

National Security and the First Amendment: A Judicial Role in Maximizing Public Access to Information

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INTRODUCTION

The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government. And paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell.¹

Essential to the exercise of free speech is the availability of information upon which citizens can form opinions. In the current political climate, where much of United States foreign policy is quietly conducted at dangerous locations around the world, the need for public information is vital for our democracy to function correctly. A sense of public curiosity is in the air regarding many current issues. What evidence is there that Iraq has weapons of mass destruction? Who are the people being secretly detained by our government as material witnesses or on immigration charges? Answers to such questions are necessary for the public to evaluate government public policy decisions. Criticism of government policy is amongst the most highly protected areas of speech, in no small part because it educates the electorate and holds government officials

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1. *N.Y. Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring).

accountable. Yet, overclassification of information and government secrecy can impede the public from forming an educated opinion, thus impeding policy debate, reform, and the accountability of leaders.

This Comment explores four closely related areas of law that deal with the protection of, or the freedom to obtain or publicize, what may be termed "state secrets." The doctrines of state secrets and prior restraints, qualified right of access cases, and Freedom of Information Act ("FOIA") cases all involve the judiciary making judgment calls that, if improper or overly deferential, can stifle political dialogue by limiting the stock of public information that is essential to the meaningful exercise of First Amendment rights.

First, Part I of this Comment discusses case law defining state secrets and the government's ability to prevent their disclosure. These cases are not directly related to First Amendment concerns since they deal with admissibility of classified information in court as well as how one can obtain state secrets through the judicial discovery process.² Nonetheless, these cases explain the government's interests in maintaining state secrets and provide some guidance on how much deference the courts will give Executive Branch determinations of what information could harm national security. The standards of deference and the methods courts can use to examine evidence are important to understanding how First Amendment prior restraint cases and right of access cases are or should be decided.

Directly related to the First Amendment is the second area of law discussed in Part II of this Comment, the doctrine of prior restraints. Prior restraints on speech usually occur when the government attempts to prevent certain information from being disseminated by an individual or press agency. Prior restraints are presumed to be an invalid restraint of speech, though there are some noteworthy exceptions. This Comment discusses the rare prior restraint situation where the government attempts to prevent the press from running a story, when there is a common secrecy agreement obligating a government employee not to disclose information related to his or her employment activities.

The final doctrine, discussed in Part III of this Comment, deals with what the Supreme Court has called the "qualified right of access." This doctrine, rooted in the First Amendment, holds that the public and press have a qualified right to enter forums like courtrooms. While prior restraints are presumptively treated as suspect, parties asserting a qualified right of access to information in the military context have failed. This Comment argues that to assert that there is a qualified right of access is to trivialize the meaning of the word "right." The practical effect of denying a right of access is the same as a prior restraint on speech. Thus, a denial of the right of access should, in some cases, be treated as a prior restraint. Case law involving FOIA requests

2. These cases are not directly related to the First Amendment because Plaintiff's interest in obtaining or introducing the evidence is usually mere compensation, often for a tort injury. For example, in *Maxwell v. First National Bank of Maryland*, 143 F.R.D. 590 (D. Md. 1992), Plaintiff sought to introduce evidence that his bank handled illegal transactions with a Central Intelligence Agency ("CIA") front corporation. *Id.* at 592-93. He alleged that the work atmosphere caused him to resign and have a nervous breakdown. *Id.* at 594. He sought to introduce classified information and to discover information about his employer's alleged CIA link not for the sake of promoting First Amendment values, but to gain and admit information that he would need to prove his various claims for compensation. *See id.* at 594.

for classified government information, discussed in Part IV of this Comment, may be instructive in suggesting better ways to adjudicate state secrets cases, secrecy agreement cases, and right of access claims.

After discussing FOIA cases and the law of state secrets, prior restraints, and rights of access, this Comment concludes with a number of recommendations that would apply to all of these types of cases. These recommendations focus on maximizing public access to information by strengthening the ability of the judicial branch to adjudicate cases involving sensitive questions of national security.

I. STATE SECRETS DOCTRINE

The state secrets doctrine and the closely related *Totten* doctrine extend back to the Civil War era. *Totten v. United States*³ was a case brought by the heir of a spy for President Lincoln. The spy, William A. Lloyd, was directed to infiltrate the South to determine the number of confederate troops and the locations of other enemy assets.⁴ When the spy returned he was only compensated for his expenses, not the \$200 per month that President Lincoln allegedly promised him.⁵ The Supreme Court dismissed *Totten's* claim to preserve national security interests. The Court held that it was against public policy for a court to hear a case in which the trial would inevitably lead to the disclosure of confidential information.⁶ The Court also noted: "Both employer and agent must have understood that the lips of the other were to be for ever [sic] sealed respecting the relation of either to the matter."⁷ The *Totten* doctrine did not provide for in camera review of allegedly secret evidence and thus has been a useful tool for the government to dismiss litigation brought by contractors for the development of military technology, as well as in other types of cases involving classified information.⁸

For example, the *Totten* doctrine was used to dismiss lawsuits brought by South Vietnamese commandos hired by the Central Intelligence Agency ("CIA") during the Vietnam War. In *Guong v. United States*,⁹ one of these commandos eventually escaped from a Vietnamese prison in 1980 and arrived in the United States to sue the government for nearly half a million dollars in back-pay.¹⁰ His case was dismissed by the Federal Circuit, which relied on *Totten's* rationale that no case can be brought to enforce a contract that was secret or covert at the time of its creation.¹¹ The *Totten* doctrine and the state secrets privilege have also been invoked by the military to avoid preparing the routine Environmental Impact Statements ("EIS") required of all federal agencies by the National Environmental Policy Act.¹²

3. 92 U.S. 105 (1875).

4. *Id.* at 105.

5. *Id.* at 106.

6. *Id.* at 107.

7. *Id.* at 106.

8. See Sean C. Flynn, *The Totten Doctrine and Its Poisoned Progeny*, 25 VT. L. REV. 793, 797 (2001).

9. 860 F.2d 1063 (Fed. Cir. 1988).

10. *Id.* at 1064.

11. *Id.* at 1065.

12. E.g., *Weinberger v. Catholic Action of Haw./Peace Educ. Project*, 454 U.S. 139 (1981) (Citizens sued to stop construction of a Navy facility that would have housed nuclear weapons

The state secrets privilege was more fully developed in the landmark case of *United States v. Reynolds*.¹³ In *Reynolds*, a military aircraft on a secret surveillance mission crashed, killing civilian observers who were on board. Certain widows of the victims sued the government for compensation under the Federal Tort Claims Act and moved for discovery of Air Force accident investigation reports.¹⁴ The Secretary of the Air Force lodged a formal claim of privilege against revealing military secrets.¹⁵ The Court held that courts must determine whether the "circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the [information that] the privilege is designed to protect."¹⁶ But how can a judge know whether the claim of privilege is appropriate if the court cannot review the supposedly privileged information? The implication of this part of the *Reynolds* opinion is that judges can sense whether a claim of privilege is appropriate without grasping even the most basic facts on which the claim is based. In so holding, the Supreme Court established a standard that provides little guidance to judges other than to rubber stamp the claim of privilege.

The Court's decision in *Reynolds* does not absolutely bar a judge from examining evidence in camera; however, it does come dangerously close to implying that even federal judges cannot be trusted with sensitive information.¹⁷ The Court noted that when all the circumstances of the case point to the conclusion "that there is a reasonable danger that compulsion of the evidence will expose military matters" that should be protected "in the interest of national security," the judge should not conduct an in camera review.¹⁸ The implication of this holding is that if the judge is not satisfied that the privilege has been properly asserted, a court may insist upon an in camera examination of the evidence.¹⁹ In fact, judges have not always been satisfied and have made requests to review sensitive information in some cases.²⁰

and ammunition until the Navy produced an EIS.); *Kasza v. Browner*, 133 F.3d 1159 (9th Cir. 1998) (Former workers of a classified Air Force facility in Nevada sued, alleging injuries that resulted from generating, storing, and disposing of toxic wastes in violation of the Resource Conservation and Recovery Act.). Both suits were unsuccessful because the government invoked the state secrets privilege. *Weinberger*, 454 U.S. at 140; *Kasza*, 133 F.3d at 1162-63.

13. 345 U.S. 1 (1953).

14. *Id.* at 2-3.

15. *Id.* at 4.

16. *Id.* at 8.

17. This distrust of federal judges is obvious in *Alfred A. Knopf, Inc. v. Colby*, 509 F.2d 1362, 1366 (4th Cir. 1975), where the trial court judge reviewed 168 items that former government employees wished to publish in a book, but which the CIA wanted deleted. *Id.* at 1365-66. The trial court judge planned to allow the items to be published unless the CIA could show that those items had in fact been classified before the manuscript was submitted. *Id.* To meet this burden, the CIA gave the judge "documents marked 'Top Secret' [that] had been reproduced with all of their contents blocked out except for one paragraph, sentence or message relating to a deletion item." *Id.* at 1366. Based on these documents the trial court judge was only able to find that 26 of the 168 items were classified. *Id.*

18. *Reynolds*, 345 U.S. at 10.

