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## CITIZEN ACCESS AND GOVERNMENT SECRECY

PAUL HARIDAKIS\*

### INTRODUCTION

Like July 4, 1776, and June 7, 1941, September 11, 2001 is indelibly imprinted on the minds of most United States citizens, and has had profound effects on the operation of our Government. In the aftermath of the devastating September 11, 2001 terrorist attacks on the Pentagon and World Trade Center, the executive branch was reorganized with the creation of the Department of Homeland Security and significant government initiatives (*e.g.*, the USA PATRIOT Act, the authorization of military tribunals, closing deportation proceedings, classifying previously public information, expanding executive privilege and control of presidential records) to enhance the government's capacity to wage a war on terrorism were implemented.<sup>1</sup>

Many of these initiatives permit the executive branch to withhold information from the press and public at its discretion.<sup>2</sup> These initiatives have generated tremendous debate as some officials support the proposals as added protections for the United States and its citizens while others expressed

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1. *See, e.g.*, Homeland Security Act of 2002, Pub L. No. 107-296, 116 Stat. 2135 (codified in scattered sections of the U.S.C.); Uniting and Strengthening America by Providing Appropriate Tools required to Intercept and Obstruct Terrorism Act of 2001 ("USA PATRIOT Act"), Pub. L. No. 107-56, 115 Stat. 272 (codified in scattered sections of the U.S.C.); Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 16, 2001); Memorandum from Chief Immigration Judge Michael J. Creppy to Immigration Judges and Court Administrators (Sept. 21, 2001), *available at* <http://news.findlaw.com/hdocs/aclu/creppy092101memo.pdf> (directing immigration judges to close hearings to the public in certain cases in which the Attorney General has implemented additional security procedures); Emanuel Gross, *The Influence of Terrorist Attacks on Human Rights in the United States: The Aftermath of September 11, 2001*, 28 N.C. J. INT'L L. & COM. REG. 1 (2002); Jan C. Ting, *Unobjectionable But Insufficient—Federal Initiatives in Response to the September 11 Terrorist Attacks*, 34 CONN. L. REV. 1145 (2002).

2. For a discussion of the Bush Administration's efforts to curtail discretionary disclosures, see James T. O'Reilly, "Access to Records" versus "Access to Evil:" *Should Disclosure Laws Consider Motives as a Barrier to Records Release?*, 12 KAN J.L. & PUB. POL'Y 559, 568-69 (2003).

concern that they give the government too much latitude to engage in clandestine activities without the public's knowledge.<sup>3</sup>

This is no simple dilemma to resolve. There is always a need, particularly during times of war, to protect the republic, the collective rights of citizens, and homeland security. But, of course, the obligation to protect individual rights always remains. In the current atmosphere in which the United States is fighting a war in Iraq, and simultaneously an ongoing war against terrorism, we find ourselves in a period of perceived crisis. In light of efforts taken by the government in the 21<sup>st</sup> century to control and withhold information from the public about the war on terrorism, the tension between the public's desire to obtain government-controlled information and the government's desire to withhold it is particularly salient.

The tension between these competing interests is not a recent phenomenon. The right of "the people" to receive information has been referenced by political leaders and scholars since the founding of the United States.<sup>4</sup> However, the Supreme Court has not provided definitive guidance regarding the extent to which the First Amendment protects a public right of access mandating government openness.

However, one thing is certain: finding the proper balance between protecting homeland security and maintaining the integrity and accountability of government bodies comes down to resolving the extent of the public's right to access information necessary to make judgments about government activity.

