of governance to rest with any of the three branches. According to the court's opinion, 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."[151]

Next, moving from the Framers' intent to textualism, the opinion addressed the executive branch's claim that the Constitution conferred upon it absolute power in the arena of national security. Judge Harold Leventhal wrote that such a claim was not supported through textual analysis.[152] However, "most significant" to Judge Leventhal was "the fact that the Constitution is largely silent on the question of allocation of powers associated with foreign affairs and national security."[153] The opinion then invoked Justice Robert H. Jackson's much quoted passage from *Youngstown* that such powers are "within a 'zone of twilight' in which the President and Congress share authority or in which its distribution is uncertain."[154]

Thus, after also determining that it did not "accept the concept that Congress' investigatory power is absolute,"[155] the court attempted to balance the executive's interest in national security and Congress' interest in investigating the warrantless wiretapping program by using a "gradual approach."[156] However, while the court's balancing approach was somewhat analogous to the majority's opinion in *Greene*, it framed the case much closer to Clark's dissent, focusing on control of national security information.

---

151. *AT&T*, 567 F.2d at 127.

152. *Id.* at 128.

153. *Id.*

154. *Id.* (quoting *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring)). Jackson's full quotation reads:

> When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.

Youngstown, 343 U.S. at 637 (Jackson, J., concurring).

155. *AT&T*, 567 F.2d at 130.

156. *Id.* at 131.

Just a few months after its decision in *AT&T*, the D.C. Circuit was called upon in *Sherrill v. Knight*[157] to determine if the First Amendment rights of a journalist were violated by the White House's refusal to grant a press pass. While the case did not directly implicate national security information *per se*, it was decided as an access case, dealing with the ability of the executive branch of the government to curtail newsgathering based on concerns related to the safety of the President, and containing a detailed discussion of a constitutionally based right to know.

In 1966, when Robert Sherrill, the White House correspondent for *The Nation*, was denied a press pass based on the results of an investigation by the Secret Service, he filed for relief in federal district court, alleging that the denial of a press pass violated the First and Fifth Amendments to the Constitution.[158] When it reached the D.C. Court of Appeals, the circuit court found the case implicated the First and Fifth Amendments and the right of access.[159] First, however, the court dealt with the issue of justiciability[160] and the executive's constitutional power, soundly rejecting the government's attempt to frame the case in terms of separation of powers and its argument that the Constitution prohibited the judiciary from ruling on the case because access to the White House and the safety of the President were outside the power of the judiciary.[161]

Citing *Pell v. Procunier*[162] and dicta from *Zemel*[163] for the respective propositions that the press had no greater First Amendment right of access than the general public and the general public had no First Amendment right of access to the White

157. 569 F.2d 124 (D.C. Cir. 1977).

158. *See* Forcade v. Knight, 416 F. Supp. 1025 (D.D.C. 1975). Thomas Forcade, a correspondent for the Alternate Press Syndicate who was also denied a White House press pass, was a second party to the complaint in the district court case. Although the judgment of the district court pertained to both Forcade and Sherrill, Forcade disclaimed further interest in the case after the parties appealed, but before the court of appeals ruled. *Sherrill*, 569 F.2d at 126 n.1.

159. *Sherrill*, 569 F. 2d at 128.

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

161. *Sherrill*, 569 F. 2d at 128 n.14.

162. 417 U.S. 817, 833–34 (1974) ("The Constitution does not, however, require government to accord the press special access to information not shared by members of the public generally.").

163. Zemel v. Rusk, 381 U.S. 1, 16–17 (1965) ("For example, the prohibition of unauthorized entry into the White House diminishes the citizen's opportunities to gather information he might find relevant to his opinion of the way the country is being run, but that does not make entry into the White House a First Amendment right.").

House, the government argued that denial of a White House press pass would violate the First Amendment "only if it is based upon the content of the journalist's speech or otherwise discriminates against a class of protected speech."[164] While the court wrote that denying a press pass on content-based criteria would be problematic, it also concluded that there were additional First Amendment arguments to consider. Chief among these was "the protection afforded newsgathering under the first amendment guarantee of freedom of the press."[165] Citing a host of Supreme Court decisions, the court concluded:

> [T]he protection afforded newsgathering under the first amendment guarantee of freedom of the press, requires that this access not be denied arbitrarily or for less than compelling reasons. Not only newsmen and the publications for which they write, but also the public at large have an interest protected by the first amendment in assuring that restrictions on newsgathering be no more arduous than necessary, and that individual newsmen not be arbitrarily excluded from sources of information.[166]

However, although the court clearly identified the First Amendment issue in the case, its focus on the specific pragmatic concerns of the case led it to conclude that while denial of a press pass could violate the First and Fifth Amendments, neither amendment justified requiring "the articulation of detailed criteria upon which the granting or denial of White House press passes is to be based."[167] Instead, the court ordered the Secret Service to "publish or otherwise make publicly known the actual standard employed in determining whether an otherwise eligible journalist will obtain a White House press pass."[168] Additionally, the court wrote that it expected courts to "be appropriately deferential to the Secret Service's determination of what justifies the inference that an individual constitutes a potential risk to the physical security of the President or his family."[169]

---

164. *Sherrill*, 569 F.2d at 129.