19. *See id.*

20. Judge Blake of the District of Maryland noted:

An *in camera* [sic] review of documents by the court is not required as a matter of course in an evaluation of an assertion of the state secrets privilege. Because the

In looking at the totality of the circumstances to decide how much deference to pay to the government's assertion of the state secrets privilege, the *Reynolds* court noted that the necessity of the information to the plaintiff's case should be taken into consideration.²¹ Even absolute necessity to the plaintiff's case will not overcome the privilege if a communication is found to be a state secret properly invoked by the government.²² A court will treat the privilege as absolute when the government makes an adequate showing of the harm that might reasonably result from disclosure.²³ In *Reynolds*, the Air Force offered to make surviving crewmembers of the plane available to the plaintiff for interviews rather than release the classified accident report.²⁴ The Court opined that this offer substantially lowered any necessity that the plaintiff had for obtaining the classified report.²⁵ Based on the principle of necessity, other courts have reviewed classified information in camera "where the litigant's need is great and the Government's claim is otherwise unsubstantiated."²⁶ Even though some courts have looked beneath the surface of governmental assertions of the state secrets privilege, plaintiffs have rarely been successful where the government properly asserted it.²⁷

information sought to be disclosed is central to the plaintiff's ability to maintain this lawsuit, however, I found it appropriate to review the initial classified affidavit . . . and a supplementary affidavit . . . submitted at my request addressing certain additional issues.

Maxwell v. First Nat'l Bank of Md., 143 F.R.D. 590, 595 n.4 (D. Md. 1992) (emphasis added) (citing *Reynolds*, 345 U.S. at 10).

21. *Reynolds*, 345 U.S. at 11 ("In each case, the showing of necessity which is made will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate.")

22. *Id.* It is important to note that in the context of a criminal prosecution the government cannot prevent a defendant from introducing evidence that would properly be defined as containing state secrets, but must instead dismiss the charge. *See United States v. Smith*, 750 F.2d 1215 (4th Cir. 1984).

23. *Halkin v. Helms*, 690 F.2d 977, 990 (D.C. Cir. 1982).

24. *Reynolds*, 345 U.S. at 4-5.

25. *Id.* at 11. The plaintiff refused to accept and pursue the alternative of interviewing the surviving crew in lieu of seeing the accident report.

26. *Kinoy v. Mitchell*, 67 F.R.D. 1, 9 (S.D.N.Y. 1975).

27. *See, e.g., Monarch Assurance P.L.C. v. United States*, 244 F.3d 1356 (Fed. Cir. 2001) (holding that the relationship between CIA and British lender was precluded from discovery under privilege); *Black v. United States*, 62 F.3d 1115 (8th Cir. 1995) (upholding dismissal of the plaintiff's claim that the CIA and other government agencies conducted domestic surveillance in violation of his Fourth Amendment rights and holding that the government could assert the privilege with respect to the plaintiff's discovery that would confirm or deny the plaintiff's alleged contacts with government officers); *Bareford v. Gen. Dynamics Corp.*, 973 F.2d 1138 (5th Cir. 1992) (holding that the action brought against a defense contractor was barred by state secret doctrine); *Zuckerbraun v. Gen. Dynamics Corp.*, 935 F.2d 544 (2d Cir. 1991) (upholding claim of privilege where administrator of estate brought wrongful death action against manufacturers of missile systems that allegedly caused the death of sailors when it did not protect them from attack and holding that privilege was properly invoked since release of information about the technology would inevitably lead to a significant risk that highly sensitive information would be disclosed); *Fitzgerald v. Penthouse Int'l, Ltd.*, 776 F.2d 1236 (4th Cir. 1985) (upholding government claim of privilege where Penthouse published an article accusing the plaintiff, a government scientist suing Penthouse for libel, of providing military technology

The idea that necessity should be a factor in determining how much weight to give an assertion of the state secrets privilege may, and should, have major implications in the First Amendment context. To what extent is there a public necessity to have access to questionably classified government reports or to have the press cover battlefield developments? Certainly the people and the press find it necessary to access information about their government that enables them to speak about and debate issues of public concern. More importantly, an informed electorate is itself a necessity if a government truly claims to be a representative democracy. As Justice Black noted, “[t]he guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic.”²⁸ Therefore, this Comment suggests that the principle of necessity should be a strong factor in judicial review of prior restraints and qualified right of access cases.

to foreign countries because disclosure of the information might divulge military secrets); *Molerio v. FBI*, 749 F.2d 815 (D.C. Cir. 1984) (upholding FBI’s claim of privilege where the plaintiff, an applicant who was refused employment with the bureau, sought reasons for the refusal in pursuit of his constitutional claims, and holding that revealing the reasons behind the denial of employment might impair national security); *Farnsworth Cannon, Inc. v. Grimes*, 635 F.2d 268 (4th Cir. 1980) (opinion on reh’g en banc) (upholding privilege where Navy intervened in suit by corporation against Navy employee for contract interference and holding that certain information about the contracts and the employee’s responsibilities were privileged but that the plaintiff’s case could proceed with non-privileged evidence); *Tilden v. Tenet*, 140 F. Supp. 2d 623 (E.D. Va. 2000) (upholding CIA claim of privilege in suit brought by CIA employee for gender discrimination since court determined that the suit could not proceed without disclosing classified, sensitive information regarding employee’s activities); *McDonnell Douglas Corp. v. United States*, 37 Fed. Cl. 270 (1996) (upholding Air Force claim of privilege in the plaintiff’s suit challenging termination of contract involving stealth technology where the court found that proceeding to trial would risk disclosure of classified information regarding stealth technology); *Bentzlin v. Hughes Aircraft Co.*, 833 F. Supp. 1486 (C.D. Cal. 1993) (upholding Air Force claim of privilege where family members of Persian Gulf War marines killed by a missile fired by an Air Force aircraft sued missile manufacturer alleging design defects, since discovery by either side in case would reveal missile capabilities). *But see In re United States*, 872 F.2d 472 (D.C. Cir. 1989) (rejecting Attorney General’s claim of privilege against the plaintiff who brought action against the government under the Federal Tort Claims Act alleging invasions of privacy between 1950 and 1964 since the government’s affidavits did not demonstrate that revelation of the government’s activities twenty to thirty years ago would jeopardize state secrets); *Yang You Yi v. Reno*, 157 F.R.D. 625 (M.D. Pa. 1994) (rejecting claim of privilege by the Executive Secretary of the National Security Counsel (“NSC”) in case involving the arrest and detention of Chinese citizens who attempted to smuggle aliens into the United States, since the Executive Secretary was not competent to invoke the privilege on behalf of the NSC because the Executive Secretary was not a member of the NSC, and even if he was, he did not personally consider the specific information at issue in the case).

28. *N.Y. Times Co. v. United States*, 403 U.S. 713, 719 (1971) (Black, J., concurring).

II. PRIOR RESTRAINTS

A. *Prior Restraints and the Press*

While the state secrets privilege is often asserted in civil claims against the government, prior restraint cases usually arise in the context of journalism. The two doctrines are similar in that both protect government secrets. A prior restraint is a “governmental restriction on speech or publication before its actual expression.”²⁹ Generally, prior restraints violate the First Amendment unless the speech is obscene or defamatory or creates a clear and present danger to society.³⁰ There are two types of prior restraints discussed in this Comment. The first occurs in the rare occasion that the government seeks to stop the press from publishing or airing a story.³¹ The second, more common, prior restraint is contractual. Government employees, contractors, licensees, and other people with access to classified information often sign agreements not to divulge or publish classified information.³²

In the 1971 case of *New York Times v. United States* (“Pentagon Papers Case”), the government sought an injunction to prevent the publication of the contents of a classified study entitled “History of U.S. Decision-Making Process on Viet Nam Policy.”³³ Six members of the Court, being careful not to create too much law on this sensitive topic, wrote a short opinion followed by nearly fifty pages of colorful concurring and dissenting opinions. The decision of the Court quoted from its opinion in *Near v. Minnesota*,³⁴ and affirmed that holding, stating: “‘Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.’ The Government ‘thus carries a heavy burden of showing justification for the imposition of such a restraint.’”³⁵ Without explanation, the Court held that the government had failed to meet that heavy burden.³⁶

There is one narrow circumstance in which the government can obtain injunctive relief as a valid prior restraint on speech. An exception may apply when the nation is at war and, for example, someone publishes material that would obstruct military

29. BLACK’S LAW DICTIONARY 1212 (7th ed. 1999).

30. *Id.*

31. *See infra* text accompanying notes 33-47.

32. *See infra* Part II.B.

33. *N.Y. Times*, 403 U.S. at 714.

34. 283 U.S. 697 (1931).

35. *N.Y. Times*, 403 U.S. at 714 (citations omitted). In *Near*, the Court invalidated a Minnesota statute that made it a nuisance to engage “‘in the business of regularly and customarily producing, publishing [, etc.] a malicious, scandalous and defamatory newspaper, magazine or other periodical.’” *Near*, 283 U.S. at 702 (quoting Act of Apr. 20, 1925, 1925 Minn. Law 285, 358 (codified at MINN. STAT. § 10123-1 (1927))). The statute allowed the state to prosecute such cases and to seek injunctive relief to prohibit future publications. The Court held that the statute was “unconstitutional, as applied to publications charging neglect of duty and corruption” by law enforcement officers. *Id.*

36. *N.Y. Times*, 403 U.S. at 714.

recruiting or enlistment. Such a case arose in *Schenck v. United States*³⁷ in which the defendant was charged under the Espionage Act (among other charges) for distributing leaflets that used harsh rhetorical language urging citizens to resist conscription for World War I and to assert their rights.³⁸ Justice Holmes recognized that speech that would be permissible during times of peace might be prohibited during times of war.³⁹ This fundamental notion of considering the context of expression is vital in determining whether speech creates a “clear and present danger that . . . will bring about the substantive evils that Congress has a right to prevent.”⁴⁰ The *Near* Court also found it was beyond dispute that the government could act to “prevent actual obstruction to its recruiting service or the publication of sailing dates of transports or the number and location of troops.”⁴¹

Thus, Supreme Court precedent demonstrates that the doctrine of prior restraints may restrict narrow categories of propaganda designed to obstruct military operations, as well as publication of the operational details of a military event. In the Pentagon Papers Case, Justice Brennan noted that even if the situation in 1971 was tantamount to a state of war, the government had not even alleged that publication of the information in the Pentagon Papers would “inevitably, directly, and imminently cause” an event similar to imperiling the safety of a transport at sea.⁴² Absent such an allegation, and some basis to support it, Brennan argued that, under *Schenck*, no injunctive relief could be granted.⁴³

One might argue that courts should restrain the press from publishing information even if the potential harm is not severe. Justice Stewart’s concurring opinion in the Pentagon Papers Case refutes this view by shifting the responsibility for leaks to the Executive Branch. It is the duty of the Executive to protect state secrets through the promulgation and enforcement of regulations.⁴⁴ This view argues that once the Executive lets a secret escape into the open, the First Amendment makes a request to suppress that information beyond the judiciary’s authority and proper place in government.⁴⁵ Although sound in principle, it would be imprudent to preclude the courts from suppressing information that falls within the standards that Justice Brennan articulated in his concurring opinion. For example, if a television network was about to air a story that would release the identity of a United States spy currently operating in a hostile country, it would be an appropriate time to impose a prior restraint because of the near certainty that the operative would be captured and tortured or even killed. When the release of information will have an immediate effect of putting lives in imminent danger, a prior restraint should be permissible.

