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UNDER ATTACK: THE PUBLIC'S RIGHT TO KNOW AND THE WAR ON TERROR

Mary-Rose Papandrea*

Abstract: Since the September 11 attacks, courts have been reluctant to uphold the public's right to obtain government information through the Freedom of Information Act and the First Amendment right of access. Given the doctrinal and statutory confusion plaguing both FOIA and the First Amendment right of access since their inception, and the judiciary's historic tendency to defer to the Executive in matters implicating national security, recent appellate decisions rejecting right to know claims may seem unsurprising. But a closer reading of these cases reveals that the judiciary's failure to uphold the public's right to government transparency has been based on a fundamental lack of appreciation for and hostility to the right's very existence. These cases suggest that an enforceable right to know is unnecessary because the political process is adequate to force government disclosure. History amply demonstrates, however, the political process's incapacity to compel government disclosure, particularly when the nation is in a time of crisis and the government activities at issue concern noncitizens.

Introduction

Since the September 11 attacks, the government has used non-traditional methods to detain, process, and prosecute individuals allegedly engaged in terrorist activities. One clear benefit of these non-traditional procedures has been that the government has been able to control the flow of information concerning its counterterrorism efforts by relying on the processes to which the public's constitutional and statutory "right to know" is at least arguably inapplicable. In addition, the government has capitalized on the judiciary's hesitation to force the disclosure of any information that will allegedly harm national security.

The judiciary's general unwillingness to enforce the "right to know" in a time of crisis is not surprising given the relatively short and tortured history of this right under the Freedom of Information Act

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(FOIA) and the First Amendment. In addition to this long-standing doctrinal confusion, the courts' historic deference to the Executive's analysis of national security risks made the decisions even less surprising. But what was surprising was that, by rejecting the right of access claims, courts revealed a singular lack of appreciation of and almost hostility to the right of access, particularly when the subjects of the desired information and proceedings were noncitizens. Not only did the courts defer to the Executive's national security claims, but they also deferred to the assumption about noncitizens that biased these claims: namely, that noncitizens are more likely than not to be involved in terrorist activities. Moreover, the courts exhibited a naive reliance upon the capacity of the political process to force government disclosure. History has demonstrated that without an enforceable right to know about government activities, the executive branch is likely to reveal only the information that serves its purposes, whatever they may be.

This Article suggests that the courts must keep in mind the interest in effective self-government that drove FOIA's passage in 1966 and the recognition of the First Amendment right of access in 1980. The right to know is more, not less, important in a time of crisis, and it is no less important when the rights of noncitizens are at issue. Indeed, history amply demonstrates that it is during times of crisis that the government is more likely to engage in questionable behavior and employ secrecy to conceal its failures.

Part I discusses the history and development of the public's constitutional and statutory rights of access to government information and proceedings. Although the right to know has been firmly established for over thirty years, even prior to September 11, courts hesitated to compel the government to disclose any information that allegedly involved national security. In addition, courts had already been struggling with some doctrinal difficulties encountered in defining and applying the First Amendment right of access.

Part II discusses the government's efforts to circumvent this "right to know" by detaining noncitizens incommunicado in Guantanamo Bay, labeling some U.S. citizens "enemy combatants," and gagging others tried in the criminal justice system. Although the government purports to be more forthcoming with information about U.S. citizens who are suspected of engaging in terrorist activities, the public's knowledge of these individuals in reality is one-sided and woefully inadequate to scrutinize government actions. Part II summarizes the two appellate court decisions reviewing the closure of immigration hearings for the hundreds of aliens rounded up after September 11, and a

third appellate court decision rejecting a FOIA request for basic information about these detainees.

Part III argues that these decisions were in some ways not surprising given the doctrinal confusion that has plagued the right of access since its beginnings. But what was disturbing about these decisions is that they represent a return to the days prior to 1970, when the judiciary regarded the right of access as unnecessary for a functional democracy; instead, courts said the political process alone sufficiently checked government power. Historically, however, the political process has proven impotent and incapable of forcing disclosures of information the government prefers to keep secret, especially when the rights of noncitizens are at issue.

I. The History of the Right to Know

The “right to know” has no single definition. When scholars and courts cite to the “right to know,” they may be referring to a number of different things, including “the rights to receive information from willing sources, to gather information from willing or neutral sources, and to acquire information from a perhaps unwilling governmental source.”¹ The first two require the government to refrain from action—namely, to refrain from interfering with information dissemination or consumption. The last, however, requires the government to provide information for public debate.² It is this “affirmative” right to know, also known as the right of access, on which this Article focuses.

The public’s statutory and constitutional rights to access federal government information and proceedings are relatively new. Before the FOIA was passed in 1966, the executive branch agencies could, in essence, deny access to information at will. As Harold Cross reported in his seminal 1954 work on the right of access, “[t]he dismaying, bewildering fact is that in the absence of a general or specific act of Congress creating a clear right to inspect—and such acts are not numerous—there is no enforceable legal right in public or press to

¹ David Mitchell Ivester, *The Constitutional Right to Know*, 4 Hastings Const. L.Q. 109, 109 (1977).

² See Heidi Kitrosser, *Secrecy in the Immigration Courts and Beyond: Considering the Right to Know in the Administrative State*, 39 Harv. C.R.-C.L. L. Rev. 95, 102–03 (2004) (drawing a distinction between “negative structuralism,” which prevents the government from interfering with the dissemination and consumption of speech, with “affirmative structuralism,” which requires the government to provide access to its proceedings or information in its possession).

inspect any federal non-judicial record.”³ Although the common law provided a limited right of access to judicial documents, it was only in 1980 that the Supreme Court held that the First Amendment guaranteed the public a right of access to criminal trials.⁴

FOIA and the First Amendment right of access are powerful mechanisms by which the press and public alike can force the disclosure of and obtain access to government documents and proceedings. Even before September 11, 2001, however, the judiciary struggled to apply these rights. Courts reviewing FOIA claims have always been extremely reluctant to question the government’s assertion that releasing the requested information would threaten national security. Likewise, courts have struggled to make sense of how to apply the constitutional right of access outside the context of criminal trials. In light of all of the difficulties existing before the terrorist attacks on U.S. soil, it is perhaps not surprising that the courts stumbled after September 11 when asked to force information disclosures that, the government claimed, would threaten national security.

A. *First Amendment Right of Access*

The United States Supreme Court did not recognize the existence of a First Amendment right of access until it decided *Richmond Newspapers, Inc. v. Virginia* in 1980.⁵ Prior to that decision, the Court had never acknowledged such a right, and in fact its decisions suggested that it never would. After its *Richmond Newspapers* decision, the Court decided three more First Amendment right of access cases in quick succession, extending the right of access to pretrial hearings and *voir dire* proceedings. Since the mid-1980s, however, the Court has left the development of the doctrine to the lower courts.⁶ The appellate courts appear to have reached a consensus that the right of access extends to civil trials, but even before September 11, they have deeply disagreed about whether and how to apply the *Richmond Newspapers* history-and-logic test outside of traditional judicial proceedings. For this

³ Harold L. Cross, *The People’s Right to Know* 197 (1954).

⁴ See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980).

⁵ See *id.* (holding that the First Amendment guarantees the public’s right to attend criminal trials).

⁶ See Eugene Cerruti, “*Dancing in the Courthouse*”: *The First Amendment Right of Access Opens a New Round*, 29 U. Rich. L. Rev. 237, 263–69 (1995) (discussing the holdings of *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982), *Press-Enter. Co. v. Superior Court I*, 464 U.S. 501 (1984), and *Press-Enter. Co. v. Superior Court II*, 478 U.S. 1 (1986), as well as lower court right of access cases).

reason, the courts' struggle to apply the right of access after September 11 can be seen as simply a continuation of the doctrinal difficulties that have plagued the right since its inception. More disturbingly, however, these recent cases contain echoes of the Court's decisions to prior *Richmond Newspapers*, where the Court questioned the very desirability of any such right.

1. Prior to *Richmond Newspapers*

In his concurring opinion in the *Richmond Newspapers*, Justice Stevens noted the monumental nature of the decision: "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."⁷

In decisions preceding *Richmond Newspapers*, the Court seemed to reject a First Amendment right of access. As one scholar noted, the right "had been so consistently and emphatically rejected by the Supreme Court that by the late 1970s, it was considered an all but dead letter."⁸

Early First Amendment cases recognized the right of private entities to impart—and of the public to receive—information. For example, in *Grosjean v. American Press Co.*, the Court declared unconstitutional a state tax on the advertising revenues of newspapers.⁹ In reaching its holding, the Court explained that "informed public opinion is the most potent of all restraints upon misgovernment," and that the tax, designed "to limit the circulation of information" to the public, went "to the heart of the natural right of the members of an organized society, united for their common good, to impart and acquire information about their common interests."¹⁰ In other cases, the Court rejected a prohibition on door-to-door distribution of literature¹¹ and the Postmaster's detention of Communist propaganda.¹² These decisions rec-

⁷ *Richmond Newspapers*, 448 U.S. at 582 (Stevens, J., concurring).

⁸ Cerruti, *supra* note 6, at 238.

⁹ 297 U.S. 233, 240, 251 (1936).

¹⁰ *Id.* at 243, 250.

¹¹ See *Martin v. Struthers*, 319 U.S. 141, 142, 149 (1943).

¹² See *Lamont v. Postmaster Gen.*, 381 U.S. 301, 302, 307 (1965). In *Zemel v. Rusk*, decided the same Term, the Court rejected the argument that the government's refusal to permit travel to Cuba unconstitutionally interfered with the right to obtain information. See 381 U.S. 1, 16 (1965). The Court characterized the travel restriction as "an inhibition of action," not speech, and that in any event, "[t]he right to speak and publish does not carry with it the unrestrained right to gather information." *Id.* at 16–17.

ognized that the government cannot interfere with an individual's constitutional right to receive information from a willing speaker. Although these cases emphasized the importance of an informed public in a democracy, none addressed whether the First Amendment gave the public the right to force the government to disclose information.

In the 1970s, the Court decided a trio of prison access cases that seemed to sound the death knell for any First Amendment right of access to government information: *Pell v. Procunier*,¹³ *Saxbe v. Washington Post Co.*,¹⁴ and *Houchins v. KQED, Inc.*¹⁵ *Pell* and *Saxbe* concerned substantially similar state and federal prison regulations that prohibited journalists from interviewing willing inmates the reported had selected.¹⁶ In both cases, the journalists argued that the regulations violated their First Amendment right to collect and publish information of great public concern.¹⁷ Rather than directly confronting the alleged First Amendment right of access to information, the Court construed the issue as one of comparative access given to the press and the public. Deeming the disputed regulations in *Pell* and *Saxbe* indistinguishable, the Court held that the government had no duty to provide the press with information that was not generally available to the public; because both the federal and state regulations granted the press access equal to that given to the public, the reporters' First Amendment claims failed.¹⁸ In both cases, although the public was given some access to the prisons, the general tone of the two opinions suggested that a majority of the justices believed that the First Amendment provided no affirmative right of access to government information at all. Indeed, Justices Powell, Brennan, and Marshall noted as

¹³ 417 U.S. 817 (1974).

¹⁴ 417 U.S. 843 (1974).

¹⁵ 438 U.S. 1, 15 (1978) (plurality opinion) ("Neither the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control.").

¹⁶ See *Pell*, 417 U.S. at 819; *Saxbe*, 417 U.S. at 844. *Pell* concerned a regulation of the California Department of Corrections, which provided that "[p]ress and other media interviews with specific individual inmates will not be permitted." 417 U.S. at 819. At issue in *Saxbe* was a federal regulation that provided that:

[p]ress representatives will not be permitted to interview individual inmates. This rule shall apply even where the inmate requests or seeks an interview. However, conversation may be permitted with inmates whose identity is not to be made public, if it is limited to the discussion of institutional facilities, programs and activities.

417 U.S. at 844 n.1.

¹⁷ See *Pell*, 417 U.S. at 829–30; *Saxbe*, 417 U.S. at 845.

¹⁸ See *Pell*, 417 U.S. at 834–35; *Saxbe*, 417 U.S. at 850.

much in their *Pell* and *Saxbe* dissents, arguing that “[f]rom all that appears in the Court’s opinion, one would think that any governmental restriction on access to information, no matter how severe, would be constitutionally acceptable to the majority so long as it does not single out the media for special disabilities not applicable to the public at large.”¹⁹

Houchins, decided only a few years after *Pell* and *Saxbe*, involved an even more restrictive prison access regulation, but the plurality’s hostility to an affirmative right of access was more vehement and direct.²⁰ Only seven justices took part in the decision.²¹ Although the question presented in the case was whether the press had a greater right of access to government-controlled information than the public, Chief Justice Burger, writing the plurality opinion joined by Justices White and Rehnquist, held that there was no such right of access at all.²² Burger drew a distinction between the First Amendment right to communicate acquired information and the asserted right to compel the government to produce information, noting that while the Court’s opinions had repeatedly recognized the former, it had never endorsed the latter.²³

In rejecting an affirmative right of access, Burger expressed concern that such recognition would “invite[] the Court to involve itself in what is clearly a legislative task which the Constitution has left to the political processes.”²⁴ He explained that “[p]ublic bodies and public officers . . . may be coerced by public opinion to disclose what they might prefer to conceal.”²⁵ According to Burger, the Constitution does not require the government to disclose information; instead, “we must rely, as so often in our system we must, on the tug and pull of the po-

¹⁹ *Saxbe*, 417 U.S. at 857 (Powell, J., dissenting); see *Pell*, 417 U.S. at 835 (Powell, J., concurring in part and dissenting in part); *id.* at 836 (Douglas, J., dissenting).