165. *Id.*

166. *Id.* at 129–30. The court cited *Branzburg v. Hayes*, 408 U.S. 665, 681, 707 (1972), and *Pell*, 417 U.S. at 829–35, for the proposition that the First Amendment protected newsgathering; *Southeastern Promotions v. Conrad*, 420 U.S. 546 (1975), and *Lovell v. Griffin*, 303 U.S. 444 (1938), as requiring that access for the purpose of newsgathering not be denied for "less than compelling reasons"; and *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491–92 (1975), and *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting), for the conclusion that the public had a right to receive information.

167. *Sherrill*, 569 F.2d at 128.

168. *Id.* at 130.

169. *Id.*

In 1991, the Southern District of New York considered the existence of a First Amendment right of access to a foreign arena in which American military forces were engaged in *Nation Magazine v. Department of Defense*.[170] The case involved a challenge to the DOD regulations governing press coverage of American military activities during periods of open hostilities. While the plaintiffs raised First Amendment right of access issues, the government put forth a variety of arguments involving justiciability and separation of powers, including standing, the political question doctrine and mootness.[171] In addition, before deciding these issues, the court stated that even in "the event the Court determines that at least some of the issues are not moot and that there is jurisdiction to hear the claims, a question remains whether the Court *should* exercise its power to address the controversy."[172]

Focusing on precedents, the court determined that a "long line of cases addressing the role of the judiciary in reviewing military decisions" had left the clear message that "[c]ivilian courts should 'hesitate long before entertaining a suit which asks the court to tamper with the . . . necessarily unique structure of the Military Establishment.'"[173] Yet, despite this strong language that seemed to favor the government's position that the case was outside judicial power, the court was unwilling to go so far as to accept the government's claim that *all* cases involving the military were outside the power of Article III courts.[174] Instead, the court found the cases cited by the government differed from the case at hand in that they had involved "direct challenges to the institutional functioning of the military in such areas as the relationship between personnel, discipline, and training."[175] Unlike that line of cases, the court ruled that the present case did not impact the executive's foreign relations powers or require the

170. 762 F. Supp. 1558 (S.D.N.Y. 1991).

171. *Id.* at 1565.

172. *Id.* (emphasis added).

173. *Id.* at 1566–67 (quoting Chappell v. Wallace, 462 U.S. 296, 300 (1983)).

174. *Id.* at 1568 (concluding the plaintiffs' complaint alleged "claims that are judicially enforceable under the First and Fifth Amendments"). The court found the DOD's primary argument that "the political question doctrine bars an Article III court from adjudicating any claims that involve the United States military" unpersuasive. The court went on to state that "[u]nder this theory of separation of powers, a court would lack jurisdiction to hear any controversy that involved DOD, including any government actions that violated the rights of non-military personnel. This reasoning is inconsistent with large bodies of constitutional law." *Id.*

175. *Id.* at 1567.

court to move beyond its traditional area of expertise and, therefore, was justiciable.[176] On the issue of declaratory relief the court ruled that because the plaintiffs asserted that the existence of the DOD restrictions violated the First Amendment generally, and not simply as applied to operations in the Middle East, the court could hear the challenge.

Unfortunately for the media plaintiffs, that did not end the court's discussion. The court then wrote: "The question of the court's power to hear a case is, however, only the beginning of the inquiry. A separate and more difficult inquiry is whether it is *appropriate* for a Court to exercise that power."[177] Thus, although the court presented the case as dealing with a conflict between transparency and national security, the court also stated that it needed to consider what branch of government 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.[178]

To determine if it *should* exercise its power, the court turned to a detailed discussion of First Amendment theory, specifically whether theories related to self-governance and the checking function of the press supported the establishment of a right to know.

Although the media organizations argued that they were not asking the court to establish a new constitutional right of access that required "affirmative assistance" from the government to provide information,[179] the court reasoned that the case involved

176. *Id.*

177. *Id.* at 1570 (emphasis added).

178. *Id.* at 1571.

179. *Id.* ("The gravamen of plaintiffs' complaint is that, under the First Amendment, the press has a right to gather and report news that involves United States military operations and that DOD's pool regulations are an unconstitutional limitation on access to observe events as they occur. . . . In other words, plaintiffs claim that no affirmative assistance from the government

charting "new constitutional territory."[180] The court wrote that while the Supreme Court had considered cases involving the First Amendment and national security, none of those cases had directly addressed "the role and limits of news gathering under the First Amendment in a military context abroad," and therefore there was no direct precedent to rely upon.[181] Instead, the court turned to "case law on questions involving the access rights of the press and public" to answer the novel constitutional questions involving a right to access to military endeavors and whether press pools violated that right.[182]

Citing *United States v. Nixon*,[183] *Saxbe v. Washington Post*,[184] *Pell v. Procunier*[185] Houchins v. KQED,[186] and *Greer v. Spock*,[187] the court concluded "there is no right of access of the press to fora which have traditionally been characterized as private or closed to the public, such as meetings involving the internal discussions of government officials,"[188] and limitations may be "placed on access to government controlled institutions."[189] Next, however, the opinion cited the judicial access cases *Richmond*[190] and *Globe*[191] as examples of the Supreme Court's support for a First Amendment-based right to know:

> A fundamental theme in *Richmond* and *Globe* was the importance of an informed American citizenry. As the Court wrote, guaranteed access of the public to occurrences in a courtroom during a criminal trial assures "freedom of communication on matters relating to the functioning of government." Learning about, criticizing and evaluating government, the Supreme Court has rea-

---

is being requested, only the freedom from interference to report on what is overtly happening in an allegedly open area.").