Justice Stewart’s opinion prohibiting prior restraints is consistent with the view expressed in Justice White’s concurring opinion, but Justice White also considered the issue of potential punishment after publication. While Justice White opposed prior

37. 249 U.S. 47 (1919).

38. *Id.* at 48-51.

39. *Id.* at 52.

40. *Id.*

41. *Near*, 283 U.S. at 716.

42. *N.Y. Times*, 403 U.S. at 726-27 (Brennan, J., concurring).

43. *Id.*

44. *Id.* at 729-30 (Stewart, J., concurring).

45. *See id.* at 730.

restraints, he supported punishing the publisher after the release of the information if that release violated a criminal law prohibiting the release of certain intelligence or military secrets.⁴⁶ The distinction between prohibiting speech via a prior restraint and punishing speech through the criminal law is a slippery one, but one which has deep roots in English common law. As Blackstone noted:

The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every free man has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequences of his own temerity.⁴⁷

This approach allows “secret” information to be exposed so that the public can judge whether it is harmful to national security or merely embarrassing. For example, no criminal prosecution took place after the Pentagon Papers Case was resolved. The public had seen published portions of the report on Vietnam policy and apparently found that information to be highly valuable and relevant to understanding the policies of their government. While it is almost certain that some classified items were published, it is doubtful that the public would have supported a criminal prosecution of the *New York Times* or its employees. Hence, when there is a potential criminal sanction, but no prior restraint, the speaker is free to expose improperly classified information at his or her own risk. The brave can expose the truth without being obstructed, but they must understand that they are gambling not only with their own freedom, but potentially with the lives of American soldiers and civilians if they disclose something that should have been kept secret.

B. Use of Secrecy Agreements

After the Pentagon Papers Case, the government realized that there were many brave journalists and writers who would risk criminal prosecution and expose matters that the government would fight to keep secret. The solution to this problem was quite simple: The government would have to prevent speakers from getting the information in the first place. As one Justice Department official in the Reagan Administration conceded in a debate on this topic: “The courts are now unwilling to impose, except in very drastic situations, any kind of prior restraint The only way the government can keep the press from jeopardizing national security is to keep them from learning national security information in the first place.”⁴⁸

46. *Id.* at 735-37 (White, J., concurring) (noting that “the newspapers are presumably now on full notice” of possible prosecution and he “would have no difficulty in sustaining convictions under these [criminal law] sections on facts that would not justify the intervention of equity and the imposition of a prior restraint”).

47. JOHN CALVIN JEFFRIES, JR., *Rethinking Prior Restraint*, in *THE FIRST AMENDMENT AND NATIONAL SECURITY* 14, 17 (1984) (quoting 4 WILLIAM BLACKSTONE, *COMMENTARIES* *151-52).

48. *AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON LAW AND NATIONAL SECURITY, NATIONAL SECURITY AND THE FIRST AMENDMENT* 24, v (1984) (statement by Richard Willard, Acting Assistant Attorney General, Civil Division, Department of Justice).

Based on such remarks, one could argue that the absolutist opinions in the Pentagon Papers Case backfired and only led to a government crackdown on the release of information and communication with the media. There is strong evidence to support this theory, such as the increased prevalence and strictness of government employee secrecy agreements and the more limited battlefield access the media has been given in covering every war since Vietnam.⁴⁹

Secrecy or nondisclosure agreements signed by government employees are perhaps the government's most widely used tool to prevent classified information from reaching the public. These agreements are effectively prior restraints that are consented to by government employees and contractors. Some may think that waiver of certain First Amendment rights by signing such contracts is not problematic, since they make such waivers voluntarily to serve the public. The average person probably believes that only upper-level government employees need to sign such agreements to be employed, but this is far from the truth. As of 1989, about three million government civilian or military personnel had signed various nondisclosure agreements.⁵⁰ That means that roughly one percent of the nation's population is forbidden to speak about information their public employer designates as classified, secret, top secret, or otherwise prohibited from disclosure.

Secrecy agreements vary from agency to agency, but there are some common terms found in these nondisclosure agreements and penalties for violating them. By signing an agreement, the employee recognizes that he or she can never disclose any classified information through publication or other means to people not authorized to receive it.⁵¹ Other secrecy agreements go even further and prohibit an employee from divulging classified information *and* from publishing *any* information related to agency activities, whether gained during or after employment, without prior approval.⁵²

In *Snepp v. United States*, a former CIA agent did exactly what the above referenced nondisclosure agreement forbade.⁵³ Based on his experience as an agent, Frank W. Snepp III published a book based on activities in South Vietnam without

49. See *Nation Magazine v. United States Dep't of Def.*, 762 F. Supp. 1558, 1563 (S.D.N.Y. 1991). Judge Sand noted that

[t]he only official restrictions by DOD during the Vietnam War were guidelines that limited dissemination of specific kinds of combat information that military officials concluded compromised the national security of this country. In contrast, when the United States invaded Panama and Grenada, DOD placed significant restraints on media coverage, particularly in terms of access for newsgathering purposes.

See *id.* (citing CHAIRMAN OF THE JOINT CHIEFS OF STAFF MEDIA MILITARY RELATIONS PANEL, FINAL REPORT (1984)).

50. Sandra D. Jordan, *Classified Information and Conflicts in Independent Counsel Prosecutions: Balancing the Scales of Justice After Iran-Contra*, 91 COLUM. L. REV. 1651, 1686 (1991) (citing Information Security Oversight Office, 1989 Report to the White House, Mar. 26, 1990, at 29).

51. *Id.* at 1685-87 (citing Classified Information Nondisclosure Agreement, Standard Form 312 (rev. Jan. 1991), available at <http://www.dior.whs.mil/forms/SF0312.PDF>).

52. See *Snepp v. United States*, 444 U.S. 507, 508 (1980) (referring to secrecy agreements signed by CIA agents).

53. *Id.* at 508.

submitting the book to the Agency for approval.⁵⁴ Snepp argued that the book contained only information that had not been classified, and the government conceded this point.⁵⁵ The government sought a declaration that Snepp had breached the contract, an injunction prohibiting future disclosures without agency approval, and a constructive trust to be imposed in the government's benefit for all revenues from Snepp's book.⁵⁶

The Supreme Court rejected Snepp's First Amendment argument that prohibiting him from publishing unclassified information was an impermissible prior restraint on speech. The majority held that, even though the information was not classified, the "[g]overnment has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service."⁵⁷ In creating this rule, the Court cited the campaign finance case of *Buckley v. Valeo*,⁵⁸ thus analogizing the appearance of government corruption to the appearance of confidentiality.⁵⁹ In addition to finding the nondisclosure agreement to be constitutionally sound, the Court upheld the injunction of the lower court against future publications.⁶⁰

As to the proper remedy, the Court overturned the decision of the Fourth Circuit, which refused to impose a constructive trust and instead suggested that the government seek punitive damages through a tort action.⁶¹ A constructive trust would have entitled the government to all royalties from the book.⁶² The Court reasoned that since Snepp's contract was of a fiduciary nature and based on the highest sense of government trust in him, the remedy of imposing a constructive trust would be most appropriate.⁶³ The Court found that this remedy would encourage agents like Snepp to seek review, thus protecting what might in fact be classified information, and this remedy would prevent an agent from profiting by breaching his fiduciary obligations.⁶⁴

54. *Id.* at 507.

55. *Id.* at 511. It is interesting to note that by having a contract that forbids publication of any agency-related information, the CIA can sue for breach, and not have to admit that what was published may have really been classified information. The CIA would be foolish to announce to the world through a lawsuit that a certain book contains highly sensitive information relating to national security.

56. *Id.* at 508. Snepp's contract did not contain a clause mandating that, in the result of a publication breach, all revenues would go to the government. The government sought this as a remedy, and the Supreme Court endorsed the idea for the first time.

57. *Id.* at 509 n.3.

58. 424 U.S. 1 (1976).

59. *Snepp*, 444 U.S. at 509-10.

60. *See id.* at 513 (finding that the publication caused irreparable harm to the government).

61. *Id.* at 509-10.

62. *Id.* at 515-16.

63. *Id.* at 514-16.