²⁰ See 438 U.S. at 3, 9, 15.

²¹ *Id.* at 16. The two absent justices were Justices Blackmun and Marshall. *Id.*

²² See *id.* at 3, 9. “The question presented is whether the news media have a constitutional right of access to a county jail, over and above that of other persons, to interview inmates and make sound recordings, films, and photographs for publication and broadcasting by newspapers, radio, and television.” *Id.* at 3.

²³ See *id.* at 9 (noting that, “[t]his Court has never intimated a First Amendment guarantee of a right of access to all sources of information within government control. Nor does the rationale of the decisions upon which respondents rely lead to the implication of such a right.”).

²⁴ *Id.* at 12.

²⁵ *Houchins*, 438 U.S. at 14.

litical forces in American society.”²⁶ Burger pointed out that broadcasters remained free to receive (and publish) information about the prison from inmates, visitors to the prison, public officials, and institutional personnel.²⁷ He also expressed concern about the lack of existing standards governing a First Amendment right of access: “Because the Constitution affords no guidelines, absent statutory standards, hundreds of judges would . . . be at large to fashion [*ad hoc*] standards, in individual cases, according to their own ideas of what seems ‘desirable’ or ‘expedient.’”²⁸ In a separate concurring opinion, Justice Stewart agreed that the Constitution does not give the public a right of access to information and instead “does no more than assure the public and the press equal access once government has opened its doors.”²⁹

Justice Stevens, in a dissenting opinion joined by Justices Brennan and Powell, disagreed with the plurality’s conclusion that the First Amendment does not guarantee the public a right of access to government information.³⁰ Drawing upon the political theory arguments that would later become the foundation for *Richmond Newspapers*, Stevens argued that “[t]he preservation of a full and free flow of information to the general public has long been recognized as a core objective of the First Amendment to the Constitution.”³¹ As Justice Powell had done in his *Saxbe* dissent, Stevens observed that the Court had long interpreted the First Amendment as embracing not only the right to communicate information in one’s possession, but also the right to receive information and ideas.³² Citing Alexander Meiklejohn and James Madison, he explained that the right to re-

²⁶ *Id.* at 14, 15 (quoting Potter Stewart, *Or of the Press*, 26 *Hastings L.J.* 631, 636 (1975)).

²⁷ *Id.* at 15.

²⁸ *Id.* at 14.

²⁹ *Id.* at 16 (Stewart, J., concurring). Justice Stewart’s concurring opinion was no surprise. In 1975, Justice Stewart wrote a law review article famously declaring that:

[t]here is no constitutional right to have access to particular government information, or to require openness from the bureaucracy. The public’s interest in knowing about its government is protected by the guarantee of a Free Press, but the protection is indirect. The Constitution is neither a Freedom of Information Act nor an Official Secrets Act.

Stewart, *supra* note 26, at 636.

³⁰ See *Houchins*, 438 U.S. at 40 (Stevens, J., dissenting).

³¹ See *id.* at 30.

³² See *id.*; *Saxbe*, 417 U.S. at 862–63.

ceive information is based on the need for an informed citizenry, which is essential for self-government.³³

One final pre-*Richmond Newspapers* case bears mentioning. In *Gannett Co. v. DePasquale*, the Court held in a split decision that the press had no right of access to pretrial criminal proceedings.³⁴ Although the petitioner's challenge implicated both the First and Sixth Amendments, the majority's opinion chiefly addressed only the Sixth Amendment claim.³⁵ Justice Stewart, writing for the majority, declared that the Sixth Amendment "right to a speedy and public trial" was a right that was "personal to the accused."³⁶ He conceded that the public had a strong interest in open trials, and that "[o]penness in court proceedings may improve the quality of testimony, induce unknown witnesses to come forward with relevant testimony, cause all trial participants to perform their duties more conscientiously, and generally give the public an opportunity to observe the judicial system."³⁷ Despite this, however, Stewart maintained that the public had no right independent of the accused to assert a Sixth Amendment right to an open trial.³⁸ After all, he declared, "our adversary system of criminal justice is premised upon the proposition that the public interest is fully protected by the participants in the litigation."³⁹

In *Gannett*, the Court specifically rejected the petitioner's invitation "to narrow [its] rulings in *Pell*, *Saxbe*, and *Houchins* at least to the extent of recognizing a First and Fourteenth Amendment right to attend criminal trials."⁴⁰ The majority explained that "[w]e need not decide in the abstract . . . whether there is any such constitutional right" because "even assuming, *arguendo*, that the First and Fourteenth Amendments may guarantee such access in some situations, a question we do not decide," the trial court properly rejected this alleged right of access, because, among other things, the petitioner failed to object in a timely manner to the closure orders.⁴¹ Although

³³ *Houchins*, 438 U.S. at 31–32.

³⁴ 443 U.S. 368, 370, 394 (1979) (5–4 decision).

³⁵ See Cerruti, *supra* note 6, at 257 (noting that "[a]lthough the petitioners had relied principally upon the First Amendment to challenge the closure order, this issue all but disappeared from the five separate opinions in the case. The matter was treated by the Justices on both sides almost exclusively as a Sixth Amendment issue.").

³⁶ *Gannett*, 443 U.S. at 379–80.

³⁷ *Id.* at 383.

³⁸ See *id.* at 384.

³⁹ *Id.*

⁴⁰ *Id.* at 392.

⁴¹ See *Gannett*, 443 U.S. at 392.

Justice Rehnquist wrote separately to argue that the petitioner had no First Amendment right of access, and Justice Powell wrote separately to assert the right's existence, but that the interest in a fair trial carried more weight, the dissenters acknowledged the petitioner's First Amendment claim by stating only that "this Court heretofore has not found, and does not today find, any First Amendment right of access to judicial or other governmental proceedings," and that accordingly the dissent would focus on the Sixth Amendment claim.⁴²

Although none of the Court's pre-1980 decisions ever squarely determined whether the public enjoyed a First Amendment right of access or right to information, the dicta of the majority and plurality opinions in these cases certainly made the Court's eventual recognition of such a right appear implausible at best.

2. The Revolutionary *Richmond Newspapers* Decision

Richmond Newspapers, Inc. v. Virginia marked a seismic shift in the Court's interpretation of the First Amendment. In this case the Court recognized, for the first time, that the First Amendment played a structural role in requiring an open government.⁴³ After several years of opinions wherein the Court seemingly rejected the notion of a First Amendment right of access, seven of the eight justices deciding *Richmond Newspapers* declared that the First Amendment did in fact guarantee the press and public a right of access to the government.⁴⁴ Although the case directly concerned the public's right to attend a criminal trial, the opinion's theoretical implications were much broader.

Neither Chief Justice Burger, writing a plurality opinion joined by Justices White and Stevens, nor Justice Brennan, writing a concurring opinion joined by Justice Marshall, found the lack of an explicit constitutional provision guaranteeing the right of access to be a barrier.⁴⁵ Instead, Burger explained, like the rights of association and of privacy, the right of access is "implicit" in the enumerated rights.⁴⁶ Underlying this implicit right, Burger elaborated, is the long history of

⁴² See *id.* at 398–99, 402 (Powell, J., concurring); *id.* at 403–04 (Rehnquist, J., concurring); *id.* at 411 (Blackmun, J., concurring in part, dissenting in part).

⁴³ See 448 U.S. at 580 (holding that the First Amendment guarantees the public's right to attend criminal trials) (Burger, J., plurality op.).

⁴⁴ See *id.* Justice Powell did not take part in the decision. *Id.* at 581. Justice Rehnquist was the lone dissenter. See *id.* at 604.

⁴⁵ See *id.* at 579–80.

⁴⁶ *Id.*

open criminal trials in both England and colonial America.⁴⁷ Citing scholars such as Jeremy Bentham and William Blackstone, who had argued that public scrutiny is the best “check” on perjury, bias, and other misconduct by trial participants,⁴⁸ Burger noted the “significant community therapeutic value” of public trials by “providing an outlet for community concern, hostility, and emotion.”⁴⁹ Open trials can thus function to restrain “self-help” measures and vigilantism, Burger explained, because regardless of the result, public trials “operat[e] to restore the imbalance which was created by the offense or public charge, to reaffirm the temporarily lost feeling of security and, perhaps, to satisfy that latent ‘urge to punish.’”⁵⁰ If the public is excluded from the process, it cannot be sure that “justice” is being done, and “an unexpected outcome can cause a reaction that the system at best has failed and at worst has been corrupted.”⁵¹

Finally, the Burger plurality stated that openness is essential for the proper functioning of government itself, as it increases “respect for the law” and knowledge of “the methods of government,” while also securing strong confidence in judicial remedies that “could never be inspired by a system of secrecy.”⁵² Public attendance at trials enables citizens to understand the judicial process both generally and in a particular case. Burger remarked 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.”⁵³ Because the trial court failed to consider a First Amendment right of access and alternatives short of total closure, Burger reversed the trial court’s judgment.⁵⁴

⁴⁷ See *id.* at 564–69, 573.

⁴⁸ See *Richmond Newspapers*, 448 U.S. at 569. Bentham stated:

Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account. Recordation, appeal, whatever other institutions might present themselves in the character of checks, would be found to operate rather as cloaks than checks; as cloaks in reality, as checks only in appearance.

Id. (quoting 1 Jeremy Bentham, *Rationale of Judicial Evidence* 524 (1827)).

⁴⁹ *Id.* at 570–71.

⁵⁰ See *id.* at 571 (quoting Gerhard O.W. Mueller, *Problems Posed by Publicity to Crime and Criminal Proceedings*, 110 U. Pa. L. Rev. 1, 6 (1961)).

⁵¹ See *id.*

⁵² See *Richmond Newspapers*, 448 U.S. at 572 (quoting Bentham, *supra* note 48, at 525).

⁵³ *Id.*

⁵⁴ *Id.* at 580–81.

In a concurring opinion joined by Justice Marshall, Justice Brennan explicitly emphasized that the right of access plays a structural role “in securing and fostering our republican system of self-government.”⁵⁵ For Brennan, it is insufficient to protect only the rights of a speaker and a listener.⁵⁶ He explained that the First Amendment protects not only “uninhibited, robust, and wide-open” public debate, “but also the antecedent assumption that valuable public debate . . . must be informed.”⁵⁷ At the same time, Brennan recognized that the right of access could be “theoretically endless,” and proposed two “helpful principles” to determine whether the right of access attached in a particular case: the history of openness of a proceeding, and the value of openness to the proceeding itself.⁵⁸ Applying both principles to criminal trials, Brennan concluded that they indicated that trials should be presumptively open to the public.⁵⁹

In the six years following *Richmond Newspapers*, the Court’s decisions in three additional First Amendment right of access cases declared that the presumptive right of access applied to *voir dire* proceedings, sexual assault trials, and preliminary hearings.⁶⁰ Although the four separate opinions in *Richmond Newspapers* left unclear what standard the lower courts should apply to determine whether a presumptive First Amendment right of access attaches, in these subsequent cases the Court adopted a two-prong history-and-logic test derived from Justice Brennan’s *Richmond Newspapers* concurrence.⁶¹ This inquiry requires the consideration of two factors: (1) whether the proceeding has traditionally been open to the public, and (2) whether public access to the proceeding at issue would play a positive role.⁶² If the right of access attaches, the proceeding can only be closed only

⁵⁵ See *id.* at 587, 589–95 (Brennan, J., concurring).

⁵⁶ See *id.* at 586–87.

⁵⁷ *Richmond Newspapers*, 448 U.S. at 587 (quoting, in part, *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

⁵⁸ See *id.* at 588–89 (quoting William J. Brennan, Jr., *Address*, 32 Rutgers L. Rev. 173, 177 (1979)).

⁵⁹ See *id.* at 598.

⁶⁰ See *Press-Enterprise II*, 478 U.S. at 13 (preliminary hearings); *Press-Enterprise I*, 464 U.S. at 510, 513 (*voir dire* proceedings); *Globe Newspaper*, 457 U.S. at 610–11 (sexual assault trials).

⁶¹ See *Press-Enterprise II*, 478 U.S. at 8–9 (quoting *Globe Newspaper*, 457 U.S. at 605–06); *Globe Newspaper*, 457 U.S. at 605–06 (quoting *Richmond Newspapers*, 448 U.S. at 589 (Brennan, J., concurring)); *Richmond Newspapers*, 448 U.S. at 580–81 (Burger, J., plurality op.); *id.* at 598 (Brennan, J., concurring); *id.* at 600–01 (Stewart, J., concurring). Some dissenting justices disagreed with this notion.

⁶² *Press-Enterprise II*, 478 U.S. at 8.

if the court makes specific findings that a “compelling governmental interest” necessitates closure, and that the closure is “narrowly tailored” to serve that interest.⁶³ By applying a strict scrutiny standard, the Court made clear that the public’s First Amendment right of access rises to the same level as the right to communicate.⁶⁴

Commentators have attacked *Richmond Newspapers* and its progeny on a number of levels, most vigorously for the Court’s failure to reconcile its recognition of a First Amendment right of access with its prior decisions in *Pell*, *Saxbe*, *Houchins*, and *Gannett*,⁶⁵ as well as the practical and theoretical difficulties of applying the history and logic tests.⁶⁶ Rather than confront these criticisms, the Supreme Court has instead declined to decide a First Amendment right of access case

63 See *Press-Enterprise I*, 464 U.S. at 510; *Globe Newspaper*, 457 U.S. at 606–07.

64 See *Press-Enterprise I*, 464 U.S. at 510; *Globe Newspaper*, 457 U.S. at 606–07. In his dissent in *Globe Newspaper*, Chief Justice Burger, however, argued that the right of access should not be treated the same as the right to disseminate information or to discuss ideas publicly, and that instead the court should merely ask whether the restriction is “reasonable” and then balance the competing interests of access and closure. *Globe Newspaper*, 457 U.S. at 615–16 (Burger, C.J., dissenting). Justice Stevens argued that “the right of access is plainly not coextensive with the right of expression” because closure laws “do not deter protected activity in the way that other laws sometimes interfere with the right of expression.” *Id.* at 621. Justice Stevens also dissented in *Press-Enterprise II*, noting that the right of access is protected by the First Amendment but does not rise to the same level as “a right to publish or otherwise communicate information lawfully or unlawfully acquired.” See 478 U.S. at 17–18 (Stevens, J., dissenting).