180. *Id.* at 1572.

181. *Id.* The court cited *Near v. Minnesota*, 283 U.S. 697, 716 (1931), *New York Times Co. v. United States*, 403 U.S. 713, 722–23 (1971), and *Snepp v. United States*, 444 U.S. 507, 514–15 (1980) as examples of the cases in which the Supreme Court had considered the balance between the First Amendment and national security.

182. *Nation Magazine*, 762 F. Supp. at 1571.

183. 418 U.S. 683 (1974).

184. 417 U.S. 843 (1974).

185. 417 U.S. 817 (1974).

186. 438 U.S. 1 (1978).

187. 424 U.S. 828 (1976).

188. *Nation Magazine*, 762 F. Supp. at 1571 (citing *Nixon*, 418 U.S. at 705 n.15).

189. *Id.* (citing *Houchins*, 438 U.S. at 16; *Greer*, 424 U.S. at 838; *Saxbe*, 417 U.S. at 850; *Pell*, 417 U.S. at 828).

190. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980).

191. Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982).

> soned, requires some "right to receive" information and ideas.[192]

In addition, the court suggested that in *Globe* the Court implied that access to other situations might also be included in the Amendment[193] and pointed out that Justice Stevens had written that the right to be informed about government operations was important "even when the government has suggested that national security concerns were implicated."[194] The court summarized:

> Given the broad grounds invoked in these holdings, the affirmative right to gather news, ideas and information is certainly strengthened by these cases. By protecting the press, the flow of information to the public is preserved. As the Supreme Court has observed, "the First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw." Viewing these cases collectively, it is arguable that generally there is at least some minimal constitutional right to access.[195]

Having established the existence of some sort of right of access, the court speculated about how this would apply to the military. Although the court concluded that at least some right of access to the military might exist, it was uncertain because "military operations are not closely akin to a building such as a prison, nor to a park or a courtroom."[196] Ultimately, based on this uncertainty, the hypothetical nature of its discussion and the lack of concrete facts on which to apply precedent, the court refused to decide if there was a right of access. The Court wrote, "Pursuant to long-settled policy in the disposition of constitutional questions, courts should refrain from deciding issues presented in a highly abstract form, especially in instances where the Supreme Court has not articulated guiding standards."[197]

---

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

193. *Id.*

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

195. *Id.* (quoting First Nat'l Bank v. Bellotti, 435 U.S. 765, 783 (1978)). The court further cited *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972), for the proposition that "[w]ithout some protection for seeking out the news, freedom of the press could be eviscerated."

196. *Id.*

197. *Id.* (citing Rescue Army Mun. Court of Los Angeles, 331 U.S. 549, 575–85(1947)).

The court next considered whether the DOD's use of press pools gave preferential treatment to some members of the press. Again the court turned to Supreme Court precedent to support its discussion, this time focusing on the Court's public forum doctrine. First, the court discussed precedent that supported the plaintiffs' case, finding that because the government had decided to "open the door" to press coverage it had "created a place for expressive activity."[198] The Court wrote, "Regardless of whether the government is constitutionally required to open the battlefield to the press as representatives of the public, a question that this Court has declined to decide, once the government does so it is bound to do so in a non-discriminatory manner."[199] Citing *Sherrill*, the court ruled that government could not arbitrarily exclude some members of the press once it allowed others to cover the conflict.[200]

The court, however, then noted that the right to be free from discriminatory treatment was "not synonymous with a guaranteed right to gather news at all times and places or in any manner that may be desired"[201] and the press could be subjected to reasonable time, place and manner restrictions.[202] Thus, the court concluded that some restrictions might be appropriate at some point. After reaching this conclusion, however, the court declined to decide the issue. Instead, it concluded it was not faced with concrete enough facts to rule on the limitations on access.[203] Faced with two "significant and novel constitutional doctrines,"[204] and without clear direction from the Supreme Court or concrete facts to rule on, the court concluded that "based on all the circumstances of the case," the controversy was not "sufficiently concrete and focused to permit adjudication on the merits."[205]

198. *Id.* at 1573 (citing *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 48 (1983), for the proposition that the government had created a limited public forum by establishing pools for coverage for the Persian Gulf conflict).

199. *Id.* (citing Houchins v. KQED, 438 U.S. 1, 16 (1978); American Broad. Cos. v. Cuomo, 570 F.2d 1080, 1083 (2d Cir. 1977)).

200. *Id.* ("Once a limited public forum has been created, the government is under an obligation to insure that 'access not be denied arbitrarily or for less than compelling reasons.'" (quoting Sherrill v. Knight, 569 F.2d 124, 129 (D.C. Cir. 1977))).

201. *Id.*

202. *Id.* (citing Grayned v. Rockford, 408 U.S. 104, 115 (1972)).

203. *Id.* at 1574–75.

204. *Id.* at 1575.

205. *Id.* at 1568.