64. *See id.* After *Snepp* (as of 1991), standard government nondisclosure forms began to include the constructive trust remedy formulated by the Court. An example of such contractual language is: "I hereby assign to the United States Government all royalties, remunerations, and emoluments that have resulted, will result or may result from any disclosure, publication, or revelation of classified information not consistent with the terms of this Agreement." Jordan, *supra* note 50, at 1685-87 n.15 (citing Classified Information Nondisclosure Agreement, Standard Form 312, ¶ 5 (rev. Jan. 1991), available at <http://www.dior.whs.mil/forms/>

Three Justices, led by Justice Stewart, dissented from the opinion in *Snepp* as to the imposition of the constructive trust.⁶⁵ The dissent essentially argued that, even though *Snepp* breached his agreement, his book did not contain any classified information, and therefore “the interest in confidentiality that *Snepp*’s contract was designed to protect has not been compromised.”⁶⁶ In *Snepp*, the imposition of the constructive trust only punished the disclosure of unclassified information and was not warranted as a deterrent as the majority opined. As the dissent pointed out, criminal statutes imposed a prison term of ten years and a \$10,000 fine for knowingly and willfully publishing certain types of classified information.⁶⁷ Another statute withdrew retirement benefits from anyone convicted of one of the crimes referenced above.⁶⁸

Thus, there were, and still are, serious sanctions and penalties in place to deter publication of classified information.⁶⁹ If an agent is unsure if some item was classified, it would seem that a potential prison term would more effectively deter the agent from bypassing review than would the imposition of a constructive trust over the book royalties. Therefore, the only real effect of the constructive trust rule is to give the government the right to censor every publication relating to an agency regardless of its content. The dissent pointed out that imposing a constructive trust is a “drastic” remedy that enforces a prior restraint upon a citizen’s right to criticize the government.⁷⁰ The dissent was also rightfully concerned that the government might abuse its power of review to delay publication of work critical of the government or to persuade authors to modify the contents of their work beyond the needs of secrecy.⁷¹

One could certainly argue that it is mere speculation that the government will abuse its power when reviewing publications, but there is some evidence that the risk Justice Stewart pointed out is real. Consider the case of *Alfred A. Knopf, Inc. v. Colby*,⁷² where the authors of a book on the Vietnam War, one of which was a former CIA agent, did follow the proper procedure for submitting their publication to the CIA for “review.”⁷³ After the manuscript was initially submitted to the CIA for review, the CIA sent the authors a letter that identified 339 items for deletion on the basis that they contained classified information.⁷⁴ After a conference with one author’s lawyer, the CIA agreed to release 114 of the deletions.⁷⁵ After more time passed, the CIA agreed to release another 29 deletion items and still later another 57, leaving 168 items on which the CIA would not budge.⁷⁶ At the district court, deputy directors of the CIA testified

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65. *Snepp*, 444 U.S. at 516.

66. *Id.* at 517.

67. *Id.* at 517 n.3 (citing 18 U.S.C. § 798 (2000)).

68. *Id.* (citing 5 U.S.C. § 8312 (2000)).

69. See 18 U.S.C. § 793 (2000) (making willful communication of information relating to national defense that the possessor has reason to believe could be used to injure the United States is punishable by imprisonment up to ten years).

70. *Snepp*, 444 U.S. at 526.

71. *Id.*

72. 509 F.2d 1362 (4th Cir. 1975).

73. *Id.* at 1365.

74. *Id.*

75. *Id.*

76. *Id.*

regarding the remaining 168 items, and then the United States offered documents related to those deletion items.⁷⁷ After reviewing the testimony and the documents, the trial judge determined that only 26 of the 168 documents were actually classified during the period of the CIA agent's employment.⁷⁸

For the sake of argument, assume that the trial judge was totally incorrect in *Knopf* and that all 168 items were actually classified. Had the authors not decided to litigate, and had they accepted the government's original assertion that the book contained 339 items that had to be deleted, a tremendous amount of unclassified information would have been suppressed from the public. In fact, it took three rounds of whittling away at the 339 number to even reach 168 deletion items, not to mention the tremendous reduction by the trial judge to the 26 figure. This bargaining process is disturbing because it strongly suggests that government agencies at least initially abuse their power of "review" and engage in true censorship. During such a negotiation or litigation routine, the author is essentially restrained from publishing his or her work lest he or she risk criminal prosecution. The author's First Amendment rights are ignored just as the *New York Times's* right to publish the Pentagon Papers was disregarded by the Second Circuit when that court issued an injunction prohibiting publication.⁷⁹

It is the type of overclassification in *Knopf* that, while censoring and suppressing important information, really causes more harm to national security than it prevents. As Justice Stewart pointed out in his concurring opinion in the Pentagon Papers Case, "when everything is classified, then nothing is classified."⁸⁰ When people become cynical and believe that the government classifies everything, people will choose to decide for themselves what information is really sensitive. Blanket assertions that large amounts of seemingly inert information have been classified will discourage government employees from seeking review of information they plan to publish or disclose to authors or press agencies. Thus, the best way to protect secrecy is to release the maximum amount of information that could be released without jeopardizing national security. This would boost the government's credibility regarding what information, if released, would truly harm national security and, therefore, would lead to fewer leaks of classified information.

77. *Knopf*, 509 F.2d at 1365-66. This testimony typically consisted of the deputy director taking the stand and stating that a certain document contained classified information without disclosing the nature of that information, who classified it, or when it was classified. *Id.* The trial judge wanted more evidence of actual classification than mere assertions and, thus, looked at the documentary evidence to determine whether the items were actually classified. *Id.* at 1366. The court of appeals found that this level of proof was far too strict. *Id.* at 1370.

78. *Id.* at 1366.

79. *United States v. N.Y. Times Co.*, 444 F.2d 544, 544 (2d Cir. 1971) (in banc), *rev'd*, 403 U.S. 713 (1971) (per curiam).

80. *N.Y. Times Co. v. United States*, 403 U.S. 713, 729 (1971) (Stewart, J., concurring).

III. QUALIFIED RIGHT OF ACCESS

People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.⁸¹

As explained above, the use of secrecy agreements prevents the media from gaining access to national security information, and thus, there is less need for the government to seek injunctive relief against the press in a suit they would be unlikely to win. Likewise, restricting media access to battlefields and other forums⁸² accomplishes the same goal, avoiding the need to go to court to seek injunctive relief against a press agency. Aside from the fact that the government is unlikely to prevail under the Pentagon Papers Case's prior restraint test, suing the media would create terrible publicity for the government, causing people to believe that the government has something scandalous or embarrassing to hide.

To protect First Amendment values, the preemptive government strategy of preventing access to battlefields and other "secret" forums must have some constitutional limits. The Supreme Court has recognized that "the First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw."⁸³ The Court has implied in its decisions that the First Amendment includes some "right to receive" information and ideas.⁸⁴

Other courts have not traditionally recognized a right of access to places that have "been characterized as private or closed to the public, such as meetings involving the internal discussions of government officials."⁸⁵ The Supreme Court has only recognized a "qualified right of access" to government property, even when access would assist the public in forming and expressing opinions about how the government is run.⁸⁶ For example, the government can surely prohibit unauthorized access to the White House without violating the First Amendment, even though unlimited press access might assist the public to better understand the government.⁸⁷ The question to be asked in any right of access case is whether the "denial of access is necessitated by an 'overriding' governmental interest and is narrowly tailored to serve that interest."⁸⁸ While this standard sounds like a strict one for the government to meet, right of access

81. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980) (Burger, C.J., plurality opinion).

82. Since the inception of the "War on Terror," the Department of Justice has conducted hundreds of secret deportation hearings, excluding the public and press, based on the justification that the people involved might have links to terrorism. Bob Herbert, *Secrecy Is Our Enemy*, N.Y. TIMES, Sept. 2, 2002, at A15.

83. *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 783 (1978).

84. *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943).

85. *See Nation Magazine v. United States Dep't of Def.*, 762 F. Supp. 1558, 1571 (S.D.N.Y. 1991) (citing *United States v. Nixon*, 418 U.S. 683, 705 (1974)).

86. *Zemel v. Rusk*, 381 U.S. 1, 17 (1965).

87. *Id.*

88. *JB Pictures Inc. v. United States Dep't of Def.*, 86 F.3d 236, 239 (D.C. Cir. 1996) (citing *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984)).

claims are not usually successful.

Recent developments in the “War on Terror” may be reversing the tide in favor of more public access to information in right of access disputes. In *Detroit Free Press v. Ashcroft*,⁸⁹ the Sixth Circuit considered whether the government could designate certain deportation cases as “special interest” cases, thereby closing off the hearings from the public and press.⁹⁰ A strongly worded opinion by Judge Keith recognized the power and importance of an informed public in protecting democratic values, stating that:

Today, the Executive Branch seeks to take this safeguard away from the public by placing its actions beyond public scrutiny. Against non-citizens, it seeks the power to secretly deport a class if it unilaterally calls them “special interest” cases. The Executive Branch seeks to uproot people’s lives, outside the public eye, and behind a closed door. Democracies die behind closed doors.⁹¹

The court held that the First Amendment requires the government to seek closure of hearings on a case-by-case basis.⁹² In addition, the court held that there was a public right of access to deportation hearings, since they have traditionally been open to the public, and openness plays a significant, positive role in the hearing process.⁹³ More recently, however, the Third Circuit reached the opposite result in *North Jersey Media Group, Inc. v. Ashcroft*.⁹⁴ The court held that the tradition of openness of deportation hearings did not meet the standard of *Richmond Newspapers*, or Third Circuit precedent.⁹⁵ The court noted that, while deportation hearings have normally been open, Congress has never mandated open hearings. In the court’s view, deportation hearings failed to meet *Richmond Newspapers*’s standard of an “unbroken, uncontradicted history” of openness.⁹⁶ Under the second prong, or the “logic prong,” of *Richmond Newspapers*, the Third Circuit considered whether openness plays a positive policy role.⁹⁷ Weighing the second prong in light of post-September 11th national security threats, the court noted that public access might impair rather than enhance the public good.⁹⁸ There is now a fundamental disagreement between the Third and Sixth Circuit Courts of Appeal on the issue of public access to deportation hearings involving people who are allegedly connected to terrorism.