65 See, e.g., *N. Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198, 213 (3d Cir. 2002) (highlighting that the problem with the “history” prong is a lack of guidelines as to how much time need elapse before something meets the test; a string of cases show that a “1000-year history is unnecessary,” but a 38-year-old presumption of openness created by a Department of Justice regulation is too recent).

66 Justice Burger’s plurality in *Richmond Newspapers* merely stated in a footnote that *Pell* and *Saxbe* “are distinguishable in the sense that they were concerned with penal institutions which, by definition, are not ‘open’ or public places.” 448 U.S. at 576 n.11. Justice Brennan mentions in his concurring opinion that “the First Amendment has not been viewed by the Court in all settings as providing an equally categorical assurance of the correlative freedom of access to information.” *Id.* at 585 (Brennan, J., concurring) (citations omitted). Several commentators have criticized the Court’s failure to reconcile its prior case law adequately. See, e.g., Leonard G. Levenson, *Constitutional Limits on the Power to Restrict Access to Prisons: An Historical Re-Examination*, 18 Harv. C.R.-C.L. L. Rev. 409, 438 (1983) (noting that *Richmond Newspapers*’ “plurality opinion . . . strained noticeably as it attempted to reconcile the Court’s reversal of the trial closure with the Court’s previous holdings in *Pell* and *Saxbe*”); Lillian R. BeVier, *Like Mackerel in the Moonlight: Some Reflections on Richmond Newspapers*, 10 Hofstra L. Rev. 311, 320–24 (1982) (criticizing Justice Burger for failing to fit new doctrine in with precedent); Archibald Cox, *Foreword: Freedom of Expression in the Burger Court*, 94 Harv. L. Rev. 1, 26 (1980) (stating that “surely, some effort to explain the relation between the decision in *Richmond Newspapers* and those earlier cases was required.”).

since 1986.⁶⁷ Accordingly, the task of developing the doctrine has been left to the lower courts.⁶⁸ All courts considering the issue have extended the right of access to civil proceedings, but courts have disagreed as to whether the right applies outside of the judicial context, particularly to executive agency proceedings.⁶⁹ They have also disagreed about what sort of historical “pedigree” satisfies the “history” prong of the *Richmond Newspapers* test, what role the “logic” prong plays, and how to balance the two prongs.⁷⁰ Given such widespread disagreement, the applicability of the right of access to nontraditional proceedings would be a tricky issue for any court at any time, much less during a time of crisis when the government claims that secrecy is necessary for national security.

B. *The Freedom of Information Act*

Although some courts and commentators have argued that the First Amendment right of access logically extends to government documents, most courts have rejected this view outside the context of judicial records. Instead, the public’s right to obtain government documents and information is based largely on the Freedom of Information Act, or FOIA.⁷¹ The passage of FOIA in 1966 revolutionized the public’s ability to force the government to release information. In the almost four decades since its creation, however, courts have been extremely reluctant to question government assertions that national security demands the continued confidentiality of the requested information. This has not changed despite congressional efforts to amend FOIA in order to encourage greater judicial scrutiny of these national security claims.

Such deference is hardly novel. At the time of the nation’s founding, executive officials had unfettered discretion to disclose or withhold government documents. The Housekeeping Statute of 1789 author-

⁶⁷ See Cerruti, *supra* note 6, at 263.

⁶⁸ *Id.*

⁶⁹ See *id.* at 263, 266–69.

⁷⁰ See *id.* at 269.

⁷¹ See Freedom of Information Act, 5 U.S.C. § 552 (2000), *amended by* Pub. L. No. 107–306, 110 Stat. 3048 (2003) (original version at Pub. L. No. 89–554 (1966)). The public has a common law right of access to government records and documents, including judicial documents. See *Nixon v. Warner Communications, Inc.* 435 U.S. 589, 597 (1978). It is unclear, however, whether FOIA supplanted the common law right of access to federal agency documents. *Cf. Ctr. for Nat’l Sec. Studies v. U.S. Dep’t of Justice*, 331 F.3d 918, 936–37 (D.C. Cir. 2003) (holding that FOIA preempted the common law right of access to agency information).

ized the heads of executive departments to issue regulations concerning the custody, use, and preservation of its records and materials.⁷² Agencies typically used this statute to keep documents from the public. The statute contained neither a requirement that executive officials release any information nor any mechanism for judicial review of non-disclosure determinations.⁷³

During the New Deal and World War II, government bureaucracy grew, as did the public's demand for a more open government. In 1946, Congress passed the first legislation that attempted to encourage the disclosure of government records.⁷⁴ Section 3 of the Administrative Procedure Act (APA) required agencies to disclose their procedures, opinions, and records.⁷⁵ Unfortunately, section 3 also covered only a limited universe of documents and was riddled with vague language. The statute provided a right of access only to "persons properly and directly concerned," and even then only to the undefined category of "matters of official record."⁷⁶ Even more troubling, agencies were entitled to withhold information if they determined that secrecy was "in the public interest," and no remedy existed for an agency's wrongful refusal to release information.⁷⁷ Agencies relied on both the Housekeeping Act and the APA to justify their decisions to withhold information from the public.⁷⁸

In 1958, Congress tried to constrain the executive branch's right to withhold information from the public with an amendment to the Housekeeping Statute, which declared that the statute "does not authorize withholding information from the public or limiting the availability of records to the public."⁷⁹ Although the House and Senate both passed this amendment unanimously, agencies continued to

⁷² Ch. 14, § 7, 1 Stat. 68 (1789) (current version at 5 U.S.C. § 301(2000)).

⁷³ See *id.* When first enacted, the Act provided: "The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property." *Id.*

⁷⁴ See Administrative Procedure Act, Pub. L. No. 79-404, § 3, 60 Stat. 237, 238 (1946) (current version at 5 U.S.C. § 552 (2000)).

⁷⁵ See *id.*

⁷⁶ See *EPA v. Mink*, 410 U.S. 73, 79 (1973).

⁷⁷ *Id.* The APA also permitted "matters of record" to be withheld "for good cause found." § 3(c).

⁷⁸ 1 James T. O'Reilly, *Federal Information Disclosure* § 2:2 (3d ed. 2000).

⁷⁹ Act of Aug. 12, 1958, Pub. L. No. 85-619, 72 Stat. 547 (amending Rev. Stat. § 161 (1875)) (codified at 5 U.S.C. § 301 (1970)).

withhold documents from the public by relying on the limitations of section 3 of the APA.⁸⁰

By the end of the 1960s, it was clear that amendments to section 3 were required to foster openness in government activities.⁸¹ Recognizing that comprehensive standards for disclosure and the right of judicial review were necessary in order to provide public access to government records, Congress replaced section 3 with FOIA in 1966.⁸²

Under FOIA, the public need not demonstrate a “need to know” to gain access to government documents; instead, FOIA creates a statutory “right to know.”⁸³ A person requesting documents also need not show any particular interest in or need for them; FOIA protects an individual’s right to obtain documents for any purpose.⁸⁴ Unlike its precursor, section 3, FOIA also provides for de novo judicial review of an agency’s decision to withhold documents.⁸⁵

Recognizing the need to strike a balance between the right to know and the often compelling need to keep information private, Congress structured nine exemptions to FOIA’s mandatory disclosure provisions.⁸⁶ FOIA itself does not contain a broad “national security” exemption, but addresses national security directly only in

⁸⁰ See O’Reilly, *supra* note 78, § 2:2.

⁸¹ See *Mink*, 410 U.S. at 79 (explaining that Section 3 “was generally recognized as falling far short of its disclosure goals and came to be looked upon more as a withholding statute than a disclosure statute”).

⁸² See 5 U.S.C. § 552 (2000).

⁸³ See *id.* In the original FOIA, any person or entity could make a request for information or documents. *Id.* In 2002, Congress amended FOIA so as to bar requests from foreign governments, international governmental organizations, or their representatives for intelligence agency records. See Intelligence Authorization Act for Fiscal Year 2003 (2002), Pub. L. No. 107-306, § 312, 116 Stat. 2390–91 (codified at 5 U.S.C. § 552(a)(3)(A), (E)) (2000 & Supp. 2003)).

⁸⁴ See Pub. L. No. 104–231, § 2(a)(1), 110 Stat. 304 (1996) (explaining that the purpose of FOIA is to provide a right of inspection “for any public or private purpose”).

⁸⁵ See 5 U.S.C. § 552(a)(4)(B).

⁸⁶ See *id.* § 552(b)(1)–(9). The exemptions state that FOIA does not apply to matters that fall under the categories of: (1) properly classified information pertaining to national defense or foreign policy, (2) internal agency personnel information, (3) information exempted by other statutes, (4) trade secrets and other privileged or confidential business information, (5) agency memoranda, (6) personnel, medical, and other information the disclosure of which would invade personal privacy, (7) certain categories of law enforcement investigation records or information, (8) reports from regulated financial institutions, and (9) geological and geophysical information. *Id.*

Exemption 1, which exempts from disclosure information that has been classified pursuant to an Executive order.⁸⁷

In an effort to limit the amount of information that could be withheld under the vague pre-FOIA “public interest” standard, and to force the Executive to be more specific about its reasons for withholding information, Exemption 1 excuses from disclosure matters that are “specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy.”⁸⁸

In 1973, the Supreme Court held in *EPA v. Mink* that when the Government claimed that Exemption 1 applied, it had to prove only that the document was in fact classified pursuant to an Executive order that protected national defense or foreign policy information.⁸⁹ The Court held that the courts could not inquire whether information was in fact properly classified or conduct an in camera inspection of classified documents to “separate the secret from the supposedly nonsecret and order disclosure of the latter.”⁹⁰ In direct reaction to the Court’s decision, Congress amended the national security exemption of FOIA in 1974 to make clear that the judiciary should not simply rubber-stamp the Executive’s classification decisions. Congress specifically designed the amendments to Exemption 1 to empower courts to exercise “meaningful judicial review of classification decisions” in order to rectify the “widespread overclassification abuses in the use of classification stamps.”⁹¹ The 1974 amendments clearly authorized courts to review classified documents in camera for a de novo determination of their classification, as well as authorized courts to separate “any reasonably segregable portion of a record . . . after deletion of the portions which [were subject to an exemption].”⁹² Even more signifi-

⁸⁷ See *id.* § 552(b)(1). Exemption 3 provides that FOIA does not apply to information that is exempted from disclosure under a separate statute. *Id.* § 552(b)(3). These separate statutory exemptions often raise national security issues. In addition, FOIA specifically permits the Federal Bureau of Investigation to exercise its discretion in determining whether to disclose documents that “pertain[] to foreign intelligence or counterintelligence, or international terrorism,” provided these documents constitute classified information as provided in subsection (b)(1). See *id.* § 552(c)(3).

⁸⁸ Act of June 5, 1967, Pub. L. No. 90–23, § 1, 81 Stat. 54, 55 (amended 1967); see S. Rep. 89–813, at 8 (1965). “Exemption No. 1 is for matters specifically required by Executive order to be kept secret in the interest of national defense or foreign policy. The change of standard from ‘in the public interest’ is made both to delimit more narrowly the exception and to give it a more precise definition.” *Id.*

⁸⁹ *EPA v. Mink*, 410 U.S. 73, 84 (1973).

⁹⁰ *Id.*

⁹¹ 120 Cong. Rec. 17,014, 17,019 (1974) (remarks of Sen. Kennedy).

⁹² See 5 U.S.C. § 552(a)(4)(B), (b) (2000).

cantly, Congress changed Exemption 1's text: under its amended phrasing, documents can be withheld only if they are: "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order."⁹³ A congressional comment on the exemption's final text noted that it "permit[s] the withholding of information where it is 'specifically authorized' . . . and is 'in fact, properly classified' pursuant to both procedural and substantive criteria contained in such Executive order."⁹⁴

Although the plain language of FOIA allows courts to review *de novo* the Executive's decision to withhold information on the basis of Exemption 1, and nothing in FOIA requires judicial deference to the Executive's classification decisions, courts nevertheless have uniformly deferred to the government's classification determinations. As a result, courts have not rigorously reviewed classified information.⁹⁵ In sum, even before September 11, the courts gave extraordinary deference to the Executive's claims that national security concerns warranted the secrecy of the requested information.⁹⁶

II. The Right of Access after September 11

Since September 11, the government has used administrative or military proceedings to detain and process individuals allegedly involved in terrorist activities. By proceeding in this way, the government has not only been able to deprive detainees of constitutional protections, such as the right to counsel, but it has also been able to conduct its counterterrorism efforts largely outside of public view. So far, efforts to force disclosure of information pertaining to the government's counterterrorism efforts through the First Amendment right of access and FOIA have been largely unsuccessful.⁹⁷ Instead, the public has been

⁹³ See *id.*

⁹⁴ H.R. Conf. Rep. No. 93-1380, at 11-12 (1974).

⁹⁵ See The Honorable Patricia M. Wald, *Two Unsolved Constitutional Problems*, 49 U. Pitt. L. Rev. 753, 760 (1988) (noting that judicial review of classified information under FOIA "often seems to be done in a perfunctory way").