While to this day the Supreme Court has still not provided any clear direction, the D.C. District Court has twice decided cases very similar to *Nation Magazine* with nearly identical results. In *Getty Images News Service Co. v. Department of Defense*[206] and *Flynt v. Rumsfeld*,[207] the court engaged in similar First Amendment discussions as the *Nation Magazine* court, relied on almost identical precedents and again focused on the lack of a concrete controversy. In *Getty Images*, a case involving access to the U.S. government's detention center at Guantánamo Bay, the D.C. District Court discussed access, but ultimately determined that Getty had failed to demonstrate that injunctive relief was needed.[208] In the case, Getty Images News Services sought a preliminary injunction to enjoin the DOD to provide Getty with equal access to the detention facilities at Guantánamo Bay, to require the DOD to "promulgate standards and procedures ensuring equal access," and to compel the DOD to create a press pool for access to Guantánamo.[209] Getty alleged that the DOD's actions violated the company's First Amendment right to equal access to Guantánamo and Fifth Amendment right to equal protection, and that the company's First and Fifth Amendment rights had been violated "because adequate regulatory standards had not been developed and applied."[210]

In considering Getty's claim, the court primarily relied upon *Sherrill* and *Nation Magazine* to reach its conclusions. The court used these two cases to support Getty's argument that once the DOD "opened Guantánamo Bay to certain members of the press, all members of the press became constitutionally entitled to equal access to the detention facilities there."[211] In addition, after a discussion of *Sherrill*, the court concluded that, although it was "reluctant to interfere" with military conduct,[212] the First and

206. 193 F. Supp. 2d 112 (D.D.C. 2002).

207. 245 F. Supp. 2d 94 (D.D.C. 2003).

208. *Getty Images*, 193 F. Supp. 2d at 118–25.

209. *Id.* at 113–14. In addition, Getty also sought to enjoin the DOD from excluding it from participation in the National Media Pool or any ad hoc or regional pools created during Operation Enduring Freedom. However, by the time the case reached the district court, Getty was granted membership in the National Media Pool and the Afghanistan regional pool no longer existed. *See id.* at 14–16.

210. *Id.* at 114. In addition, the media company argued its due process rights under the Fifth Amendment were violated because the company's competitors "had allegedly been delegated the power to regulate Getty's access to pool coverage." *Id.*

211. *Id.* at 118.

212. *Id.* at 121. The court agreed with the government's arguments "that the Guantánamo Bay Naval Base [was] not a public forum and that consideration of Getty's First and Fifth Amendment claims must be undertaken through

Fifth Amendments required, "at a minimum, that before determining which media organizations receive the limited access available" there must be some reasonable criteria to guide the DOD decisions.[213] Quoting the *Sherrill* court's discussion of First Amendment protection for newsgathering,[214] the court determined that the First Amendment required the government to have solid reasoning behind its decisions and refrain from arbitrary or capricious decision making.[215]

Ultimately, however, the court ruled that it was not the appropriate time to grant Getty's motion for an injunction. Although the court wrote that it was persuaded that Getty had raised "a serious question" relating to its request for equal access and that the DOD "at some point in time" would have to establish and publish non-arbitrary criteria and a process to govern media access, the court would not grant Getty's injunction.[216] To support this ruling, the court balanced Getty's interests and likelihood of success against the public's interest in *not* granting access.[217] The court weighed the potential harm to the public interest that a disruption at Guantánamo Bay would cause against Getty's "speculative" First Amendment claims.[218] The court reasoned that "absent some concrete and irreparable diminution of First Amendment rights," it was "not possible to conclude that the public interest favors the injunctive relief Getty seeks."[219] In its conclusion, the district court focused on the speculative nature of both a First Amendment right of access and Getty's claims that it was being harmed to support the decision not to grant an injunction.[220] One year later, the court adopted a similar stance in *Flynt*.

Like *Nation Magazine, Flynt* involved a magazine's claim that DOD regulations violated the "qualified First Amendment right"

---

the prism of the heightened deference due to military regulations and decision-making." *Id.* at 119.

213. *Id.* at 121.

214. *Id.* at 119 (quoting Sherrill v. Knight, 569 F.2d 124, 129–30 (D.C. Cir. 1977)).

215. *Id.* at 121.

216. *Id.* at 124.

217. *Id.* At no time did the court consider the public's interest in *receiving* information about the Guantánamo Bay detention facility, terrorists or terrorism trials.

218. *Id.* at 123–24.

219. *Id.* at 124. While the court found in favor of Getty on parts one and two of the test, it found that the public interest outweighed the speculative nature of Getty's claims. *Id.*

220. *Id.*

of media access to the battlefield.[221] While the court discussed the First Amendment implications of access, it focused instead on the hypothetical nature of the claim and the need to practice judicial restraint in such situations. In 2001, *Hustler Magazine* requested that one of its correspondents be allowed "to accompany and cover American ground forces in Afghanistan and wherever else such forces may be utilized in this campaign against terrorism."[222] While the *Hustler* correspondent was placed on a waiting list of journalists seeking to embed with conventional combat troops, because all of the ground forces in Afghanistan at the time were Special Operations Forces, the correspondent was not allowed to accompany any soldiers on actual missions.[223] In what would become a central argument to the case, the DOD claimed that it was "awaiting approval to allow reporters to accompany special forces on missions."[224]

In challenging the DOD's regulations, *Hustler* made two distinct claims. First, the magazine challenged the DOD regulations as applied,[225] charging that the DOD violated *Hustler's* First Amendment rights by "improperly denying a *Hustler* correspondent the right to accompany combat forces on the ground in Afghanistan."[226] Second, the magazine brought a facial challenge.[227] The opinion first considered *Hustler's* as-applied challenge. The court held that it had no jurisdiction to address the issue because the controversy was not ripe for review, nor did *Hustler* have standing. Although *Hustler* attempted to insert the First Amendment into the argument by contending that a ripe controversy existed because the parties disagreed as to whether there was "a First Amendment right of media access to the battlefield,"[228] the court wrote that the "mere existence of a legal disagreement about the scope of the First Amendment [did] not make that disagreement fit for judicial review."[229] Instead,

221. Flynt v. Rumsfeld, 245 F. Supp. 2d 94, 99 (D.D.C. 2003).

222. *Id.* at 97.