Cases involving access to battlefields, however, have consistently denied access to plaintiffs.⁹⁹ No case addressing the media’s right of access to a battlefield has reached the Supreme Court, and, in fact, no court has ever reached a holding on the merits of

89. 303 F.3d 681 (6th Cir. 2002).

90. *Id.* at 683.

91. *Id.*

92. *Id.* at 692.

93. *Id.* at 700 (citing *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980)).

94. 308 F.3d 198 (3d Cir. 2002).

95. *Id.* at 201.

96. *Id.* at 211-15.

97. *Id.* at 216-20.

98. *Id.* at 200-01, 217-20.

99. See *Flynt v. Weinberger*, 762 F.2d 134, 135 (D.C. Cir. 1985) [hereinafter *Flynt II*]; *Nation Magazine v. United States Dep’t of Def.*, 762 F. Supp. 1558 (S.D.N.Y. 1991); *Flynt v. Weinberger*, 588 F. Supp. 57 (D.D.C. 1984) [hereinafter *Flynt I*].

that issue. The first suit ever filed to gain access to a battlefield situation occurred when the government prevented any media from accompanying United States forces during the first days of the invasion of Grenada. Media access was also heavily limited via travel restrictions for about two weeks which resulted in a virtual "news blackout."¹⁰⁰ Larry Flynt, as the plaintiff and publisher of Hustler Magazine, sought injunctive relief to bar any further government actions that would prevent the gathering of news in Grenada.¹⁰¹ The court held that the case was moot, since the restrictions on the press had been lifted months before and there was no real possibility that the government would engage in such conduct in Grenada again since the military actions were essentially over.¹⁰² The court also discussed the merits of the case and determined that it would be improper for the court to "limit the range of options available to the commanders in the field in the future, possibly jeopardizing the success of military operations."¹⁰³ In fact, the trial court's opinion basically held that the case was not justiciable at all.¹⁰⁴ Mr. Flynt appealed but the D.C. Circuit agreed with the district court that the case was moot; however, the court held that it was improper for the district court to have reached the merits of the case.¹⁰⁵ The D.C. Circuit, therefore, vacated that portion of the judgment.¹⁰⁶

A similar suit was filed during the Persian Gulf War challenging military regulations that limited the media's access to forward areas.¹⁰⁷ As in the *Flynt* cases, the court addressed whether this issue was justiciable or whether it was a political question beyond the judiciary's power of review.¹⁰⁸ The court noted that the judiciary does have the power to review Executive decisions under Article II of the Constitution, but that civilian courts should "hesitate long before entertaining a suit which asks the court to tamper with the . . . necessarily unique structure of the Military Establishment."¹⁰⁹ The court held that it was competent to address issues regarding whether the military regulations at issue violated the First Amendment or Equal Protection Clause.¹¹⁰ The court went on to decide that the constitutional claims were not moot since there was a potential for repetition of the alleged unconstitutional government practices.¹¹¹ The court then considered the basis for the right of access doctrine, and noted that such a right had been recognized in other public forums such as courtrooms.¹¹²

While the court in *Nation Magazine* recognized that the reasoning of public forum

100. *Flynt I*, 588 F. Supp. at 58.

101. *Id.*

102. *Id.*

103. *Id.* at 60-61.

104. *Id.* at 59-60.

105. *Flynt II*, 762 F.2d 134, 135 (D.C. Cir. 1985).

106. *Id.* at 135-36.

107. *Nation Magazine v. United States Dep't of Def.*, 762 F. Supp. 1558, 1558 (S.D.N.Y. 1991)

108. *Id.* at 1566.

109. *Id.* at 1566-67 (citing *Chappell v. Wallace*, 462 U.S. 296, 300 (1983)).

110. *Id.* at 1567-68.

111. *Id.* at 1570.

112. *Id.* at 1572 (citing *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 564 (1980) (discussing a right of access to criminal trials)).

cases might extend to media access to overt combat operations, the court declined to reach a decision on the merits of that issue.¹¹³ Because the novel issues involved would force the court to “define the outer constitutional boundaries of access,” the court decided that it should not reach a decision on the merits because the factual record was not fully developed and the issues were framed too abstractly.¹¹⁴

In addition to challenging regulations prohibiting media access to forward areas, the plaintiffs also challenged Department of Defense media pooling regulations that provided a level of access that the media perceived to be guided tours.¹¹⁵ The plaintiffs challenged these regulations on First Amendment and Equal Protection grounds since they believed the regulations were content-based and structured to present favorable images of the war.¹¹⁶ Once again, the court held that the issues were not sufficiently in focus to reach a decision, since the conflict was over and the regulations were currently being considered for revision.¹¹⁷

Behind the *Nation Magazine* court’s reluctance to decide the merits of the case were the court’s concerns about the changing nature of warfare. The court was reluctant to strike down regulations that might not have been appropriate in the Persian Gulf War context, but might be appropriate in a future conflict. Judge Sand prophetically noted, “[w]ho today can even predict the manner in which the next war may be fought?”¹¹⁸ For example, a regulation requiring media to be closely escorted to limited areas of a forward troop position consisting of hundreds of tanks and tens of thousands of troops makes less sense than restricting the media’s access to a covert operation that involves small groups of troops and helicopters. In the former situation, the enemy is likely to be aware of the location of our troops. In the latter situation, our military relies upon the element of surprise. Small special operations missions are also inherently difficult for the media to cover since troops may be dropping out of helicopters into hot combat zones. The ongoing military operations in Afghanistan meet this description and demonstrate the prudence of the *Nation Magazine* court’s reluctance to invalidate regulations in a manner that might hamper effective regulation of press access in a future conflict with different contours.

Not long after the recent conflict in Afghanistan began, Larry Flynt brought a suit for an injunction to prohibit the military from “interfering with [his] asserted First Amendment right to have Hustler Magazine correspondents accompany . . . troops on the ground in Afghanistan.”¹¹⁹ Once again, the court decided not to reach the merits of the First Amendment claim.¹²⁰ The court noted that there were ongoing negotiations between Hustler Magazine and the Department of Defense, and that Hustler Magazine had not exhausted available administrative channels to gain access.¹²¹ Based on this, and the fact that media access had increased in “recent weeks,” Hustler Magazine

113. *Id.*

114. *Id.*

115. *See id.* at 1565, 1573.

116. *See id.* at 1573-75.

117. *Id.* at 1575 (citing *Rescue Army v. Mun. Court of L.A.*, 331 U.S. 549, 584 (1947)).

118. *Id.* at 1574.

119. *Flynt v. Rumsfeld*, 180 F. Supp. 2d 174, 175 (D.D.C. 2002) [hereinafter *Flynt III*].

120. *Id.* at 177.

121. *Id.* at 176-77.

failed to demonstrate that they would be irreparably harmed.¹²²

As demonstrated in all the battlefield right of access cases, courts have failed to address the merits of the First Amendment claims for three different reasons: mootness,¹²³ a factually abstract record that is not sufficiently focused,¹²⁴ and the plaintiff's ability to pursue administrative channels to prevent irreparable harm.¹²⁵ The current system of judicial review is too slow to give serious consideration to the merits of cases like these, or even to a case of a total press blackout lasting for a limited period of time.¹²⁶ In addition, judges are hesitant to second-guess military judgments regarding the harm that could be caused by giving access to the press. There are two paths that the government can take to resolve this predicament. It can leave the situation as it is, allowing the most flagrant abuse of press censorship to escape serious judicial scrutiny, or the government can modify the judicial system to at least provide a realistic chance for a press agency to prevail if it is unconstitutionally restricted. The latter option must be preferred. For this reason, this Comment recommends speedy review of these cases by specially trained National Security Judges. A National Security Court would be competent to give serious consideration to both the First Amendment issues at stake and the realistic threats to national security that could result from media access.¹²⁷ No existing civilian court has the jurisdiction, efficiency, and the expertise to do this today.¹²⁸

IV. FREEDOM OF INFORMATION ACT

A. FOIA Review of National Security Classification Decisions

As the nature of warfare changes, the government may justifiably restrict or exclude the press from battlefields in certain situations. Small-scale covert military operations inherently rely upon the element of surprise and also it may be logistically impossible to have media agencies accompany troops on these missions. An example of such a situation was the United States mission in Somalia where a small number of helicopters and vehicles went to capture a warlord who was obstructing United Nations food aid

122. *Id.*

123. See *Flynt II*, 762 F.2d 134, 135 (D.C. Cir. 1985); *Flynt I*, 588 F. Supp. 57, 58 (D.D.C. 1984).

124. See *Nation Magazine v. United States Dep't of Def.*, 762 F. Supp. 1558, 1572 (S.D.N.Y. 1991).

125. See *Flynt III*, 180 F. Supp. 2d 174, 176-77 (D.D.C. 2002); *Nation Magazine*, 762 F. Supp. at 1573-75.

126. It is not hard to imagine a military operation that, from start to finish, would last only a month. If the military totally blocked media access, it is unlikely that the media would get its day in court before the suit became moot.

127. Even though the government would likely continue to win most right of access cases, if the government knew it would have to defend its decisions immediately and in front of a judge with expertise on the subject matter, the government might be deterred from unreasonably restricting the press from battlefields.

128. See *Ctr. for Nat'l Sec. Studies v. Dep't of Justice*, 215 F. Supp. 2d 94, 101 (D.D.C. 2002).

shipments.¹²⁹ It is difficult to argue that the media could have been involved in this operation without exposing operational details. Troops might also have been put in danger if they had to escort these journalists through an urban war zone.