⁹⁶ See *id.* at 760-61.

⁹⁷ See, e.g., *Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918 (D.C. Cir. 2003) (denying FOIA request for information pertaining to post-September 11 detainees); *N. Jersey Media*, 308 F. 3d at 198 (upholding broad closure of removal proceedings for detainees); *ACLU v. U.S. Dep't of Justice*, 265 F. Supp. 2d 20 (D.D.C. 2003) (denying FOIA request for statistical information regarding the DOJ's use of Patriot Act surveillance authority); *ACLU v. County of Hudson*, 799 A.2d 629 (N.J. Super. Ct. App. Div. 2002) (denying access to information concerning detainees held in New Jersey facilities). *But*

forced to rely on the whim of government officials to release information when it suits them. Although the government appears to be somewhat more forthcoming with information about detained citizens, in truth the public's information remains remarkably one-sided.

A. *Guantanamo Bay, Military Tribunals and Enemy Combatants*

The United States has detained hundreds of people captured by U.S. forces in Afghanistan or neighboring countries in Guantanamo Bay, Cuba. Many have been held for almost three years without charge or access to lawyers.⁹⁸ The U.S. military has closed most of the prison at Guantanamo Bay to reporters and forbidden visitors from speaking to detainees.⁹⁹ Because of the government's failure to allow meaningful access to the detainees, the public knows little about who is detained at Guantanamo Bay or on what basis. Although international political pressure has compelled the United States to release some detainees in the past year, hundreds more essentially remain in secret detention.¹⁰⁰ This high level of secrecy

see *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002) (holding broad closure of removal proceedings violated the First Amendment). A federal district court recently ordered various government agencies to respond to a FOIA request for information about detainees in United States custody. *ACLU v. Dep't of Defense*, 339 F. Supp. 2d 501, 2004 WL 2050921 (S.D.N.Y. Sept. 15, 2004). The agencies had failed to give any meaningful response to the request, which had been made almost a year earlier. The district court rebuked the government, noting that "the glacial pace at which defendant agencies have been responding to plaintiff's requests shows an indifference to the commands of FOIA, and fails to afford accountability of government that the act requires." *Id.* at *3.

⁹⁸ John Mintz, *U.S. Charges 2 as Bin Laden Aides*, Wash. Post, Feb. 25, 2004, at A1.

⁹⁹ See Scott Higham et al., *Guantanamo*, Wash. Post, May 2, 2004, at A1.

¹⁰⁰ See Associated Press, *U.S. Releases 26 Guantanamo Detainees*, Wash. Post, Mar. 16, 2004, at A2 (reporting release of twenty-six detainees); Peter Baker, *U.S. Sends to Russia 7 Held at Guantanamo*, Wash. Post, Mar. 2, 2004, at A14 (discussing release of seven Russians); Higham, et al., *supra* note 99 (noting that detainee releases resulted from political pressure and that, despite releases, 600 detainees remain at Guantanamo); John Mintz, *U.S. Faces Quandary in Freeing Detainees*, Wash. Post, Mar. 22, 2004, at A1 (mentioning international law experts' suggestions that U.S. allies have advantage in securing release of their detainees); Pierre-Antoine Souchard, *4 Frenchmen Freed from Guantanamo*, Wash. Post, July 28, 2004, at A11 (discussing release of four French prisoners and noting the slow release of prisoners after much international criticism); Don Van Natta, Jr. & Tim Golden, *Officials Detail a Detainee Deal by 3 Countries*, N.Y. Times, July 4, 2004, at A1 (noting U.S. release of five Saudi Arabian detainees in exchange for the release of British prisoners); *Washington in Brief*, Wash. Post, Apr. 3, 2004, at A11 (reporting that the United States had released an additional 15 detainees from different countries). In May 2004, the United States announced that it planned to conduct periodic reviews of the detention of enemy combatants held in South Carolina and Guantanamo

is disconcerting, especially given reports that many of the detainees have no connection to terrorism and have been subject to abusive treatment.¹⁰¹

After the recent Supreme Court decisions holding that detainees are entitled to challenge their enemy combatant status through habeas petitions filed in federal district court,¹⁰² the U.S. military has initiated "Combatant Status Review" hearings in Guantanamo Bay. Attorneys for the detainees have charged that the military established these proceedings in the hopes of avoiding federal habeas proceedings and public scrutiny.¹⁰³ In these hearings, the detainees may testify and present witnesses who are deemed "reasonably available," but they are afforded no access to counsel.¹⁰⁴ Instead, they are permitted to meet with a "personal representative," an Army officer who is neither a lawyer nor bound by attorney-client privilege.¹⁰⁵ The detainees also bear the burden of rebutting the presumption that they are in fact enemy combatants, while having no access to any of the classified evidence that allegedly supports that designation.¹⁰⁶

The regulations for the status hearings make no mention of public access, and the hearings that have been held so far have been open to only a few members of the press.¹⁰⁷ The military has declared further its unwillingness to release the detainees' names or any other information it deems to be sensitive.¹⁰⁸

The Combatant Status Review proceedings are distinct from trials to be conducted by the military commissions President Bush estab-

Bay. See John Mintz, *U.S. to Review Detainees' Cases*, Wash. Post, May 19, 2004, at A18. These reviews would be conducted by a three-judge military panel. *Id.*

101 Neil A. Lewis, *Broad Use of Harsh Tactics Is Described at Cuba Base*, N.Y. Times, Oct. 17, 2004, at A1.

102 See Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2644 (2004); Rasul v. Bush, 124 S. Ct. 2686, 2692 (2004).

103 Josh White, *U.S. to Tell Detainees of Rights: Pentagon Outlines New Procedures*, Wash. Post, July 10, 2004, at A7.

104 Memorandum from the Deputy Secretary of Defense, to the Secretary of the Navy, Order Establishing Combatant Status Review Tribunal 1-3 (July 7, 2004), available at <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf>.

105 *Id.* at 1.

106 See Memorandum from the Deputy Secretary of Defense, *supra* note 104, at 2, 3.

107 Neil A. Lewis, *Scrutiny of Review Tribunals as War Crimes Trials Open*, N.Y. Times, Aug. 24, 2004, at A12.

108 See Ian James, *Tribunal Weighs Guantanamo Detainee Cases*, A.P. Newswires, Aug. 4, 2004.

lished in November 2001.¹⁰⁹ Preliminary proceedings for military trials have begun only recently, and only for four of the several hundred detainees.¹¹⁰ President Bush instituted the military commissions to prosecute noncitizens who are allegedly members of al-Qaeda or have “engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor.”¹¹¹ When announcing the creation of the military tribunals, President Bush declared that in view of the terrorist threat, “it is not practicable to apply in military commissions under this order the principles of law . . . generally recognized in the trial of criminal cases in the United States district courts.”¹¹² One such principle is the general presumption that trials are open to the press and public. After considerable public outcry, the Department of Defense released significantly modified regulations for the military trials entitling the detainees to a number of civil rights criminal defendants enjoy, including the right to an open trial.¹¹³ The regulations give the presiding officer broad discretion to close the proceedings on a number of grounds, however, and they provide no mechanism for the press or public to challenge a closure order.¹¹⁴ Any members of the press or human rights groups attending the trials must sign a five-page list of “ground rules” that permit the government to exercise a measure of control over the information released to the pub-

¹⁰⁹ See James, *supra* note 108; Lewis, *supra* note 107.

¹¹⁰ Neil A. Lewis, *U.S. Terrorism Tribunals Set to Begin Work*, N.Y. Times, Aug. 22, 2004, at 22. Lawyers for the detainees have made preliminary motions challenging the tribunals that are expected to delay the start of the trials themselves until December. See Neil A. Lewis, *Guantanamo Tribunal Process in Turmoil*, N.Y. Times, Sept. 26, 2004, at 29. A military official recently revealed to the *New York Times* that the first four detainees facing trial were chosen specifically because they had not been subjected to abusive treatment and would therefore be less likely to make any allegations embarrassing for the government. See Lewis, *supra* note 101.

¹¹¹ See Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833, 57,834 (Nov. 16, 2001).

¹¹² Press Release, White House, President Issues Military Order (Nov. 13, 2001), at <http://whitehouse.gov/news/releases/2001/11/print/20011113-27.html>.

¹¹³ See Dep't of Defense Military Commission Order No. 1, § 6(B)(3) (Mar. 21, 2002), available at <http://www.dtic.mil/whs/directives/corres/mco/mco1.pdf>.

¹¹⁴ See *id.* The regulations permit the presiding officer to close the hearings for any number of reasons, including the following grounds: “protection of information classified or classifiable . . . information protected by law or rule from unauthorized disclosure; the physical safety of participants in Commission proceedings, including prospective witnesses; intelligence and law enforcement sources, methods, or activities; and other national security interests.” *Id.* Whether the public and press will be able to challenge the closure of a military tribunal in United States courts is an open question. For a discussion of this issue, see The Reporters Committee for Freedom of the Press, *Military Tribunals*, in *Homefront Confidential* (4th ed. 2003), available at <http://www.rcfp.org/homefrontconfidential/tribunals.html>.

lic.115 For example, observers may release neither the identities of the detainees nor the identities of any commission personnel (including the commission members, prosecutors, or defense counsel) without approval; many detainees, however, have already been identified.116

No U.S. citizens are subject to trial before a military commission, for the order establishing the tribunals explicitly excludes U.S. citizens.117 As several scholars have argued, the decision to exclude citizens from military tribunals appears politically motivated and lacks a rational basis.118 The government initially planned to prosecute U.S. citizens in federal court, as it did with the “American Taliban” John Walker Lindh.119 But when faced with the difficulties of justifying its prolonged detention of Hamdi and Padilla, the Department of Justice removed them from the criminal justice system altogether, labeling them “enemy combatants” who, the government claimed, could be held indefinitely. 120

Although the United States detained Hamdi and Padilla in secret military custody without the ordinary protections of the criminal justice

115 See Charlie Savage, *Guantanamo Coverage to Be Restricted*, Boston Globe, Aug. 27, 2004, at A9; Press Kit, Media Ground Rules for Coverage of Military Commissions (May 2004), available at <http://www.defenselink.mil/news/Aug2004/d20040818PK.pdf>.

116 See Press Kit, *supra* note 115. Using non-governmental sources, the *Washington Post* has compiled a list of the names of 367 detainees. See Names of the Detained in Guantanamo Bay, Cuba, at http://www.washingtonpost.com/wp-srv/nation/guantanamo_names.html (last visited Sept. 21, 2004).

117 Detention, Treatment, and Trial, *supra* note 111, at 57,834.

118 See, e.g., David Cole, *Their Liberties, Our Security: Democracy and Double Standards*, 31 Int'l J. Legal Info. 290, 299 (2003) (arguing that excluding citizens from military tribunals was likely “a politically opportunistic decision”); George P. Fletcher, *On Justice and War: Contradictions in the Proposed Military Tribunals*, 25 Harv. J.L. & Pub. Pol'y 635, 646 (2002) (commenting that “[n]ot only does the lumping together of all foreigners vastly exceed standards of relevance, but it also invokes a method of classification—citizen versus foreigner—that has no reasonable bearing on the supposed objective of protecting the United States against international terrorism.”); Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 Yale L.J. 1259, 1298–1303 (2002) (arguing that the citizen/noncitizen distinction violates the Equal Protection Clause and is a distinction that “cannot be understood in immigration or international bargaining terms”).

119 See *I Made a Mistake by Joining the Taliban: Apologetic Lindh Gets 20 Years*, Wash. Post, Oct. 5, 2002, at A1.

120 Dan Eggen & Susan Schmidt, *'Dirty Bomb' Plot Uncovered, U.S. Says: Suspected Al Qaeda Operative Held as 'Enemy Combatant'*, Wash. Post, June 11, 2002, at A1 (reporting that Padilla was named an enemy combatant after prosecutors determined that a criminal prosecution would be “difficult”); John Mintz, *Justice Says It Won't Charge U.S. Citizen Moved From Cuba: Man in Custody as Government Deliberates What to Do*, Wash. Post, Apr. 9 2002, at A10 (reporting that the government did not intend to charge Hamdi because it lacked sufficient evidence for a criminal prosecution).

system, the United States has voluntarily released some information about both individuals. At the outset, the government revealed their identities and some of the circumstances of their arrest, which was far more than it was willing to do for the noncitizens held in Guantanamo.¹²¹ The Department of Justice also did not challenge Hamdi's or Padilla's right to file a habeas petition, as it did for the Guantanamo Bay detainees. Instead, the Department of Justice submitted declarations detailing the circumstances of Hamdi's and Padilla's capture and basis for detention.¹²² In addition, on June 1, 2004, when a decision from the U.S. Supreme Court on their habeas petitions was imminent, the Department of Justice spokesman James Comey held a press conference to provide Padilla's "full story" in an effort to "allow the American people to understand the threat he posed, and also understand that the [P]resident's decision was and continues to be essential to the protection of the American people."¹²³ Comey quite candidly noted that a primary reason for the release of information about Padilla was his citizenship status, stating that "[p]eople are right to question when the [P]resident of the United States orders the military detention of an American citizen in the United States. And I very much wanted to have some of the answers for folks. And now we do."¹²⁴

But the government's apparent eagerness to provide information about the U.S. citizens in its custody is deceptive. In actuality, the public's knowledge about Hamdi and Padilla is strikingly skewed. By removing them from the criminal judicial system, the government effectively curtailed the public scrutiny that accompanies criminal trials. Labeled as enemy combatants and deprived of access to their attorneys for the first two years of their captivity, Hamdi and Padilla have

¹²¹ See [Transcript of News Conference on Jose Padilla \(June 1, 2004\)](http://www.cnn.com/2004/LAW/06/01/comey.padilla.transcript/index.html), at <http://www.cnn.com/2004/LAW/06/01/comey.padilla.transcript/index.html>. Indeed, Hamdi, who had been initially detained in Guantanamo, was not identified until military officials discovered he was a U.S. citizen. Jess Bravin & Greg Jaffe, *American Prisoner in Cuba to Be Moved*, Wall St. J., Apr. 5, 2002, at B2.