223. *Id.* at 97–98.

224. *Id.* at 99.

225. "A claim that a law or government policy, though constitutional on its face, is unconstitutional as applied, usually because of a discriminatory effect; a claim that a statute is unconstitutional on the facts of a particular case or in its application to a particular party." BLACK'S LAW DICTIONARY 244 (8th ed. 2004).

226. *Flynt*, 245 F. Supp. 2d at 99.

227. "A claim that a statute is unconstitutional on its face—that is, that it always operates unconstitutionally." BLACK'S LAW DICTIONARY 244 (8th ed. 2004).

228. *Flynt*, 245 F. Supp. 2d at 102.

229. *Id.*

because the DOD was still technically "awaiting permission" to allow journalists to travel with the only troops on the ground, the court held the issue had not been settled and was, therefore, not ripe for review. It wrote *Hustler's* as-applied claims were "not fit for judicial decision at this juncture because defendants have not made a final decision with respect to plaintiffs' request for access to combat ground forces in battle."[230]

Next, considering *Hustler's* facial challenge, although the court admitted that "there may be a limited or qualified right of media access to the battlefield"[231] based on the First Amendment, it declined to definitively decide the issue. Instead, the court turned to the issue of judicial power, writing that the case was more about the role of the courts in making decisions than it was about the First Amendment. The court held it could decide the case under the political question doctrine because *Hustler* was not making a claim that went to "the heart of the military's 'goals, directives and tactics'" by challenging the DOD's regulations.[232] The court wrote:

> In their facial challenge claims plaintiffs do not ask the Court to delve into tactical decisions made by defendants. They ask the Court only to consider whether a First Amendment right of media access to the battlefield exists—a right they themselves characterize as a 'qualified right of access' subject to reasonable Executive Branch regulations—and, if so, to direct defendants to enact guidelines that comport with such First Amendment protections.[233]

However, the court never truly addressed the existence of a First Amendment "qualified right of access." Instead the court ruled that just because it had jurisdiction to hear the facial challenge, that conclusion did "not necessarily result . . . in adjudication of plaintiffs' claims on the merits at this time."[234] Quoting the admonition from *Getty Images* that "the absence of a concrete controversy is of particular concern in light of the important constitutional issues at stake and the national defense interests that might be implicated,"[235] as well as a lengthy passage from *Nation*

230. *Id.* at 101.

231. *Id.* at 108.

232. *Id.* at 106–07.

233. *Id.* at 107.

234. *Id.*

235. *Id.* at 109 (quoting Getty Images News Servs. Corp. v. Dep't of Defense, 193 F. Supp. 2d 112, 113, 118 (D.D.C. 2002)).

Magazine,[236] the court concluded the "prudent course" was to "delay resolution of these constitutional issues until and unless plaintiffs are denied access after having pursued their request through normal military channels."[237] The court therefore "declined to exercise its discretion" to consider the facial challenge.[238]

V. CONCLUSION

There are a number of significant differences between access cases involving the judiciary and access cases involving national security, and comparing the cases leads to a number of interesting conclusions. First, it is clear that the Supreme Court has sent mixed signals to lower courts about the existence of a First Amendment based right of access. With the exception of a few early cases, the Court has framed access to judicial proceedings as a First Amendment issue that advances trust in the judicial system and the democratic process. As the *Nation Magazine* court noted, in cases that have considered a right of access to the judiciary, the Supreme Court has consistently articulated a broad right of access—a right that might not even be limited to the judiciary.[239] In addition, the opinions in these cases reference a wide range of sources for this right, including Framers' intent, structural and functional analysis, and historical evidence. However, because the discussion of a broad right of access that extends beyond judicial proceedings and documents has never been fully articulated or endorsed by the Court, lower courts considering access to national security information or locations have had trouble determining when or if there is a right of access. For example, as noted, when faced with the question, the

236. *Id.* ("In order to decide this case on the merits, it would be necessary to define the outer constitutional boundaries of access. Pursuant to long-settled policy in the disposition of constitutional questions, courts should refrain from deciding issues presented in a highly abstract form, especially in instances where the Supreme Court has not articulated guiding standards. . . . Since the principles at stake are important and require a delicate balancing, prudence dictates that we leave the definition of the exact parameters of press access to military operations abroad for a later date when a full record is available, in the unfortunate event that there is another military operation. Accordingly, the Court declines to exercise its power to grant plaintiffs' request for declaratory relief on their right of access claim." (quoting Nation Magazine v. Dep't of Defense, 762 F. Supp. 1558, 1572 (S.D.N.Y. 1991) (citing Rescue Army v. Municipal Court of L.A., 331 U.S. 549, 575–85 (1947)))).

237. *Id.* at 110.

238. *Id.*

239. 762 F. Supp. at 1572.