The recent actions in Afghanistan have shown that guerrilla warfare and other forms of stealth combat are likely to become more common in the global "War Against Terror." The public will have to find another method to obtain information about military operations that cannot be directly covered by the media. Documentary evidence of these operations will essentially form the historical record of what happened in a covert operation. Therefore, there must be a way for the public to access that record. Two major concerns support this public interest. First, the public holds an interest in criticizing the government and holding leaders accountable for the conduct of these operations. Second, it is important that history not be lost in mounds of classified documents. Historians have a strong interest in constructing a historical record for the public to learn from in the future.

FOIA is one avenue that the public and media often use to request access to government documents of military and covert operations. FOIA requires each government agency to make available to the public copies of records that have become or are likely to become the subject of subsequent requests.¹³⁰ Such a request must be honored when a request "reasonably describes such records"¹³¹ and is made in accordance with agency procedures for requesting records.¹³² This strong language of access, however, is severely tempered by FOIA's numerous exceptions, including those which preclude access to certain classified documents. FOIA does not apply to matters that are "specifically authorized under criteria established by Executive Order to be kept secret in the interests of national defense or foreign policy and . . . are in fact properly classified pursuant to such Executive order."¹³³ Also, information may be specifically exempted under other statutes, such as the National Security Act of 1947.¹³⁴

Courts have applied the FOIA exemption by using the following test.¹³⁵ First, "[t]he government has the burden of establishing an exemption."¹³⁶ Second, "[t]he court must make a de novo determination" on the validity of the claimed exemption.¹³⁷ Third, agency affidavits must be given "substantial weight" in making that determination.¹³⁸ Fourth, the trial court has discretion on "whether and how to conduct in camera review

129. Sean J.A. Edwards, *Mars Unmasked: The Changing Face of Urban Operations*, 2000 RAND 11-15, available at <http://www.rand.org/publications/MR/MR1173>.

130. Freedom of Information Act, 5 U.S.C. § 552(a)(2)(D) (2003).

131. 5 U.S.C. § 552(a)(3)(A)(i).

132. See 5 U.S.C. § 552(a)(6)(E).

133. 5 U.S.C. § 552(b)(1).

134. See 5 U.S.C. § 552(a)(3)(E).

135. See *Ray v. Turner*, 587 F.2d 1189, 1194-95 (D.C. Cir. 1978). Under FOIA's § 552(b) disclosure exemption, there are nine grounds for withholding information. Aside from the national security exemption, some other items that can be withheld are trade secrets, personnel and medical files, certain law enforcement files, and geological maps and information relating to wells. *Id.*

136. *Ray*, 587 F.2d at 1194-95.

137. *Id.*

138. *Id.*

of the documents.”¹³⁹ And fifth, the judge should be satisfied that proper classification procedures were followed and that the items logically fall into the category claimed.¹⁴⁰ Proof or suspicion of bad faith on the part of the withholding government agency is not needed to justify in camera inspection. “A judge has discretion to order in camera inspection on the basis of an uneasiness, on a doubt he wants satisfied before he takes responsibility for a de novo determination.”¹⁴¹

While this test may appear to place a heavy burden on the government to demonstrate that classified information should not be released, plaintiffs have rarely been successful in seeking the release of classified information. This is in large part because some courts have refused to reach the issue of whether classified information, if released, would pose a risk to national security or foreign relations. In *Epstein v. Resor*,¹⁴² for example, the Ninth Circuit held that FOIA only requires that the court determine whether the information was properly classified under an Executive Order, and that the origin of the file’s contents is sufficient to dispel any suggestion that the classification was “arbitrary or capricious.”¹⁴³ The court also opined that, under FOIA’s exemption, the decision of whether secrecy of certain information is in the national interest is expressly designated to the Executive Branch.¹⁴⁴ The court’s rationale for essentially barring judicial review of an Executive determination of whether secrecy is in the interest of national security was that courts “have neither the ‘aptitude, facilities, nor responsibility’ to review these essentially political decisions.”¹⁴⁵

Decisions to keep information secret are more than simply political decisions. Such decisions have serious First Amendment implications that the judicial branch cannot turn a blind eye toward. The Ninth Circuit’s view in *Epstein* conflicts with FOIA’s legislative intent, which was to allow meaningful review of classification decisions. In the debate on FOIA, Senator Muskie noted:

As a practical matter, I cannot imagine that any Federal judge would throw open the gates of the Nation’s classified secrets, or that they would substitute their judgment for that of an agency head without carefully weighing all the evidence in the arguments presented by both sides.

On the contrary, if we constrict the manner in which courts perform this vital review function, we make the classifiers themselves privileged officials, immune from the accountability necessary for Government to function smoothly.¹⁴⁶

139. *Id.*

140. *Id.*

141. *Id.* at 1195.

142. 421 F.2d 930 (9th Cir. 1970).

143. *Id.* at 933. In *Epstein*, the Army presented evidence that its classification procedure did not designate things as top secret merely because, for filing purposes, it related to something else that was top secret. The court noted that the Army had reviewed the file for declassification “paper-by-paper.” *Id.* This information alone was sufficient to satisfy the court’s test that classification not be arbitrary or capricious. *Id.*

144. *Id.* at 933.

145. *Id.* (citing *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948)).

146. 120 CONG. REC. 36,870 (1974) (statement of Sen. Muskie).

This statement, combined with the remarks of other Senators cited by the court in *Ray*, demonstrates that Congress did not want federal judges to passively approve FOIA exemption claims as the Ninth Circuit approach suggests.¹⁴⁷

Indeed, other circuits have been more generous in allowing at least some review of whether continued secrecy is justified in the name of national security. The D.C. Circuit affirmed the district court's holding in *Bevis v. Department of State*¹⁴⁸ that the court should look at whether the classified information by itself, or in the context of other information, could reasonably be expected to cause damage to national security.¹⁴⁹ The agency is not required to prove that harm will occur, but only that there is a reasonable expectation that release of the information would cause harm to national security.¹⁵⁰ This approach recognizes that FOIA is not a device that completely defers to the Executive's determination of what information should be kept secret. A limited inquiry into the Executive's reasoning strikes the proper balance between respecting separation of powers and allowing the branches of government to check one another.

It is important that courts examine whether information claimed to be exempt under the national security exception to FOIA might reasonably lead to harm to national security if released. There are a number of reasons that courts should undertake making such a determination. One valid basis for classifying information is that releasing it would give hostile entities the ability to assess the United States's intelligence gathering methods and capabilities.¹⁵¹ For example, if a document is released indicating that the United States believes that Iran will have three nuclear weapons by 2005, and the truth is that Iran already has nuclear weapons, this release would give away the fact that our intelligence gathering in Iran is weak and that we are not currently prepared for an Iranian nuclear threat. While, as in the hypothetical above, this may be a strong and legitimate basis to keep information secret, it is a basis that can easily be abused to overclassify information. Any information that intelligence agencies possess must have originated from some source or method, and disclosure of any information will always imply something about what our government knows or does not know. For example, if the State Department were to assess that genocide was taking place in Congo, releasing that information would indeed say something about the United States's ability to collect credible information in Congo. On the other side of the equation, however, is the First Amendment interest in open public debate necessary for an informed representative democracy. If our government knew of such genocide, and took no actions to stop the carnage, then the public has a strong interest in holding its government accountable. Whatever nominal harm to national security might result from revealing our intelligence capabilities in this hypothetical situation should be outweighed by the cost of the public being ignorant of genocide and their

147. See *Ray v. Turner*, 587 F.2d 1187, 1194 (D.C. Cir. 1978) (citing S. REP. NO. 93-1200, at 12 (1974)).

148. 575 F. Supp. 1253 (D.D.C. 1983), *remanded*, 801 F.2d 1386 (D.C. Cir. 1986).

149. *Id.* (citing Exec. Order No. 12,356, 3 C.F.R. 166 (1983)).

150. *Id.*; see also *Maynard v. CIA*, 986 F.2d 547, 559 (1st Cir. 1993) (applying reasonable expectation of damage to national security standard).

151. See *Bowers v. United States Dep't of Justice*, 930 F.2d 350, 355-57 (4th Cir. 1991) (approving the FBI's argument under the FOIA exception that releasing the information sought would allow the Soviet Union, a hostile entity, to assess the intelligence capabilities of the FBI).

government's inaction in the face of it.

Another reason that courts should review classification decisions is that the government will always tend to overclassify documents. This phenomenon occurs for a number of reasons. Some have argued that, psychologically, people in positions of censorship feel a need to justify their worth as professionals by finding material to classify. This may lead the censor to exaggerate the evils that may result from declassification.¹⁵² Thomas Emerson noted: "The function of the censor is to censor. He has a professional interest in finding things to suppress."¹⁵³ While there is probably some truth in this proclamation, Emerson is overly pessimistic regarding the general nature of people who censor information. It is more likely that the tendency to overclassify information is based on the fact that it is easier for the censor to classify something than it is to decide that the public should know about it, since the public, of course, includes hostile entities. Representative Porter J. Goss of Florida, who worked with the CIA for ten years, described to the Senate Committee on Governmental Affairs how this mental process manifests itself in the censor:

I believe that we do classify too much material, because it is the path of least resistance, and I know that from experience. If I get a piece of paper on my table and I am not sure what to do with it, I put a confidential stamp on it and put it in the confidential box. Then I will not have to worry about whether I released something that was classified that I should not have. So, the incentive is to do the wrong thing, and that is something we have got to get at.¹⁵⁴

Thus, the problem of overclassification is essentially a natural phenomenon of human behavior in the bureaucratic context and should be checked through judicial oversight.¹⁵⁵

It is arguable that oversight of any abuses in national security classification decisions should be left solely in the hands of the legislative branch. To Congress's credit, it recently created a Public Interest Declassification Board to advise the President and other Executive Branch members on items that should be declassified to advance the public's interest in open government.¹⁵⁶ This Board, however, does not, and should not, replace long-standing traditions of judicial review. In the area of military affairs, where the Executive yields enormous power, there does not seem to be a constitutional conflict in placing two weaker branches in a position to check the giant that controls public access to information.