¹²² Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2636–37 (2004); Padilla v. Rumsfeld, 352 F.3d 695, 700–01 (2d Cir. 2003), *rev'd*, 124 S. Ct. 2711 (2004).

¹²³ See [Transcript of News Conference on Jose Padilla](#), [supra note 121](#). Comey explained, "We have decided to release this information to help people understand why we are doing what we're doing in the war on terror and to help people understand the nature of the threat we face . . ." *Id.* "I'm [releasing this information] as soon as it was done so that in the court of public opinion people could better understand why we've done some of the things we've done." *Id.*

¹²⁴ See *id.*

been unable to respond to the government's allegations.¹²⁵ Indeed, even once they were permitted to speak to counsel, their attorneys were forbidden to convey anything the detainees said to the public because the government deemed their communications classified.¹²⁶ In light of the government's continued assertion that it was entitled to keep Hamdi detained indefinitely and incommunicado, it is quite extraordinary that, within two months of the Supreme Court's decision holding that Hamdi was entitled to a meaningful opportunity to rebut the basis for his detention, the government announced that an agreement for his release was imminent.¹²⁷ And even more curious is that after Hamdi's release, the government has continued to shroud his case with secrecy by refusing to explain why he no longer posed a threat to national security.¹²⁸

The government has also attempted to limit the amount of information released about John Walker Lindh, an American citizen who ultimately pled guilty to assisting the Taliban.¹²⁹ Before his indictment, he was held incommunicado as an enemy combatant for fifty-four days, despite his request for counsel and his parents' numerous attempts to contact him.¹³⁰ When Lindh was indicted on ten different counts, for which he faced the possibility of three life sentences, Attorney General John Ashcroft declared that he was an "an al Qaeda trained terrorist who conspired with the Taliban to kill his fellow citizens."¹³¹ Within months, however, nine of the ten charges were

¹²⁵ See Michael Powell, *Padilla Case Puts Lawyers in Limbo, Too*, Wash. Post, June 5, 2004, at A3.

¹²⁶ *Id.*

¹²⁷ See Sonja Barisic, *Lawyers Work to Free Former Combatant*, (Aug. 11, 2004), at <http://www.boston.com> (Boston Globe online). Even after the Justice Department admitted that Hamdi was no longer a national security threat to the United States, the government continued to hold him incommunicado in solitary confinement. See Eric Lichtblau, *U.S. Set Back on Treatment of Combatant*, N.Y. Times, Aug. 28, 2004, at A13. In September 2004, the government and Hamdi's lawyers reached an agreement for his release. Eric Lichtblau, *U.S., Bowing to Court Ruling, Will Free 'Enemy Combatant'*, N.Y. Times, Sept. 23, 2004, at A1.

¹²⁸ Jerry Markon, *Hamdi Returned to Saudi Arabia: U.S. Citizen's Detention as Enemy Combatant Sparked Fierce Debate*, Wash. Post, Oct. 12, 2004, at A2. A Pentagon statement explained merely that it could not give any details "because of operational and security considerations." *Id.*

¹²⁹ See *'I Made a Mistake by Joining the Taliban'*, *supra* note 119.

¹³⁰ Jane Mayer, *Lost in the Jihad*, New Yorker, Mar. 10, 2003, at 50, 57.

¹³¹ Attorney General Transcript, News Conference—Indictment of John Walker Lindh (Feb. 5, 2002), at <http://www.usdoj.gov/ag/speeches/2002/020502transcriptindictmentofjohnwalkerlindh.htm>.

dropped, and a plea agreement reached.¹³² Despite the apparent disintegration of the government's case against Lindh, many documents involved in the case remain classified, and Lindh himself has been forbidden from speaking to the media.¹³³

Although the government professes greater willingness to release information about American citizens detained as terrorists, the reality is that the public still has very little information about them. By establishing military tribunals and labeling individuals as "enemy combatants," the government has sought to avoid public scrutiny of its counterterrorism efforts that would otherwise be available through the First Amendment right of access to criminal proceedings.

B. Administrative Proceedings

Within seven weeks after the September 11 attacks, the government had detained over a thousand aliens as part of its counterterrorism investigation. In an effort to keep information about these detainees secret, Chief Immigration Judge Michael Creppy issued a directive to all U.S. immigration judges ordering heightened security measures in "special interest" cases.¹³⁴ The Creppy Directive offered no definition of this "special interest" category, but the Department of Justice indicated in litigation that the category included removal proceedings for aliens who "might have connections with, or possess information pertaining to, terrorist activities against the United States."¹³⁵ In practice, the government applied this category to all aliens rounded up during the post-September 11 investigation, regardless of whether actual evidence existed that they had been involved in terrorist activities. The Creppy Directive required judges to close the hearings to the public, with "no visitors, no family, and no press," and

¹³² Mayer, *supra* note 130, at 50.

¹³³*Id.*

¹³⁴ See Memorandum from Michael J. Creppy, Chief Immigration Judge of the United States, to Immigration Judges and Court Administrators 1 (Sept. 21, 2001), *available at* <http://news.findlaw.com/hdocs/docs/aclu/creppy092101memo.pdf>. Under the Immigration and Nationality Act, the Attorney General has authority over the "administration and enforcement" of all "laws relating to the immigration and naturalization of aliens." Immigration Act § 103, 8 U.S.C. § 1103(a) (2000). Removal proceedings, conducted by immigration judges in the executive branch, must follow regulations the Attorney General prescribes. *See id.* (giving Attorney General power to establish regulations which he deems necessary). Since 1964, an Attorney General regulation governing access to removal and other administrative proceedings permits the closure of hearings to protect "witnesses, parties, or the public interest." 8 C.F.R. § 1003.27 (2004) (modern codification).

¹³⁵ See *N. Jersey Media*, 308 F.3d at 202 (quoting declaration of Dale L. Watson).

to neither confirm nor deny whether a particular case was even on the docket.¹³⁶ As one court described it, the Creppy Directive amounted to “a complete information blackout along both substantive and procedural dimensions.”¹³⁷

Various media and public interest groups attempted to obtain information about those noncitizens living in the United States who were detained in the aftermath of September 11. In one set of cases, they sought access to the detainees’ immigration hearings, arguing that the Creppy Directive violated the First Amendment right of access.¹³⁸ In another case, parties challenged the government’s refusal to honor their FOIA request for basic information about the post-September 11 detainees, including their names, date of arrest, and place of detention.¹³⁹ Appellate courts reviewing the government’s national security secrecy claims reached mixed results, and the Supreme Court declined to review the issue. As a consequence, the public still has very little information about the identity and processing of these individuals.

1. Challenges to Closure of “Special Interest” Immigration Hearings

Two federal appellate courts—the Third and the Sixth Circuits—examined the First Amendment challenges to the Creppy Directive and reached opposite results.¹⁴⁰ Although both courts agreed that the *Richmond Newspapers* history-and-logic test applied to the removal proceedings, the Sixth Circuit applied the test and concluded that the presumptive right of access attached, while the Third Circuit concluded that it did not.¹⁴¹

In response to the First Amendment challenges to the Creppy Directive, the government argued that the “[c]losure of removal proceedings in special interest cases is necessary to protect national security by safeguarding the Government’s investigation of the September 11 terrorist attack and other terrorist conspiracies.”¹⁴² Specifically, the government maintained that disclosing the names of the

¹³⁶ *Id.* at 203.

¹³⁷ *Id.* Regulations also permit government attorneys to submit information under seal to the immigration judge, who is required to give “appropriate deference” to the government’s contention that disclosure of the documents would harm national security. 8 C.F.R. § 1003.46 (2004).

¹³⁸ *N. Jersey Media*, 308 F.3d at 203–04.

¹³⁹ *Ctr. for Nat’l Sec. Studies v. U.S. Dep’t of Justice*, 331 F.3d 918 (D.C. Cir. 2003).

¹⁴⁰ See *N. Jersey Media*, 308 F.3d at 221; *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 710–11 (6th Cir. 2002).

¹⁴¹ See *N. Jersey Media*, 308 F.3d at 204–05; *Detroit Free Press*, 303 F.3d at 700.

¹⁴² *Detroit Free Press*, 303 F.3d at 705.

“special interest” detainees would enable possible terrorists to compile seemingly innocuous information and create a “mosaic” that would reveal the direction, patterns, and progress of the investigation; this mosaic would thus reveal which terrorist cells had been compromised and which ports of entry were most dangerous.¹⁴³

Both the Third and Sixth Circuits agreed that the two-pronged history-and-logic test dictated the relevant inquiry for determining whether there is a constitutional right of access to deportation hearings.¹⁴⁴ The courts rejected the government’s argument that the Executive’s plenary power over immigration required deference on “all facets of immigration law” as long as they are “facially legitimate and bona fide,” noting that this deference was appropriate only to the Executive’s promulgation of substantive immigration laws, not rules of procedure implicating constitutional rights.¹⁴⁵ The courts also rejected the government’s contention that *Richmond Newspapers* applied only to criminal proceedings, emphasizing that a removal proceeding is an adversarial process that closely resembles a judicial trial.¹⁴⁶

It was in the application of the *Richmond Newspapers* test, however, where the courts’ agreement ended. The Sixth Circuit applied the

143 See *N. Jersey Media*, 308 F.3d at 203; *Detroit Free Press*, 303 F.3d at 705–06, 709. The government also argued that (1) terrorist organizations might intimidate or harm investigative sources and potential witnesses associated with the detainee; (2) the detainees would no longer be a fruitful source of information because terrorist groups would stop dealing with detainees known to be in government custody; (3) verifying that an individual is detained would reveal the organization and direction of anti-terrorism efforts and alert terrorist organizations to the need to find a substitute actor to accomplish their goals; (4) terrorist organizations might interfere with the proceedings by creating false or misleading evidence; and (5) detainees who do not actually have any connection to terrorism would be stigmatized. See *Detroit Free Press*, 303 F.3d at 705–06.

144 See *N. Jersey Media*, 308 F.3d at 208–09 (holding that *Richmond Newspapers* “is a test broadly applicable to issues of access to government proceedings, including removal”); *Detroit Free Press*, 303 F.3d at 694, 700 (rejecting the government’s argument that a more deferential standard for non-adjudicative proceedings applied).

145 *Detroit Free Press*, 303 F.3d at 685, 686 (quoting *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972)); see *id.* at 692–93.

146 See *N. Jersey Media*, 308 F.3d at 207, 208–09; *Detroit Free Press*, 303 F.3d at 698–99. The *Detroit Free Press* opinion notes that immigration hearings commence with a “complaint-like pleading”; “the government bears the burden of establishing its allegations by ‘clear and convincing evidence’”; the respondent has the right of counsel of his own choosing and the right to be present at the hearing; the respondent may assert affirmative defenses or seek discretionary relief; the “immigration judge cannot have participated in the same case in an investigative or prosecutorial role”; and a removal order “must be based on reasonable, substantial, and probative evidence.” *Detroit Free Press*, 303 F.3d at 698–99. As one court noted, “Deportation hearings ‘walk, talk, and squawk’ very much like a judicial proceeding.” *Id.* at 702.

history-and-logic test and concluded that there was a constitutional right of access to the deportation hearings, and that the government had not met its burden of showing the closure order was narrowly tailored to address the government's compelling interest in national security.¹⁴⁷ In contrast, the Third Circuit determined that there was not even a presumptive right of access to "special interest" deportation hearings because they failed both prongs of the history-and-logic inquiry.¹⁴⁸

The courts' disagreement first centered on whether removal proceedings had a sufficient tradition of openness to satisfy the history prong. The Sixth Circuit found that "[a]lthough exceptions may have been allowed, the general policy has been one of openness."¹⁴⁹ The court noted that no immigration statute had ever required closure, and that since 1965, INS regulations have provided explicitly for presumptively open proceedings.¹⁵⁰ The court took notice of historical evidence that some deportation hearings were conducted in prisons, hospitals, and homes, but discounted these hearings as rare exceptions.¹⁵¹ The Third Circuit, in contrast, placed much more emphasis on these exceptions, and concluded that the history of openness of deportation hearings "has neither the pedigree nor uniformity necessary to satisfy *Richmond Newspapers*' first prong."¹⁵²

Although the Third Circuit's conclusion concerning the history of openness of deportation proceedings is debatable in light of the longstanding confusion concerning the application of the test,¹⁵³ its

¹⁴⁷ *Detroit Free Press*, 303 F.3d at 700, 705.

¹⁴⁸ *N. Jersey Media*, 308 F.3d at 221.

¹⁴⁹ *Detroit Free Press*, 303 F.3d at 701.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 703.

¹⁵² See *N. Jersey Media*, 308 F.3d at 209. The court noted that "there is also evidence that, in practice, deportation hearings have frequently been closed to the general public." *Id.* at 212.