Nation Magazine court discussed the different approaches and conflicting results in Supreme Court access cases.[240]

In addition, analysis of these cases indicates that confusion over the existence of the right to know is also the product of the judiciary's reluctance to intrude into an area where it does not have expertise or concludes it would be intruding on the constitutional authority of another branch of government. The national security cases clearly demonstrate the judiciary's extreme reluctance to become involved in another branch of government's affairs. Although courts considering access to national security locations or information have engaged in discussions of a First Amendment right of access, ultimately, most of the courts focused on other issues that allowed them to avoid deciding the cases based on a right of access. While some of the cases specifically presented the issues in terms of justiciability, mootness or the political question doctrine, others engaged in discussions of the need to balance the powers of the separate branches of government or decided the facts of the case were not developed enough to intercede on behalf of the press.

The importance of the courts' concern with their own power and role is highlighted by the fact that in the national security access cases discussions about separation of powers often overshadowed discussion of balancing government transparency with national security or the benefits transparency brings to the democratic process. Only three of the national security access opinions—the majority opinion as well as Justice White's dissent in *Egan*, and *Nation Magazine*—specifically presented the cases as dealing with the need to balance national security with the First Amendment and transparency concerns and decided the cases by focusing on the issue.[241] The *Nation Magazine* court was particularly clear that the case was about balancing the two issues. Although *Sherrill*,[242] *Getty Images*,[243] and *Flynt*[244] all discussed balancing transparency with another factor, the opinions relied on practical case specific considerations to reach their decisions and refused to break new constitutional ground on amorphous or shifting facts. No lower court was willing to advance a right of access based on abstract issues and hypothetical situations. Although they have been willing to consider extending a consti-

240. *Id.*

241. *See* Dep't of Navy v. Egan, 484 U.S. 518, 527–28 (1988); *id.* at 534–38 (White, J., dissenting); *Nation Magazine*, 762 F. Supp. at 1571.

242. Sherrill v. Knight, 569 F. 2d 124 (D.C. Cir. 1977).

243. Getty Images News Services Co. v. Dep't of Def., 193 F. Supp. 2d 112 (D.D.C. 2002).

244. Flynt v. Rumsfeld, 245 F. Supp. 2d 94 (D.D.C. 2003).

tutional right of access well beyond the courtroom, they have not seen fit to actually rule on whether such a right exists, instead focusing on other issues and waiting for the Supreme Court to clarify how far access extends.

While this approach was particularly evident in the lower court national security cases, it was also present in at least one Supreme Court case, *Warner Communications*,[245] in which the Court decided the question presented would best be answered outside of the judiciary. As noted, instead of confronting the executive or legislative branches, the Court declined to rule on the existence of a right of access, and instead held that the Presidential Recordings Act would ultimately control the release of the records.[246] In an argument that was very similar to the national security access cases, Justice Powell's majority opinion simply stated that the courts were not well equipped to handle the details of access to presidential records[247] and failed to address major access issues raised by the case.

Thus, when confronted with another branch of government, although many courts engaged in detailed discussions of the benefits of a First Amendment right of access, ultimately most courts found other ways to reach a conclusion. Although a few courts have voiced concerns or put restraints on the executive branch's ability to control national security information,[248] the general trend has been for courts to rule that they are not qualified to consider the cases dealing with national security.[249]

There are a number of explanations for courts' desire to not decide these cases. First, it is possible that this emphasis is related to legitimate constitutional questions and concerns. Several of the cases discussed above focused on which branch of government was given the power to control national security information by the Constitution or focused on the Framers' intent to determine who should have the power. For example, in

245. Nixon v. Warner Commc'ns, Inc., 435 U.S. 589 (1978).

246. *Id.* at 603.

247. *Id.* at 606.

248. *See* Dep't of Navy v. Egan, 484 U.S. 518, 534 (1988) (White, J., dissenting); Greene v. McElroy, 360 U.S. 474 (1959); United States v. American Tel. & Tel. Co., 567 F.2d 121 (D.C. Cir. 1977).

249. *See, e.g.*, Hall v. U.S. Dep't of Labor, Admin. Review Bd., 476 F.3d 847 (10th Cir. 2007); Bennett v. Chertoff, 425 F.3d 999 (D.C. Cir. 2005); Hill v. White, 321 F.3d 1334 (11th Cir. 2003); Reinbold v. Evers, 187 F.3d 348 (4th Cir. 1999); Makky v. Chertoff, 489 F. Supp. 2d 421 (D.N.J. 2007); Nickelson v. United States, 284 F. Supp. 2d 387 (E.D. Va. 2003); Cobb v. Danzig, 190 F.R.D. 564 (S.D. Cal. 1999); Edwards v. Widnall, 17 F. Supp. 2d 1038 (D. Minn. 1998); Stehney v. Perry, 907 F. Supp. 806 (D.N.J. 1995). *But see* Ranger v. Tenet, 274 F. Supp. 2d 1 (D.D.C. 2003).

Egan, 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."[250] Second, it could be related to practical concerns with the ability and/or expertise of the courts to deal with national security information. Several courts have stated their concerns with 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.[251]

Finally, it is possible that it is related to inter-institutional constraints placed on the judiciary. Scholars who advance the "strategic account" of judicial decision-making have argued that judges are strategic actors who must consider the preferences of other actors and institutions and the institutional and historical context in which they act.[252] 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. While the Constitution set out the powers of each branch, scholars have noted that this was only the beginning of a long process by which political institutions take shape.[253] 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]."[254] Under this analysis, it is clear that in national security access cases, the courts are being mindful of the desires and powers of other political institutions.