152. See JEFFRIES, *supra* note 47, at 23.

153. *Id.* (citing Thomas I. Emerson, *The Doctrine of Prior Restraint*, 20 L. & CONTEMP. PROB. 648, 659 (1955)).

154. *Public Interest Declassification Act: Hearing on S. 1801 Before the Senate Comm. on Governmental Affairs*, 106th Cong. 6-7 (2000) (statement of Rep. Porter J. Goss).

155. A similar mental process might be observable in law firms and other places of legal employment, where attorneys frequently stamp documents as work product or attorney-client privileged without serious consideration of whether they are or not.

156. See Public Interest Declassification Act of 2000, Pub. L. No. 106-567, tit. VII, 114 Stat. 2856 (codified at 50 U.S.C. § 435 (2003)).

B. Recent Developments: FOIA, Terrorism, and the Law Enforcement Exemption

Decisions regarding what information could jeopardize national security, and thus should be classified and exempt under FOIA, have traditionally been made in the contexts of military and foreign affairs. In the post-September 11th world, however, domestic law enforcement agencies are playing an increasingly significant role in national security. Rather than classifying information under FOIA's national security exemption, the Department of Justice has relied upon FOIA's "7(A)" law enforcement exemption to block disclosure of certain information.¹⁵⁷ Under this exemption, information gathered for law enforcement purposes is exempt from disclosure whenever it "could reasonably be expected to interfere with law enforcement proceedings."¹⁵⁸

Since September 11th, this exemption has taken on an increasingly important role in national security and civil rights law. In the investigation immediately following the September 11th terrorist attacks, the government "detained . . . well over 1,000 people in connection with its investigation."¹⁵⁹ Numerous civil and human rights groups, members of Congress, and the media organizations requested the identities of the detainees and other information about them, such as why they were being held and who their attorneys were.¹⁶⁰

In *Center for National Security Studies*, where the above-mentioned groups brought suit against the Department of Justice, the government argued that just about all information pertaining to the post-September 11th detainees was subject to FOIA's law enforcement exemption. Through a variety of theories, the government argued that releasing information about the detainees would compromise their use as intelligence sources, or interfere with law enforcement efforts to stop attacks and apprehend terrorists.¹⁶¹ The district court disagreed in part, and found that the affidavits presented by the government failed to establish "a 'rational link' between the harms alleged and disclosure."¹⁶² The court then held that the government was required to release the identities of the detainees and their attorneys, but not more specific information.¹⁶³ Soon after the resolution of this case, the district court stayed its own order so that the case could be heard on appeal.¹⁶⁴ That appeal is now pending before the D.C. Circuit.

The court's opinion in *Center for National Security Studies* is a clear step toward furthering First Amendment values. While the court decided the case under FOIA, rather than under the plaintiff's First Amendment right of access argument,¹⁶⁵ the

157. See 5 U.S.C. § 552(b)(7)(A) (2000).

158. *Id.*

159. *Ctr. for Nat'l Sec. Studies v. United States Dep't of Justice*, 215 F. Supp. 2d 94, 96 (D.D.C. 2002) [hereinafter *Ctr. for Nat'l Sec. Studies I*].

160. *Id.*

161. See *id.* at 101.

162. *Id.* at 102.

163. *Id.* at 106, 109. The government was not required to release information pertaining to the dates of arrest, detention, and release, as well as the location of arrest and detention. See *id.* at 108-09.

164. See *Ctr. for Nat'l Sec. Studies v. United States Dep't of Justice*, 217 F. Supp. 2d 58, 58-59 (D.D.C. 2002) [hereinafter *Ctr. for Nat'l Sec. Studies II*].

165. *Ctr. for Nat'l Sec. Studies I*, 215 F. Supp. 2d at 111.

court's decision was quite bold in a constitutional sense. The court's opinion began by delineating the roles of the Executive and Judicial Branches in our constitutional system:

[T]he first priority of the executive branch in a time of crisis is to ensure the physical security of its citizens. By the same token, the first priority of the judicial branch must be to ensure that our Government always operates within the statutory and constitutional constraints which distinguish a democracy from a dictatorship.¹⁶⁶

It is hard to read much into one district court opinion, but it may be the case that courts will give less deference to Executive national security decisions made on Main Street U.S.A. than those made in a cave in Afghanistan. The court in *Center for National Security Studies* enhances First Amendment values through a non-deferential application of FOIA exemptions. By enhancing First Amendment values domestically, courts may have an eye toward protecting other civil liberties related to the Due Process and Fourth Amendment rights of those accused of crimes.

V. RECOMMENDATIONS

A. *Specialized Courts*

Having reviewed the standards for access to information involved in FOIA and other types of cases, it becomes apparent that the litigant seeking access to sensitive information faces substantial challenges. The challenge to the judicial branch is to adapt in a way that preserves barriers to access where, in the interests of national security, access should not be granted, while taking steps to prevent the abuse of privileges where information should be released.

Executive decisions regarding what information, if released, might reasonably be expected to harm national security should be given substantial deference by the judiciary. The current state of judicial review, as discussed in state secrets cases, secrecy agreements cases, right of access cases, and FOIA claims, suggests that the judiciary usually gives near total deference to Executive determinations of what should be kept secret. But absolute deference to Executive decisions in national security cases only demonstrates unwillingness, or inability, to confront issues that are becoming central to civil rights in America.

To address this problem, specialized courts should be created to hear cases that involve state secrets and national security, whether those cases involve prior restraints, a right of access claim, or a FOIA request. One model for such a court might be the Foreign Intelligence Surveillance Court ("FISC"). The FISC was created under the Foreign Intelligence Surveillance Act ("FISA") in response to the domestic spying scandals of the Nixon era.¹⁶⁷ While the FISC is a specialized court with some expertise

166. *Id.* at 96.

167. See 50 U.S.C. §§ 1803, 1822(c) (2003); see also Dan Egan & Susan Schmidt, *Secret Court Rebuffs Ashcroft: Justice Dept. Chided on Misinformation*, WASH. POST, Aug. 23, 2002, at A01.

in national security law, its jurisdiction is narrowly focused on approving government collection of foreign intelligence information, and it does not hear cases involving right of access, prior restraint, or FOIA claims.¹⁶⁸ The secret court “deliberates behind . . . spy-proof doors in a windowless, vault-like room in the headquarters of the Department of Justice.”¹⁶⁹ FISC hearings are nonadversarial proceedings where the government presents applications to conduct surveillance. The information sought must be “foreign intelligence information,” and “a significant purpose of the surveillance is to obtain foreign intelligence information,” when “such [foreign intelligence] information cannot reasonably be obtained by normal investigative techniques,” and “designates the type of foreign intelligence information being sought.”¹⁷⁰ Comparable requirements apply in applications for physical searches.¹⁷¹

The substance of the FISC’s work has been precisely the opposite of a National Security Court that would function to maximize public access to information. Indeed, the FISC’s work has been focused on protecting government secrecy and enabling the government to collect information. Structurally, however, the FISC has characteristics, such as secure chambers and national security expertise, which could enable a specialized National Security Court to hear the type of right of access, prior restraint, and FOIA claims discussed in this Comment.¹⁷² Perhaps such a National Security Court could simply be merged into the existing FISC court structure. It seems more likely, however, that a National Security Court would have to be created from scratch through separate enabling legislation. This is because the FISC’s mission is well

168. See 50 U.S.C. §§ 1803, 1822(c).

169. Paul DeRienzo & Joan Moossy, *America’s Secret Court*, at http://www.penthouse.com/features/9906f_secret_court/index2.html (accessed Feb. 17, 2003).

170. 50 U.S.C. § 1804(a)(7)(A)-(D).

171. 50 U.S.C. § 1823(a)(7)(A)-(D); see also *In re All Matters Submitted to the Foreign Intelligence Surveillance Court*, No. 02-429, 2002 WL 1949263 (mem. as corrected and amended) (Foreign Int. Surv. Ct. May 17, 2002), available at <http://news.findlaw.com/cnn/docs/terrorism/fisa51702opn.pdf>. The FISC recently released its first public opinion in its twenty-five-year history and found that the government supplied erroneous information in more than seventy-five applications for warrants and wiretaps. More importantly, the FISC rejected a proposed policy change by the Justice Department that would have allowed criminal prosecutors to have routine access to intelligence information collected for foreign intelligence purposes. *Id.*; see also Egan & Schmidt, *supra* note 167, at A01. The Foreign Intelligence Surveillance Court of Review (“FISCR”) was then assembled for the first time since the passage of FISA to review a FISC decision. See *In re Sealed Case 02-001, 02-002*, 310 F.3d 717 (Foreign Int. Surv. Ct. Rev. 2002), available at <http://www.cadc.uscourts.gov/common/newsroom/02-001.pdf>. The FISCR, consisting of three judges, reversed. The court found that, under the “significant purpose” amendment to FISA contained in the USA Patriot Act of 2001, Pub. L. No. 107-56, 115 Stat. 272, the government could share information gained through a FISA warrant with federal prosecutors, as long as “the government entertains a realistic option of dealing with the agent other than through criminal prosecution.” *In re Sealed Case 02-001, 02-002*, 310 F.3d at 735.