¹⁵³ See Kathleen K. Olson, *Courtroom Access After 9/11: A Pathological Perspective*, 7 *Comm. L. & Pol'y* 461, 487-88 (2002) (explaining that given the general confusion surrounding the application of the history-and-logic test, particularly to administrative proceedings, "[p]redicting how the *Richmond Newspapers* test would apply in [INS proceedings and military tribunals] would be a difficult task even in the best of times"). The Court of Appeals for the Third Circuit itself recognized the lack of guidance on how to determine whether a proceeding satisfies the history prong. See *N. Jersey Media*, 308 F.3d at 213 (noting that it appears a 1000-year history is unnecessary, but the 38-year history of open removal hearings was too short). Others have noted that the Third Circuit's application was inconsistent with its own precedent, where it had concluded the "history" prong satisfied on a lesser showing. See Lauren Gilbert, *When Democracy Dies*

analysis of the logic prong was truly unprecedented. The Sixth Circuit approached the logic inquiry in a traditional manner and concluded that its requirements were met in the context of deportation hearings.¹⁵⁴ The court emphasized that public scrutiny was particularly important in immigration proceedings because in that area “the government has nearly unlimited authority, [and] the press and the public serve as perhaps the only check on abusive government practices.”¹⁵⁵ In addition, after September 11, openness has particularly significant “cathartic” effect by serving as an outlet for the hostility and high emotions resulting from the terrorist attacks.¹⁵⁶

The Third Circuit, in contrast, voiced frustration that the “logic” prong did not do much “work,” noting that it could not identify a case where the proceedings passed the history test but failed the logic test.¹⁵⁷ The court concluded that the logic prong therefore must require consideration of not only whether openness can play a positive role, but also whether openness could “impair[] the public good.”¹⁵⁸ The court emphasized that “in the wake of September 11, 2001, a day on which American life changed drastically and dramatically . . . the primary national policy must be self-preservation.”¹⁵⁹ The Third Circuit summarized the reasons the government gave for closing all “special interest” deportation hearings—with no discussion of whether the government assertions were reasonable or credible—and held that the government had met its burden of presenting substantial evidence that a presumption of open hearings could threaten national security.¹⁶⁰ The Third Circuit conceded that the government’s showing of national security risk was “to some degree speculative,” but concluded that “[w]e are quite hesitant to conduct a judicial inquiry into the credibility of these security concerns, as national security is an area where courts have traditionally extended great deference to Executive expertise.”¹⁶¹

The Sixth Circuit was far more skeptical of the government’s national security argument. First, the court considered whether govern-

Behind Closed Doors: The First Amendment and “Special Interest” Hearings, 55 Rutgers L. Rev. 741, 769–70 (2003) (citing Third Circuit cases that the Third Circuit ignored).

¹⁵⁴ See *Detroit Free Press*, 303 F.3d at 703.

¹⁵⁵ *Id.* at 704.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *N. Jersey Media*, 308 F.3d at 217.

¹⁵⁹ *Id.* at 202.

¹⁶⁰ See *id.* at 219–21.

¹⁶¹ *Id.* at 219.

ment had met its burden of rebutting the presumption that the right of access applied. To meet its burden, the government was required to show that not only its compelling interest in closure, but also that the broad Creppy Directive was narrowly tailored to serve this interest.¹⁶² The Sixth Circuit accepted that the government had a compelling interest in preventing terrorism, and that the government's "mosaic" argument had possible merit—that is, that terrorists could take "[b]its and pieces of information that may appear innocuous in isolation" and piece them together "to help form a 'bigger picture' of the government's terrorism investigation."¹⁶³ The court concluded, however, that the government had not demonstrated that the Creppy order was narrowly tailored to serve its national security interests, or that "no less restrictive alternative would serve the government's purpose."¹⁶⁴ The court explained that the government had failed to demonstrate why immigration judges could not evaluate closure requests on a case-by-case basis, employing in camera proceedings when necessary.¹⁶⁵ The court also rejected the government's argument that divulging merely the detainees' names would provide too much information to potential terrorists, noting that the detainees and their lawyers were already free to disclose their identities to the public.¹⁶⁶ The court also remarked that potential terrorists capable of "sophisticated intelligence-gathering" would certainly be aware that one of their operatives was missing and possibly in government custody.¹⁶⁷ In addition, the court rejected the government's categorical invocation of the "mosaic intelligence" theory.¹⁶⁸ The court explained that if it accepted this argument, the government would be allowed to use national security as justification for closing *any* public hearing, including criminal proceedings.¹⁶⁹ The court was particularly concerned about accepting a "mosaic" theory in the situation at hand, given that the government had failed to explain the standards or procedures used to designate a particular deportation hearing as a "special interest" hearing.¹⁷⁰

¹⁶² See *Detroit Free Press*, 303 F.3d at 705.

¹⁶³ *Id.* at 706 (citing several other circuit court cases recognizing the general validity of the "mosaic" theory of intelligence gathering).

¹⁶⁴ *Id.* at 705, 708 (quoting *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 815 (2000)).

¹⁶⁵ See *id.* at 708.

¹⁶⁶ *Id.*

¹⁶⁷ *Detroit Free Press*, 303 F.3d at 708.

¹⁶⁸ See *id.* at 709.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 709–10.

Despite conflicting conclusions in the lower courts, the Supreme Court declined to review the constitutionality of the Creppy Directive.¹⁷¹ One possible reason for this decision was the Solicitor General's representation to the Court that the Creppy Directive was no longer in effect and that the issue of its constitutionality was therefore moot.¹⁷²

2. Request for Detainee Information Under FOIA

Frustrated in their attempts to gain access to the "special interest" deportation proceedings, the Center for National Security Studies, the American Civil Liberties Union, and twenty-one other public interest organizations committed to human rights and civil liberties issues filed a FOIA request to make public the identities of the detainees and their attorneys, dates of arrest and release, locations of arrest and detention, and the reasons for detention. To support their request, the plaintiffs submitted press reports that "raised serious questions about 'deprivations of fundamental due process, including imprisonment without probable cause, interference with the right to counsel, and threats of serious bodily injury.'"¹⁷³ In response, the government indicated that the detainees fell into three categories: (1) individuals criminally charged; (2) individuals held on immigration charges; and (3) material witnesses.¹⁷⁴ The Department of Justice agreed to release a small portion of the requested information concerning the few detainees who had been criminally charged. With respect to the immigration detainees, however, the government refused to reveal their names, the names of their counsel, the dates of arrest, any filed charges, or the

¹⁷¹ See *N. Jersey Media*, 308 F.3d at 198.

¹⁷² See Devlin Barrett, *Abuse of Detainees Spurs Homeland Changes*, *Monterey Herald*, ¶¶ 3, 9, 7 (Apr. 14, 2004) (describing new rules), available at <http://www.montereyherald.com>; John Mintz, *New Rules Shorten Holding Time for Detained Immigrants*, *Wash. Post*, Apr. 14, 2004, at A17 (discussing Department of Homeland Security's announcement of new rules). In mid-April 2004, the Department of Homeland Security announced new guidelines for the treatment of individuals detained for alleged immigration violations. *Id.* For example, the new procedures require high-ranking officials in the Department of Homeland Security to review all cases in which the government seeks to make a national security exception to the rule that an individual detained for an alleged immigration violation must be released on bond within 48 hours. Mintz, *New Rules*, *supra*. In addition, the regulations prohibit the Department from seeking the broad-scale closure of immigration proceedings for entire groups of detainees. Barrett, *supra*. Instead, each closure request must be made on an individual basis. See Mintz, *New Rules*, *supra*.

¹⁷³ *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 922.

¹⁷⁴ *Id.* at 921–22.

dates on which any of the detainees had been released.¹⁷⁵ The government refused to disclose any information at all about the material witnesses.¹⁷⁶ The requesters filed suit in federal district court in the District of Columbia challenging the Department's withholding decision.¹⁷⁷

In opposing the lawsuit, the government claimed that the detainee information was exempt from disclosure under FOIA because its release would interfere with the government's counterterrorism efforts. Throughout its brief, the government emphasized that the court must defer to the Executive's determination that releasing the information would pose a threat to national security.¹⁷⁸ Like the Creppy Directive, which applied indiscriminately to post-September 11 detainees, the Department of Justice's response to the FOIA request did not distinguish between the detainees who had been found to have terrorist connections and those who did not; instead, the Department asserted that the information needed to be protected under a "mosaic" theory.¹⁷⁹

Although the government claimed that "national security" concerns required the nondisclosure of detainee information, the government did not claim that this information was exempt from disclosure under Exemption 1. As explained above, Exemption 1 applies only to information that has been properly classified pursuant to an Executive order. Because information about the post-September 11 detainees had not been classified, the government could not invoke that exemption. Instead, the government claimed that the detainee information was exempt from disclosure under FOIA pursuant to Exemptions 7(A), (C), and (F).¹⁸⁰ These exemptions permit the withholding of information "compiled for law enforcement proceedings" when disclosure "(A) could reasonably be expected to constitute an unwarranted invasion of personal privacy, . . . (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, [or] . . . (F) could reasonably

¹⁷⁵ *Id.* at 922. The government has also released selective information about individual detainees, typically ones who are alleged to have ties to terrorism. *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ See *Ctr. for Nat'l Sec. Studies v. Dep't of Justice*, 215 F. Supp. 2d 94 (D.D.C. 2002), *aff'd in part, rev'd in part*, 331 F.3d 918 (D.C. Cir. 2003).

¹⁷⁸ See generally Brief for Appellant, *Ctr. for Nat'l Sec. Studies*, 215 F. Supp. 2d 94 (D.D.C. 2002) (No. 02-5254).

¹⁷⁹ *Ctr. for Nat'l Sec. Studies*, 215 F. Supp. 2d at 103.

¹⁸⁰ *Id.* at 98.

be expected to endanger the life or physical safety of any individual.¹⁸¹

The D.C. Circuit rejected the request for detainee information.¹⁸² Just as the Third Circuit created an exemption to the First Amendment right of access for national security matters, the D.C. Circuit essentially created a “national security” exception to FOIA. The court explained that the appropriateness of judicial deference to the Executive “depends on the substance of the danger posed by disclosure—that is, harm to the national security—not the FOIA exemption invoked.¹⁸³ At several points throughout its opinion, the D.C. Circuit reiterated the importance of judicial deference to the Executive when national security matters are at issue.¹⁸⁴ The court appeared concerned, as the government repeatedly warned in its brief,¹⁸⁵ that grave consequences would result if the court released the requested information about the detainees. The majority noted that “[t]he need for deference in this case is just as strong as in earlier cases. America faces an enemy just as real as its former Cold War foes, with capabilities beyond the capacity of the judiciary to explore.”¹⁸⁶ Just as the Third Circuit did in *North Jersey Media*, the D.C. Circuit concluded that when national security

¹⁸¹ 5 U.S.C. § 552(b)(7)(A), (C), (F) (2000). The government also claimed that information concerning individuals detained as “material witnesses” was exempt from disclosure under Federal Rules of Criminal Procedure 6(e)(2) and 6(e)(6), which bar the disclosure of matters occurring before a grand jury. The district court rejected this argument because the government had failed to establish that any of the detainees actually had appeared or were scheduled to appear before a grand jury. 215 F. Supp. 2d at 106–07. The D.C. Circuit did not reach this argument because it concluded that all the requested information was exempt from disclosure under Exemption 7(A). Judge Tatel, in dissent, agreed with the District Court that the government had failed to demonstrate that all the material witness detainees were likely to testify before a grand jury. *Ctr. for Nat’l Sec. Studies*, 331 F.3d at 949 (Tatel, J., dissenting). Judge Tatel noted that, in fact, “the record indicates that at least seven material witnesses have been released without testifying before a grand jury, so in their cases, it seems more accurate to say that their testimony is quite *unlikely* to occur before a grand jury.” *Id.* (Tatel, J., dissenting) (emphasis in original).

¹⁸² *Ctr. for Nat’l Sec. Studies*, 331 F.3d at 937.

¹⁸³ *Id.* at 928.

¹⁸⁴ See *id.* at 926–27 (“It is equally well-established that the judiciary owes some measure of deference to the executive in cases implicating national security, a uniquely executive purview.”); *id.* at 927 (“[B]oth the Supreme Court and this Court have expressly recognized the propriety of deference to the executive in the context of FOIA claims which implicate national security.”).

¹⁸⁵ For example, the government argued that releasing the information could lead to a “possible loss of life, perhaps on a massive scale.” Brief for Appellant at 52, *Ctr. for Nat’l Sec. Studies*, 215 F. Supp. 2d 94 (D.D.C. 2002) (No. 02-5254).

¹⁸⁶ *Ctr. for Nat’l Sec. Studies*, 331 F.3d at 928.

matters are implicated, it would be “unwise to undertake searching judicial review.”¹⁸⁷

Applying this extremely deferential mode of analysis, the court accepted as “reasonable” the government’s argument that releasing the names of all the post-September 11 detainees would enable potential terrorists to map the counterterrorism investigation and develop ways to impede it.¹⁸⁸ The court rejected the plaintiffs’ argument that terrorist organizations most likely know which of its members have been detained, stating that it had “no way of assessing that likelihood” and that even if it did, “a complete list of detainees could still have great value in confirming the status of their members.”¹⁸⁹ A terrorist group might not know that one of its members had been detained briefly and released, and if it learned that information, “this detainee could be irreparably compromised as a source of information.”¹⁹⁰ In addition, the court explained, a released detainee might not be a member of a terrorist group but merely have information about terrorists who are members of their mosques or community groups.¹⁹¹ These individuals will be less likely to cooperate with officials if their names are released, and terrorist groups might attempt to intimidate these individuals or feed them false or misleading information.¹⁹² The Court also noted that future potential informants are less likely to come forward if they believe their identities will be revealed.¹⁹³

At a pivotal moment in its opinion, the majority seized on the vague assertion in a government declaration that “concerns remain[ed]” about the detainees’ links to terrorism to leap to the conclusion that in fact “many of the detainees have links to terrorism.”¹⁹⁴ The court added that “[t]his comes as no surprise given that the detainees were apprehended during the course of a terrorism investigation, and given that several detainees have been charged with federal terrorism crimes or held as enemy combatants.”¹⁹⁵ The court disregarded the fact that, as of the time the FOIA suit was filed, only one detainee out of 1,182 had been criminally charged in connection with the September

¹⁸⁷ See *id.* at 927.