Because they deal with the powers of the other branches of government, the national security access opinions become especially important to consider when discussing access to terrorism trials. In the judicial access cases, concerns with intruding upon another branch of government were, of course, not present. Because the justices were in effect creating rules for their own house, the Court had leeway to rely upon structural and functional arguments to create a system of access and dissemination without worrying about overextending their power. After the September 11, 2001, terrorist attacks, however, the U.S. government has claimed a need to conduct numerous judicial proceedings in secret, based on national security concerns. Therefore, because these cases will combine judicial access and national

250. Dep't of Navy v. Egan, 484 U.S. 518, 527 (1988).

251. *See, e.g.*, Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362, 1369–70 (4th Cir. 1975).

252. *See, e.g.*, EPSTEIN & KNIGHT, *supra* note 42, at 10–18.

253. Knight & Epstein, *supra* note 42, at 88.

254. *Id.*

security access cases, it is helpful to analyze access to terrorism trials under the conceptual framework offered by social architecture theory in order to ensure the values and architecture advanced by the judicial access cases continue to be reinforced, even when dealing with national security information.

As Daniel Solove wrote, all law should be used to establish an "architecture of power" that maintains the appropriate balance of power in relationships.[255] 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 these symptoms."[256] Similarly, although many of the national security cases outlined above are clear examples of judges discussing power relationships, they are too frequently decided on issues related to specific circumstances of the cases rather than on architecture.

When judges, politicians and other government officials consider cases or public policy dealing with access to terrorism trials, it is important to remember the nation's original social architecture, as established by the Constitution and the First Amendment. As noted in several cases discussed above, the Framers of the Constitution were acutely aware of the dangers of the accumulation of power in the same hands.[257] For example, referring to an architecture of power that went beyond a focus on the individual complaint, the D.C. Circuit wrote in *ATT*[258] 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."[259] 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."[260]

---

255. Solove, *supra* note 19, at 1087.

256. DANIEL J. SOLOVE, THE DIGITAL PERSON: TECHNOLOGY AND PRIVACY IN THE INFORMATION AGE 100 (2004).

257. *See, e.g.*, THE FEDERALIST NO. 47, at 239 (James Madison) (Lawrence Goldman ed., 2008) (writing the accumulation of power "in the same hands . . . may justly be pronounced the very definition of tyranny").

258. United States v. Am. Tel. & Tel. Co., 567 F.2d 121 (D.C. Cir. 1977).

259. *Id.* at 127.

260. *Id.*

In addition, when judges and policy makers move beyond separation of powers concerns to focus on balancing national security and transparency or, more fundamentally, the relationship between the government, the press and the people, they 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.*[261] 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.[262] Locke's understanding of the social contract is based on the pre-existing rights of the individual, which are retained even when the individual enters 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 free expression."[263] 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,[264] government should be judged by the governed through the free exchange of ideas,[265] and citizens need as much information about their government as possible in order to function in a democracy.[266] In terms of social architecture theory, Locke "proposed a social architecture in which power ultimately belonged to citizens, not those who governed them."[267]

Therefore, judges and other policy makers 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

261. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT (Thomas P. Peardon, ed., Bobbs-Merrill Co. 1975) (1690).

262. *See, e.g., id.* at 32 (writing "the end of law is not to abolish or restrain, but to preserve and enlarge freedom").

263. Silver, *supra* note 33, at 172–73.

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

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

266. *Id.* at 92–93.

267. Packer, *supra* note 32, at 401.

war-launching invasion,"[268] these two values must *always* coexist. Advocating for an architecture of power that embraces these notions goes beyond arguing that courts should recognize the individual rights of the plaintiffs in access to terrorism trial cases. It advocates decisions that empower both the courts and society in a broad and meaningful way.

There are several ways for judges and policy makers to reinforce the architecture established by the Constitution and First Amendment, as well as uphold the structure created by the judicial access cases, while also ensuring that national security information is protected during trials involving terrorist suspects. First, judges should be mindful of the Supreme Court's discussion of the long history and benefits of access to court proceedings and documents. Opening criminal trials to the public contributes to fairness, reliability and trust in the judicial system[269] and a right of access is necessary to protect the free flow of information about government in order to ensure the proper functioning of a democratic society.[270] In addition, open trials have a "therapeutic value" for the community,[271] a value that is especially important in terrorism cases given the effect of the terrorist attacks of September 11 on the American public. Furthermore, by actively deciding when to grant access—as courts have traditionally done in the judiciary cases—rather than deferring to other branches of government—as courts have done in the national security access cases—the judiciary will remain an independent, co-equal branch of government.

Finally, an architecture of access is especially important in cases dealing with terrorism trials because access to the judiciary by the press serves an especially important function in these cases. Because national security is important to every person in the United States, yet trials involving terrorism are located geographically distant from so much of the population, providing access to the press so that they may serve as "surrogates for the public"[272] is vital. As one scholar wrote:

> Cases involving national security necessarily deal with information that is of broad public interest to people

268. Thomas B. McAffee, *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).

269. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 569 (1980).

270. Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 604–05 (1982).

271. *Richmond*, 448 U.S. at 570–71 (1980) (writing that open criminal trials provide "an outlet for community concerns, hostility and emotion").

272. *Id.* at 572–73.