172. See 50 U.S.C. § 1803(c) (requiring that “[t]he record of proceedings under this chapter, including applications made and orders granted, shall be maintained under security measures established by the Chief Justice in consultation with the Attorney General and the Director of Central Intelligence”). This section could be used in establishing the basic structure of a National Security Court.

established in the federal code, and, at least on a theoretical level, its functions would conflict with those of a National Security Court. Merging the two courts would attempt to fuse a judicial culture rightly concerned with secrecy with a new culture justly focused on disclosure.

Federal legislation creating a lottery system to designate already appointed civilian federal judges as National Security Judges could be a starting point for such a court. In contrast to this approach, to make up the FISC, the FISA mandates that the "Chief Justice of the United States . . . publicly designate 11 district court judges from 7 of the United States judicial circuits of whom no fewer than 3 reside within 20 miles of the District of Columbia."¹⁷³ In the context of creating a court focused on maximizing public access to information, a lottery seems like a better way to pick judges than delegating that power to the Chief Justice alone. Imagine the types of judges Chief Justice Warren would have selected for such a court, and then imagine those that Chief Justice Rehnquist or Burger would choose. It would be dangerous for such a court to be entirely composed of judges with similar judicial philosophies. The result would likely be a system that would disclose far too much, or a court that would disclose almost nothing at all. Using a lottery would create a balanced court, entirely made up of qualified federal judges who had been confirmed through the normal congressional process. The FISA mandate that no fewer than three judges reside near Washington, D.C.,¹⁷⁴ makes practical sense, since it would assure that the judges could assemble quickly in the nation's capital to hear emergency cases.

National Security Judges would be specifically trained and educated on classification procedures and on how government agencies assess whether the release of certain information could harm national security. National Security Courts would have secure chambers and staff that would hold appropriate security clearances to view classified information.¹⁷⁵ National Security Judges should also be able to hire former intelligence or military experts to serve as special masters in the consideration of cases. Analogous situations have appeared in cases where it was alleged that there were overbroad classifications of a large volume of documents. In such cases, judges have used special masters to assist the court by reviewing representative samples of the documents to determine if they were properly classified.¹⁷⁶ Such types of expert assistance would not only enhance the judge's confidence in his or her own ability to evaluate a case, but would also strengthen public confidence in the court itself. Indeed, the Executive Branch might be more willing to cooperate and disclose materials to the court knowing that it has at least some expertise dealing with sensitive national security issues.

The expertise of these courts would not change the level of deference accorded to agency decisions, but would make review more meaningful by providing judges with tools enabling them to ask informed questions and to feel more comfortable in criticizing classification decisions that seem dubious or overbroad. In essence, the current level of scrutiny would remain the same, but could accurately be termed

173. 50 U.S.C. § 1803(a).

174. *Id.*

175. See Flynn, *supra* note 8, at 811-12.

176. *Id.* at 812 (citing *In re United States Dep't of Def.*, 848 F.2d 232, 233 (D.C. Cir. 1988), wherein a newspaper brought a FOIA claim to compel production of 14,000 pages of documents related to the Iranian hostage crisis).

“substantial deference with teeth.”

Expertise without efficiency, however, will fail to address the problems of mootness that face plaintiffs bringing right of access claims during military conflicts. As mandated by the FISA, legislation creating a National Security Court should require that cases be handled “as expeditiously as possible.”¹⁷⁷ To address the mootness hurdle in such litigation, National Security Courts should have dockets designed to hear cases within days of filing. This expedited process would enable the court to hear cases quickly, thus allowing the court to address issues of access, such as those involved in the Grenada case, before they arguably become moot. The speed of such a court would also provide it with an advantage over administrative and legislative bodies that review information for declassification. A specialized court would probably be able to react more quickly in a crisis situation than any administrative commission or legislative committee. Legislative bodies prioritize assignments based on political goals, and would be unlikely to deal with classification decisions expeditiously. Commissions and administrative agencies often involve bureaucratic delay, and may also be driven by political goals that do not give high priority to matters of declassification. In contrast, a specialized court would be structured to prioritize declassification decisions and avoid bureaucratic delay.

B. Use of the Freedom of Information Act Test in Other Contexts

Of all the styles and standards of judicial review discussed in this Comment, the five-part FOIA exemption test is the most comprehensive, as explained in Part IV.A.¹⁷⁸ A major strength of the FOIA test that would benefit a National Security Court is that it allows judges to conduct in camera inspections of evidence.¹⁷⁹ This review, coupled with a judicial determination of whether the information could reasonably be expected to harm national security if released, should be applied to state secrets cases, secrecy agreement cases (prior restraints), and right of access cases.¹⁸⁰ The original intent behind FOIA was to “ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against [government] corruption and to hold the governors accountable to the governed.”¹⁸¹ Using the FOIA test in other contexts would also be consistent with the congressional intent behind FOIA’s exemption of classified information, and would lead to a more informed public and a more accountable democracy.

In a right of access case, there is typically no document that is being kept secret.

177. 50 U.S.C. § 1803(c).

178. *See supra* notes 136-40 and accompanying text.

179. 5 U.S.C. § 552 (a)(4)(B).

180. For instance, the FOIA test could be applied in a secrecy agreement and prior restraint case by placing the burden on the government to show why the information it seeks to remove from the publication would be exempt under FOIA, by the court making a de novo determination on the claimed exemption, by the court requiring affidavits to support the assertion that the information should not be released, by the court conducting in camera review of documents if necessary, and by making a determination whether proper classification procedures were followed and the items logically fall into the privileged category. *See Ray v. Turner*, 587 F.2d 1189, 1194-95 (D.C. Cir. 1978); *supra* text accompanying notes 136-40.

181. *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

Rather, there is a military operation that is being kept out of the media's view. In such a case, the military should be required to describe that operation in documentary form for an in camera inspection by the court. The court should then apply the FOIA exemption test to determine whether legitimate national security interests reasonably lead to the conclusion that the media should be denied access. Requiring such a process would cause the government to articulate a specific basis for denying access, and might act as a deterrent to arbitrary or heavy-handed access restrictions.

C. Public Necessity as a Factor to Modify the Level of Deference in All Contexts

In the state secrets context, the Supreme Court recognized that when reviewing the government's claim of privilege, the court should consider the necessity of the information sought to the plaintiff's case.¹⁸² Yet a case for *public necessity* can and should be made as well. In a secrecy agreement or FOIA or right of access case, the plaintiff is often fighting on behalf of the public to reveal information. This is the case when news agencies sue to gain access to a battlefield, or when a historian brings suit under FOIA to reveal information about classified historical events. Thus, courts should consider whether the information sought is of high public concern and necessary to maintain government accountability.

Such a consideration, as a factor added on top of the FOIA review process, may seem difficult to apply. It is true that many groups in society will disagree as to what information is of high public concern or necessary to maintain government accountability. However, such a consideration could be made in a content-neutral manner in limited situations. Courts should consider this factor mainly in situations where exigent circumstances exist and there is an immediate public need for the information being sought.

For instance, consider the following hypothetical situation. The President is seeking re-election next year, and a newspaper files a FOIA claim seeking documents that will allegedly show the public that the President supported military aid to the Taliban when he was an official at the State Department five years ago. In such a situation, there is an immediate public necessity to confirm or dispel the accusation before the election takes place. Exigent circumstances also exist in right of access cases. Since military actions are often short-lived, an uninformed public will miss an opportunity to oppose or criticize an operation if it cannot access relevant information. In both of these situations, consideration of the factor of public necessity is intended to give the public the opportunity to participate in shaping current events. If the public ignorance that results from overclassification leads our nation to fight an unjust war, or to elect an unsuitable President, our democracy would prove to be a simple illusion. An evaluation of public necessity, while difficult in a practical sense, would strengthen our democracy by releasing information needed to hold our leaders accountable.

Some may argue that adding this factor and establishing a National Security Court will usurp the Executive's power to make national security decisions. Admittedly, at some point the judicial branch could become too involved in national security affairs. It is presently clear, however, that with the exception of the Pentagon Papers Case and few others, the judicial branch has been extremely deferential to Executive decisions

182. See *United States v. Reynolds*, 345 U.S. 1, 11 (1953).

related to national security.¹⁸³ As the threat to America in foreign and domestic national security matters increases, the Executive Branch will logically react by making more secrecy decisions. As that power grows and is exercised more frequently, there must be some corresponding force to check it. The time has come for Congress to check that power by giving the judiciary an increased capability to review national security decisions that threaten First Amendment rights. As Judge Kessler noted in the recent case of *Center for National Security Studies*, “[T]he first priority of the judicial branch must be to ensure that our Government always operates within the statutory and constitutional constraints which distinguish a democracy from a dictatorship.”¹⁸⁴

CONCLUSION

The “War on Terror,” and the changing nature of warfare in general, will present the judiciary with an increasing number of cases that will force courts to determine whether government claims of secrecy are justified. To protect public access to information, and to safeguard the First Amendment value of an informed democracy, the judiciary will have to adapt in a way that will enable it to evaluate quickly and confidently government claims that information should be kept secret in the interest of protecting national security. To accomplish this goal, Congress and the courts should act to establish National Security Courts with the speed and expertise necessary to maximize public access to information in sensitive cases involving state secrets, prior restraints, rights of access, and FOIA claims. Such courts should engage in FOIA-style review of classification decisions and undertake in camera review of documents when necessary. In addition to the five-part FOIA test, National Security Courts should consider public necessity as a sixth factor in certain exigent cases.

183. *See, e.g.*, *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971); *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002).

184. *Ctr. for Nat’l Sec. Studies I*, 215 F. Supp. 2d 94, 111 (D.D.C. 2002).