¹⁸⁸ *Id.* at 928.

¹⁸⁹ *Id.* at 930.

¹⁹⁰ *Id.*

¹⁹¹ *Ctr. for Nat’l Sec. Studies*, 331 F.3d at 930.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ See *id.* at 931.

¹⁹⁵ *Id.*

11 attacks, and ignored as well the government's concession that many of the detainees included individuals proven to have no connection with terrorist activity and "no information useful to the investigation."¹⁹⁶

The majority also agreed with the government's contention that disclosing the names of the detainees' attorneys, or the dates and locations of arrest, detention, and release for each would have the same potentially "disastrous" consequences as releasing the names of the detainees themselves.¹⁹⁷ The court predicted that the press would talk to the attorneys to compile information about the detainees, and that the remaining information concerning the date and place of their arrest, detention, and release "would provide a chronological and geographical picture of the government investigation," allowing terrorists to "derive conclusions as to how [to] more adequately secure their clandestine operations in future terrorist undertakings."¹⁹⁸ The Supreme Court declined to review the D.C. Circuit's ruling.¹⁹⁹

The D.C. Circuit opinion in *Center for National Security Studies* exacerbates a longstanding tendency of the courts to defer to the Executive's classification decisions. Even before the terrorist attacks of September 11, courts and commentators had lamented the judiciary's excessive deference to the Executive's classification decisions. The text of FOIA makes clear that all decisions to withhold information from the public must be reviewed "*de novo*." Affording broad, almost conclusive deference to the Executive's decisions regarding the disclosure of information whenever the Executive asserts a "national security" need for secrecy—whether for classified information subject to Exemption 1 or not—is contrary to Congress's clear intention, and returns the public's right of access to its unfortunate status before FOIA, when the Executive could withhold information on the basis of his unreviewable determination that it was "in the public interest" to do so.

III. The Threat to the Right to Know

Although the Third and D.C. Circuits were evaluating different claims—respectively, the First Amendment right of access and FOIA—the cases are remarkably similar in a number of ways. Most obviously, the two courts considered whether the public should be

196 See *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 941 (Tatel, J., dissenting).

197 See *id.* at 932–33.

198 *Id.* at 933.

199 See *id.* at 918.

given access to essentially the same information about the post-9/11 detainees, and in doing so, both courts had to evaluate the government claims that such access would threaten national security.²⁰⁰ Beneath the surface, the two decisions also reflected deeper misgivings as to the value of the right of access, particularly when the government alleges that releasing the information could harm national security, and even more so when that information concerns noncitizens, a group historically suspect in times of war.

A. Amplification of Pre-Existing Doctrinal Confusion

The Third and D.C. Circuits' decisions reflect the judiciary's historic hostility to the right of access under FOIA and the First Amendment, particularly when the information sought allegedly concerns national security. Both rights are relatively new, and throughout their brief history the courts have demonstrated a persistent reluctance to question the Executive's claims that national security requires secrecy.

Given the Court's failure to reconcile *Richmond Newspapers* with its prior decisions, it is not surprising that the lower courts have disagreed about whether the First Amendment right of access applies outside of judicial proceedings. Some courts have held that *Richmond Newspapers* has no application to the executive and legislative branches, holding that in such cases the applicable rule is that of the *Houchins* plurality—that the First Amendment does not guarantee a right of access to government information.²⁰¹ Although the Third Circuit rejected the government's argument that *Richmond Newspapers* did not apply to immigration proceedings, its utter failure to recognize the importance of the right of access is the same as that expressed in the majority and plurality decisions in *Pell*, *Houchins*, and *Saxbe*.²⁰²

²⁰⁰ See *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 927–28; *N. Jersey Media*, 308 F.3d at 217–19.

²⁰¹ See *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 935 (noting that *Houchins*, not *Richmond Newspapers*, applies outside the judicial context); *In re Boston Herald, Inc.*, 321 F.3d 174, 180–81 (1st Cir. 2003) (suggesting same); *Calder v. IRS*, 890 F.2d 781, 783–84 (5th Cir. 1989) (*Houchins*, not *Richmond Newspapers*, governs the right of access to agency records); *Capital Cities Media, Inc. v. Chester*, 797 F.2d 1164, 1173 (3d Cir. 1986) (“While [*Richmond Newspapers* and its progeny] clearly represent a significant development, they do not expressly or impliedly overrule *Houchins*.”). *But see Cincinnati Enquirer v. Cincinnati Bd. of Educ.*, 249 F. Supp. 2d 911, 915 (S.D. Ohio 2003) (rejecting argument that *Richmond Newspapers* test applies only to judicial or quasi-judicial proceedings).

²⁰² See *supra* Part I.A.1.

Even more dramatically, the differences between the Third and Sixth Circuit opinions demonstrate the difficulties of applying the “history-and-logic” test outside of the context of a judicial proceeding. The first problematic prong is the “history” inquiry. Although *Richmond Newspapers* noted that the history of open criminal trials extended from the time of the Norman Conquest to the present, often no historical analog is available for consideration, or the history of openness is limited or mixed.²⁰³ As a result, most courts have held that a history of openness with the same pedigree of a criminal trial is not necessary to satisfy the history prong. Instead, as one professor noted, “some [courts] have drawn analogies with established proceedings or have examined the history, however short, of the specific proceeding at issue.”²⁰⁴ Others have discounted the importance of a historical tradition altogether and instead emphasized the logic prong and the structural value of access, thus extending the right of access to proceedings possessing very little history at all, including administrative proceedings such as unemployment benefit hearings and fact-finding hearings of the federal Mine Safety and Health Administration.²⁰⁵

The logic prong has also been a lightning rod for criticism. In *Globe Newspaper*, the Court explained that this inquiry asks whether a right of access “plays a particularly significant role in the functioning of the judicial process and the government as a whole.”²⁰⁶ For example, the Court noted, public scrutiny of a trial can enhance the quality of the proceedings by serving as a check on the judiciary as well as the integrity of the fact-finding process, foster the appearance of fairness and increase public respect for the judicial system, and encourage public participation in the government.²⁰⁷ In *Press-Enterprise II*, decided only two years later, a dissenting Justice Stevens noted that the logic prong “proves too much” because it is hard to imagine any proceeding in which there would be no value in public openness.²⁰⁸ Most proceedings, he explained, are arguably an “important step” in the judicial process in which public monitoring could

²⁰³ See 448 U.S. at 565. Some commentators have noted how incongruous it is to rely on history when the framers’ only well-documented focus when drafting the First Amendment was prohibiting prior restraints. See Kitrosser, *supra* note 2, at 113–14 (citing commentators).

²⁰⁴ Olson, *supra* note 153, at 485 (citing cases).

²⁰⁵ See *id.* at 485–87.

²⁰⁶ See 457 U.S. at 606.

²⁰⁷ See *id.*

²⁰⁸ See 478 U.S. at 25 (Stevens, J., dissenting).

be valuable, and closure of any judicial proceedings would arguably deny an outlet for “community rage.”²⁰⁹ Similarly, some commentators have argued that the logic prong gives “little principled guidance” to courts attempting to resolve access claims.²¹⁰

Although the Third Circuit’s general approach to the history prong of the *Richmond Newspapers* test was not significantly different from that of the Sixth Circuit, its application of the logic prong was novel. Rather than consider the value of public access to removal hearings in general, the court considered the value of public access to the particular subset of “special interest” removal hearings. This approach was plainly inconsistent with *Globe Newspaper*, in which the Supreme Court made clear that the proper inquiry is whether there is a right of access to criminal trials generally rather than rape trials specifically.²¹¹ The Sixth Circuit’s misapplication of the logic prong of the right of access threatens to undermine the right entirely. Weighing the “public interest” in national security in the logic prong significantly lowers the standard the government must meet to obtain closure. The Third Circuit itself recognized the “force of [the plaintiffs’] contention” that the government’s showing would not satisfy strict scrutiny if the court had concluded that the presumptive right of access attached.²¹²

The D.C. Circuit’s decision similarly brought to the forefront the limitations that have plagued FOIA since its inception. As discussed earlier, the courts persist in deferring to the Executive’s claims regarding the continued non-disclosure of classified information pursuant to FOIA’s Exemption 1, despite Congress’s efforts to compel more searching judicial review.²¹³ In *Center for National Security Studies*, the court took this deference one step farther, finding that it is appropriate to defer to the Executive’s assessment that releasing information would harm national security, even when the information at issue is not classified.²¹⁴ In so doing, the D.C. Circuit has essentially created a broad “national security” exception to FOIA.

²⁰⁹ See *id.* at 25–26.

²¹⁰ See Olson, *supra* note 153, at 488; see also BeVier, *supra* note 66, at 338–39 (arguing that the logic prong “does not provide meaningful guidance”); Kitrosser, *supra* note 2, at 115 (noting that “a logic prong so unclear in its theoretical grounding and practical implications as that relied upon by the Supreme Court cannot meaningfully contribute to the assessment of access claims”).

²¹¹ See *Globe Newspaper*, 457 U.S. at 604–06.

²¹² See *N. Jersey Media*, 308 F.3d at 219 n.14.

²¹³ See *supra* Part I.B.

²¹⁴ See *Ctr. for Nat’l Sec. Studies*, 331 F.3d at 927–28.

B. *Failure to Recognize the Value of the Public's Right to Know*

Even more disturbing in the recent access cases was the judiciary's view that the right of access lacks significant value. Both the D.C. and Third Circuits failed to recognize the importance of an open government for the democratic process.

When determining whether the public's interest in openness outweighed the government's interest in national security, the Third Circuit gave virtually no weight to the democratic importance of openness and the checking function that informed public debate can have on government actors.²¹⁵ Instead, the court disparaged the value of openness as merely providing a "community benefit of emotional catharsis." With this limited view of the value of the right of access, the court not surprisingly concluded that it was "impossible" to weigh this interest "against the security risk of disclosing the United States' methods of investigation and the extent of its knowledge."²¹⁶ Indeed, the Third Circuit went so far as to state that "the reality" was that "the persons most directly affected by the Creppy Directive are the media."²¹⁷ Both the Third and D.C. Circuits accepted the government's assurances that it had respected the civil liberties of the detainees by protecting their due process rights and providing them access to counsel. The D.C. Circuit explained that press access was unnecessary because the detainees "had access to counsel, access to the courts, and freedom to contact the press or the public at large."²¹⁸

As has now been well-documented, the Justice Department neither respected the civil liberties of the detainees nor afforded them a timely or adequate means of communicating with their families or counsel, much less the press. Shortly before the D.C. Circuit's opinion was issued, the Department of Justice's own Inspector General released a report revealing myriad problems with the government's handling of detainees.²¹⁹ For example, the detainees waited an average

²¹⁵ See *N. Jersey Media*, 308 F.3d at 217 (listing values typically served by openness, but stating that just because openness serves community values does not mean that it passes the logic test by playing a "significant positive role" in a proceeding).

²¹⁶ See *id.* at 219.

²¹⁷ See *id.* at 221.

²¹⁸ *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 922.

²¹⁹ See Office of the Inspector General, U.S. Dep't of Justice, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks* 35, 137–38, 143–44 (2003), available at <http://www.usdoj.gov/oig/special/0306/full.pdf>. The Inspector General's Report was released on June 2, 2003. See Press Release, Office of the Inspector General, De-

of fifteen days to receive notice of the charges against them.²²⁰ Some were held in unduly harsh conditions and subjected to abuse and mistreatment.²²¹ The Bureau of Prisons imposed a “communications blackout” that lasted several weeks, during which the detainees were not permitted to receive or make telephone calls, have visitors, or send mail.²²² Even after this time, prison officials continued to withhold the detainees’ location from attorneys and family members.²²³ The detainees had great difficulty obtaining legal representation because they were permitted only one weekly phone call, and the lists of attorneys the government provided were outdated and contained incorrect phone numbers.²²⁴ Contrary to the D.C. Circuit’s conclusion that “many of the detainees have links to terrorism,”²²⁵ most of them did not. According to the Inspector General’s report, many detainees were targeted on vague and inconclusive evidence, such as “a landlord reporting suspicious activity by an Arab tenant,” or someone complaining that a retail store had “too many” Middle Eastern employees.²²⁶ As Professor David Cole has said, the Inspector General’s report revealed that “Ashcroft was shooting in the dark and virtually every one of his shots missed.”²²⁷ Of the estimated 5,000

partment of Justice Inspector General Issues Report on Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Terrorist Attacks (June 2, 2003), <http://www.usdoj.gov/oig/special/0306/press.htm>. The D.C. Circuit’s opinion was released June 17, 2003. See *Ctr. for Nat’l Sec. Studies*, 331 F.3d at 922.

²²⁰ U.S. Dep’t of Justice, Supplemental Report on September 11 Detainees’ Allegations of Abuse at the Metropolitan Detention Center in Brooklyn, New York 2, 29 (Dec. 2003), available at <http://www.usdoj.gov/oig/special/0312/final.pdf> (reporting that additional investigation substantiated detainees’ claims of abuse).

²²¹ *Id.* at 142–47 (summarizing detainees’ claims that they were slammed against walls, dragged by their handcuffed arms, threatened, kicked, unnecessarily strip-searched, and had their arms, hands, fingers, and wrists twisted); *id.* at 153–55 (reporting that cell lights were kept on 24 hours a day for several months); see also Office of the Inspector General, *The September 11 Detainees*, *supra* note 219, at 28.