> outside of the geographic region in which the proceeding is taking place. Thus, as the interest in the case increases, the ability of interested individuals to monitor the proceedings decreases. Thus, . . . access . . . serves an even more important purpose and should be subject to an even more rigorous analysis.[273]

Additionally, it is important to note that the architecture of presumptive access created by the Supreme Court is not without limits. The Court has determined that although there is a First Amendment right of access to criminal trials, such a right can be overcome by an overriding or compelling interest, so long as that right is narrowly tailored, that is, as brief as possible to serve the interest. In *Press-Enterprise I*, the Court wrote:

> The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.[274]

While such an architecture would allow for the closing of terrorism trials in cases that truly warrant it for a narrow amount of time when the court specifically articulates why the closure is necessary, it would certainly not allow for the arbitrary closure of courtrooms or the removal of an entire case from a public docket.[275]

However, although this Article calls for the judiciary to take a greater role in providing access to terrorism trials, it is important to remember that constitutional doctrine provides only one way in which constitutional principles—and thus social architecture—can be advanced. As Professor Jack M. Balkin noted, "Sometimes [First Amendment] values are best enforced . . . by legislatures, administrative agencies, and by courts interpreting

---

273. Michael P. Goodwin, *A National Security Puzzle: Mosaic Theory and the First Amendment Right of Access in the Federal Courts*, 32 HASTINGS COMM. & ENT. L.J. 179, 201 (2010).

274. Press-Enter. Co. v. Riverside County Superior Court, 464 U.S. 501, 510 (1984).

275. *See, e.g.*, M.K.B. v. Warden, 540 U.S. 1213 (2004). After September 11, Mohamed Kamel Bellaouel, an Algerian man married to a U.S. citizen, was detained in Miami, Florida, for overstaying his student visa. Bellaouel was held for five months, during which time he was transferred to Virginia to testify at the trial of September 11 conspirator Zacarias Moussaoui. See Meliah Thomas, *The First Amendment Right of Access to Docket Sheets*, 94 CALIF. L. REV. 1537 (2006), for a more detailed discussion of the case.

statutes and regulations."[276] Statutory law—such as the Classified Information Procedures Act (CIPA)[277]—can also work to reinforce a social architecture of access and accountability. Because CIPA, which governs the use of classified information when such information is used in federal prosecutions, allows judges the ability to control national security information, court closures and blocking access to trial is not needed. When classified information must be used in a criminal proceeding, CIPA provides for in camera review by the presiding judge to determine if the information is relevant to the proceeding[278] and gives the judge tools for dealing with the classified information. For example, the judge may order the government to delete certain portions of the information, present an unclassified summary of the information, or summarize what the classified information might tend to prove.[279]

While the statute itself has no bearing on public access, it does provide the judiciary with a valuable tool that might alleviate concerns that the judiciary is not properly equipped to deal with national security information. This in turn allows the courts to maintain the appropriate balance of powers with the other branches of government—an important goal of social architecture—without having to worry about dangers to national security. Together, the ability to close trials for a specific, narrowly tailored reason and CIPA, ensure national security information is safe during terrorism trials. A 2008 study of terrorism prosecutions based on publicly available information concluded that no security breach has occurred during a terrorism trial because of a court's failure to close a docket or judicial proceeding and there is no evidence of a leak in a case in which CIPA has been invoked.[280]

Additionally, public policy—such as the Pentagon's new guidelines for reporters covering the detention and trials of terrorism suspects at Guantánamo Bay, Cuba—should embrace the

276. Balkin, *supra* note 30, at 941.

277. 18 U.S.C. app. 3 §§ 1–16 (2006).

278. *Id.* § 6(a), (d).

279. *Id.* § 4.

280. *See* JAMES J. BENJAMIN, JR. & RICHARD P. ZABEL, HUMAN RIGHTS FIRST, IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN FEDERAL COURTS 88 (2008), http://www.humanrightsfirst.info/pdf/080521-USLS-pursuit-justice.pdf. While it is possible that classified information might be able to prove otherwise, this provides another example of why transparency can benefit the government. If there are examples of how the mishandling of national security information by the judiciary has led to breaches of national security, this information does nothing to inform the debate of access to terrorism trials if this information itself is classified and unavailable to the public.

notion that the press is a vital component of the democratic process. As noted, in September 2010, in response to complaints from media organizations, the DOD created new "Media Ground Rules" for Guantánamo Bay. In addition to other provisions, the ground rules narrowed the definition of "protected information,"[281] stated journalists would not be in violation of the rules for republishing protected information where that information was "legitimately obtained" in the course of independent newsgathering[282] and stated the "Defense Department [would] facilitate media access to military commissions to the maximum extent possible, in an effort to encourage open reporting and promote transparency."[283] While there were still a number of issues to be worked out, media organizations expressed the belief that the new guidelines were a good faith effort to "address the problems that have prevented reporting from Guantánamo to be as complete and accurate as it ought to be."[284]

In sum, by focusing on architecture in judicial decisions, statutory law and public policy, the government can ensure an architecture of power that promotes core democratic values and the proper sharing of both power and information. While being mindful of the appropriate balance of power is important in all cases dealing with national security, it is especially important in cases dealing with access to national security information. As Professor Cathy Packer wrote, disputes about access to 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]

281. GUANTÁNAMO MEDIA GROUND RULES, *supra* note 18, at 4. Protected information includes classified information, information "which could reasonably be expected to cause damage to national security," and information "subject to a properly-issued protective order." *Id.*

282. *Id.*

283. *Id.* at 6.

284. Lane, *supra* note 18, at 1 (quoting comments from John Walcott, the Washington bureau chief of McClatchy, the third largest newspaper company in the United States).

285. Packer, *supra* note 31, at 32–33.