²²² Office of the Inspector General, *The September 11 Detainees*, *supra* note 219, at 158.

²²³ *Id.* at 159.

²²⁴ *Id.* at 161.

²²⁵ *Ctr. for Nat’l Sec. Studies*, 331 F.3d at 931.

²²⁶ Office of the Inspector General, *The September 11 Detainees*, *supra* note 219, at 16, 17.

²²⁷ Adam Liptak, *Palmer Raids Redux: The Pursuit of Immigrants in America After Sept. 11*, *N.Y. Times*, June 8, 2003, at 14.

alien detainees, only three have been charged with crimes relating to terrorism, and none to the September 11 attacks.²²⁸

In any event, the courts' focus on the underlying rights of the detainees ignores the broader purposes of the right of access. It is not simply the media that benefits from openness, but the public that they serve. It is through the press—and increasingly watchdog groups—that the public learn about the government's processes and see for themselves whether those processes are fair. It is not merely about the “emotional catharsis” value of openness, but the democratic values this openness serves. If the government released information about the detainees and it turned out that the detainees were treated properly, this fact would increase the public's confidence in the government. Instead, by concealing detainee information, the government only gives credence to the suspicion that the government has something to hide.

The Sixth Circuit had no trouble identifying the public's interest in presumptively open removal proceedings, particularly in a time of crisis.²²⁹ It closed its opinion by noting that the open proceedings best served the public's interest, particularly after September 11, in order to “ensur[e] that our government is held accountable to the people and that First Amendment rights are not impermissibly compromised.”²³⁰ Noting that “[d]emocracies die behind closed doors,” the court said that:

[i]t would be ironic, indeed, to allow the Government's assertion of plenary power to transform the First Amendment from the great instrument of open democracy to a safe harbor from public scrutiny. . . . Even though the political branches may have unfettered discretion to deport and exclude certain people, requiring the Government to account for their choices assures an informed public—a foundational principle of democracy.²³¹

It is difficult to comprehend how public pressure can begin to be effective if the public does not even have sufficient information by which to judge its government.

²²⁸ David Cole, *The Priority of Morality: The Emergency Constitution's Blind Spot*, 113 *Yale L.J.* 1753, 1753–54 (2004).

²²⁹ See *Detroit Free Press*, 303 F.3d at 711.

²³⁰ *Id.*

²³¹ *Id.* at 683, 686, 693.

C. Public Pressure is Unreliable and Insufficient

In rejecting the right of access to deportation proceedings for immigrants rounded up after the September 11 terrorist attacks, the Third Circuit also suggested that the right of access was unimportant because there was, “as always, the powerful check of political accountability on Executive discretion.”²³² This statement reflects the court’s profound misconception of the role of judicial review and the important role of the courts in checking the other two branches of government. The Third Circuit abdicated its role and left it to the political process to check the government’s failure to disclose information.

This approach is not a novel one, and indeed was the majority view of the Court prior to the *Richmond Newspapers* decision in 1980. Justice Stewart famously declared in a law review article he authored:

There is no constitutional right to have access to particular government information, or to require openness from the bureaucracy. . . . The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act. . . . [W]e must rely, as so often in our system we must, on the tug and pull of the political forces in American society.²³³

Chief Justice Burger argued in the plurality opinion in *Houchins* (prior to *Richmond Newspapers*) that recognizing the right of access would “invite[] the Court to involve itself in what is clearly a legislative task which the Constitution has left to the political processes” and that instead, “we must rely, as so often in our system we must, on the tug and pull of the political forces in American society.”²³⁴

But as scholars have argued for decades, abandoning the right of access to the whims of the political process is problematic. The government’s tendency to suppress damaging news and to highlight favorable news is often a deliberate effort to skew public debate and the

²³² See *N. Jersey Media*, 308 F.3d at 220.

²³³ Stewart, *supra* note 26, at 631, 636 (1975) (citing in part *Pell v. Procunier* and *Saxbe v. Washington Post Co.*).

²³⁴ 438 U.S. at 12, 15 (quoting in part Stewart, *supra* note 26, at 636); see also *Capital Cities Media*, 797 F.2d at 1171 (noting that “decisions as to how much governmental information must be disclosed in order to make democracy work historically have been regarded as political decisions to be made by the people and their elected representatives. Conversely, the judiciary has never asserted the institutional competence to make such decisions.”).

public's perception of the government's performance and foreign affairs.²³⁵ Former executive branch officials have admitted that they selectively released sensitive information in a conscious effort to generate public support for its policies or serve some other bureaucratic or personal agenda.²³⁶ For example, former national security advisor Zbigniew Brzezinski admitted that he released otherwise sensitive information for "explicit administration purposes," the former Assistant Secretary of Defense under President Carter conceded that "he 'had the authority to declassify particular pieces of information when that seemed necessary,'" and a White House official under President Kennedy agreed that high-ranking administration officials "knowingly and deliberately disseminated [classified] information from time to time in order to advance the interests of a particular person, [or] policy."²³⁷ As one commentator noted, "the executive's power to classify and declassify information raises the specter of government misinformation, or its weaker and less noxious relative, 'spin control.'"²³⁸ The result is a distortion of the public debate on fundamental public issues.

Although the Executive has not hesitated to release details concerning the arrest and prosecution of individuals believed to have a connection to terrorism—such as Hamdi, Padilla, and Moussaoui—the Executive has continued to resist information requests regarding the other individuals investigated after September 11 who have been found to have no connection to terrorism. This sort of selective disclosure of information raises the concern that the government is abusing the "national security" umbrella to conceal its counterterrorism efforts that have been less than successful and in turn to "spin" public debate on the government's performance.

The political process notoriously has failed to force the disclosure of information, particularly in times of crisis. A particularly instructive example of this failure is the "trial" of eight Nazi saboteurs during World War II.²³⁹

In 1942, eight Nazis landed on the shores of the United States in a bungled attempt to sabotage the nation's industrial complexes.²⁴⁰

²³⁵ See Note, *Keeping Secrets: Congress, the Courts, and National Security Information*, 103 Harv. L. Rev. 906, 910–11 (1990).

²³⁶ See *id.* at 911–12.

²³⁷ *Id.* at 912 n.29.

²³⁸ *Id.* at 913.

²³⁹ See Eugene Rachlis, *They Came to Kill: The Story of Eight Nazi Saboteurs in America* 176–237 (1961) (describing in detail the saboteurs' trial).

²⁴⁰ See *id.* at 20–21, 160–65.

Their plans were never set in motion, and their brief visit to the United States was cut short after one member of the conspiracy turned everyone in to the FBI.²⁴¹ Although the government announced that the FBI had foiled a Nazi plot and released some information about the plot itself and the identities of the captured, it purposely failed to disseminate any information about the conditions of the arrests in order to obtain the greatest political benefit possible.²⁴² The government implied that other sabotage attempts were possible, and that therefore releasing information about how these eight men were captured might undermine the government's efforts.²⁴³ As a result, the public celebrated the FBI's "victory" over the Nazis, a bit of good news in an otherwise grim period of the war.²⁴⁴

The government specifically chose to use a military tribunal to try the saboteurs in order to conduct the proceedings in secret.²⁴⁵ The tribunal announced that this secrecy was essential for national security, while in truth, the government merely did not want to reveal that one of the saboteurs had surrendered the group.²⁴⁶ The trial was held on the fifth floor of the Department of Justice, in a lecture room literally shrouded in secrecy, with heavy black curtains draped over the windows and the glass doors on each end of the room blacked out.²⁴⁷ The press and public were excluded from the proceedings, except when a small group of reporters was permitted to take pictures of the hearing room while proceedings were suspended.²⁴⁸ General McCoy, the president of the commission, issued daily communiqués to the press about the trial, but these releases typically consisted of little more than the times the hearings commenced and concluded.²⁴⁹

²⁴¹ See *id.* at 157–59.

²⁴² See *id.* at 169–70; see also Lloyd Cutler, *What I Saw at a Military Tribunal*, Time, Nov. 19, 2001, at <http://www.time.com> (web exclusive) (noting that "Hoover . . . wanted to maximize the public relations value of the arrests"). The government released only "the names, photographs and brief biographies of the eight men, a description of their weapons, a list of their objectives, where and how they landed, and very little else." Rachlis, *supra* note 239, at 169.

²⁴³ See Rachlis, *supra* note 239, at 170.

²⁴⁴ See *id.*

²⁴⁵ See *id.* at 174.

²⁴⁶ Louis Fisher, *Nazi Saboteurs on Trial* 54 (2003).

²⁴⁷ See Fisher, *supra* note 246, at 53; Rachlis, *supra* note 239, at 182–83.

²⁴⁸ See Fisher, *supra* note 246, at 53, 55; Rachlis, *supra* note 239, at 177–78.

²⁴⁹ Rachlis, *supra* note 239, at 177–78.

Although the press was frustrated with its limited access to the proceedings, the secrecy did not bother the public much at all.²⁵⁰ Instead, the public's debate focused on why the government was taking so long to execute these men and whether death by hanging or firing squad was more appropriate.²⁵¹ When the Supreme Court announced it would hold a special session to consider the defendants' habeas corpus claim of entitlement to trial before a civil court, the public and most of the press expressed outrage that such a "spectacle" would be held for "a group that came among us to blast, burn and kill."²⁵² There was no public pressure to hold the military trial proceedings in the open; if anything, the public was pressuring the government not to hold any trial at all.

The treatment of the Nazi saboteurs is of course just one example of a time during the history of the United States when the majority has willingly jettisoned the civil liberties of minority groups. During the Palmer Raids in the 1920s, the public did not complain when immigrants were rounded up as suspects in the bombing of Attorney General Palmer's home. During World War II, the public did not object to the internment of citizens and noncitizens of Japanese, Italian, or German origin. Undoubtedly such apathy is due at least in part to the majority's readiness to regard foreigners as inherently suspect.

This is not to deny that public pressure has at times been an effective mechanism for forcing greater government transparency. But during the so-called "War on Terror," the political process has led to the arbitrary and calculated declassification and release of information. The arbitrariness of the classification system as well as the Executive's prerogative to override the classification system has become clear as the executive branch has selectively agreed to declassify documents in response to pressure from the September 11 Commission. With the September 11 Commission's investigation of

²⁵⁰ *Id.* at 178, 185.

²⁵¹ *Id.*; see also Felix Cotten, *Death Penalty Asked for 8 Captured Spies*, Wash. Post, June 29, 1942, at 2 (reporting that members of Congress demanded "swift justice" and that various Congressmen have complained that this country is "too soft" and that these men "ought to be shot, since they are clearly spies"); Editorial, N.Y. Times, Aug. 2, 1942, at E2 (reporting that polls show the public would prefer the immediate execution of these men, by a 10 to 1 margin); Raymond Moley, *Death for the Saboteurs*, Newsweek, July 6, 1942, at 64 (calling for the saboteurs' death and asking that punishment not be delayed).

²⁵² Rachlis, *supra* note 239, at 249; see also Editorial, The Nation, Aug. 8, 1942, at 103 (stating that "[a] touch of the ludicrous is a small price to pay for maintaining the traditions of American judicial procedure. . . . The niceties of jurisprudence, however, can be carried too far . . .").

the failure to prevent the World Trade Center and Pentagon attacks, the executive branch finds itself declassifying information in response to political pressure. But three years have passed since September 11. Access to three-year-old government information, although still valuable, is no substitute for the timely receipt of information.

Political pressure has been notably ineffective or virtually nonexistent when noncitizens are involved. Most obviously, noncitizens cannot vote, and as a result they wield little political might. Instead, they must rely on voting citizens to be sufficiently concerned with the conduct of elected officials to exercise political muscle for those who are disenfranchised.²⁵³ This remote possibility becomes even less likely when the government conceals or distorts information about its treatment of noncitizens. Certainly with respect to the post-9/11 detainees, some watchdog groups suspected that, based on the limited information they managed to amass, the detainees were mistreated. In the face of the government's continued denials of maltreatment, however, their concerns were easily dismissed as hysterical.

Conclusion

The Freedom of Information Act and the First Amendment right of access have served as poor tools for ensuring the public's ability to obtain information about the government's detention of individuals as part of its counterterrorism efforts. As demonstrated above, a variety of factors contribute to this problem. FOIA is riddled with large, undefined exceptions. When information arguably involves national security, courts are too timid to force the executive branch to provide a thorough explanation for continued secrecy. The First Amendment right of access likewise has significant limitations. Although the scope of the right has expanded significantly since the Supreme Court first recognized it in the *Richmond Newspapers* decision, its scope remains severely limited. Courts have been willing to extend the right beyond criminal trials to include some criminal and civil pre-trial proceedings and records, but they have hesitated to recognize the right outside of the judicial context. Even when they have willingly recognized the extension of the right into administrative proceedings,

²⁵³ See, e.g., John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 78 (1980) (arguing that "if it is not the 'many' who are being treated unreasonably but rather only some minority, the situation will not be so comfortably amenable to political correction.").

courts have twisted the *Richmond Newspapers* test so as to favor the continued concealment of any information allegedly pertaining to national security.

The "right to know" has encountered additional and more disturbing problems since the terrorist attacks of September 11. Not only has the courts' tendency to defer to the Executive's national security risk assessment become exaggerated, but courts now appear overtly hostile to the very existence of a right of access during a time of crisis. Instead, they suggest that an enforceable right to know is unnecessary because the political process is adequate to force government disclosure. History demonstrates, however, that the political process is woefully inadequate to realize this purpose. Although the government has been somewhat more forthcoming with information about detained citizens, its voluntary disclosure in reality is little more than a smoke-screen. In the end, the public has been receiving insufficient information about the government's counterterrorism efforts with respect to citizens and noncitizens alike to make an informed judgment about its performance.