This paper focuses on the extent of the public's First Amendment right to access information, including information pertaining to actions taken by the government in the War on Terrorism. However, a comprehensive review of all

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3. For recent reviews and commentary on various such initiatives, see Patrice McDermott, *Withhold and Control: Information in the Bush Administration*, 12 KAN. J.L. & PUB. POL'Y 671 (2003); James T. O'Reilly, *FOIA and Fighting Terror: The Elusive Nexus Between Public Access and Terrorist Attack*, 64 LA. L. REV. 809 (2004); Mary-Rose Papandrea, *Under Attack: The Public's Right to Know and the War on Terror*, 25 B.C. THIRD WORLD L.J. 35 (2005); Susan Dente Ross, *Secrecy's Assault on the Constitutional Right to Open Trials*, 40 IDAHO L. REV. 351 (2004); Kim Lane Scheppelle, *Law in a Time of Emergency: States of Exception and the Temptations of 9/11*, 6 U. PA. J. CONST. L. 1001 (2004); Rena Steinzor, "Democracies Die Behind Closed Doors:" *The Homeland Security Act and Corporate Accountability*, 132 KAN. J.L. & PUB. POL'Y 641 (2003); Christina E. Wells, *Information Control in Times of Crisis: The Tools of Repression*, 30 OHIO N.U.L. REV. 451 (2004); Keith Anderson, Note, *Is There Still a "Sound Legal Basis?": The Freedom of Information Act in the Post-9/11 World*, 64 OHIO ST. L.J. 1605 (2003); Bradley Pack, Note, *FOIA Frustration: Access to Government Records Under the Bush Administration*, 46 ARIZ. L. REV. 815 (2004); Darren W. Stanhouse, Comment, *Ambition and Abdication: Congress, The Presidency, and the Evolution of the Department of Homeland Security*, 29 N.C. J. INT'L L. & COM. REG. 691 (2004).

4. See, e.g., Eric B. Easton, *Public Importance: Balancing Proprietary Interests and the Right to Know*, 21 CARDOZO ARTS & ENT. L.J. 139, 144-49 (2003) (discussing the development of "right to know" jurisprudence).

of the ways the PATRIOT Act and other government initiatives may affect citizen access to information cannot be addressed comprehensively in a single paper. Similarly, comprehensive coverage of all case law and commentary throughout the years pertaining to the public's First Amendment right of access to government information and practices also cannot be addressed adequately in a single paper. Accordingly, the discussion must be both representative and illustrative.

This essay will be organized in four parts. First, I will review representative literature and case law pertaining to the extent of the First Amendment right of access to information. Second, I will briefly discuss the Freedom of Information Act, the principle piece of federal legislation pertaining to public access to government records. Third, I will review representative examples of government action during the War on Terrorism that has constrained public access to information held by the government. Finally, I will attempt to place recent executive branch actions, which have been cloaked in secrecy, in historical context.

#### THE FIRST AMENDMENT AND ACCESS TO INFORMATION

The importance of public access to information and visibility of government processes cannot be overstated. The right of citizens to receive information about government activities is a notion that predates the United States Constitution.<sup>5</sup> Thomas Jefferson wrote in the Declaration of Independence that governments derive their authority from the consent of the governed.<sup>6</sup> Jefferson's concept of self-governance formed the foundation upon which our Federal Constitution is based.<sup>7</sup>

Given these central tenets of United States democratic principles (*i.e.*, that it is a republic based on public consent and the right of "the people" to dictate the itinerary of their government), various jurists have advanced the idea that the right of access to information should be fostered and protected by the First Amendment.<sup>8</sup> Put succinctly, the citizens, not the government, should decide what information is needed to participate in self-governance.<sup>9</sup>

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5. See William H. Rehnquist, *Thomas Jefferson and His Contemporaries*, 9 J.L. & POL'Y 595, 607-08 (1993).

6. *Id.*

7. See Thomas B. McAfee, *Does the Federal Constitution Incorporate the Declaration of Independence?*, 1 NEV. L.J. 138, 144 (2001).

8. See, *e.g.*, *Lamont v. Postmaster General*, 381 U.S. 301, 308 (1965) (Brennan J., concurring) (arguing that the public right to receive information is so fundamental that the government is limited in its authority to interfere with it).

9. *Id.*

Although self-governance does not mean that the people rule in a *practical* sense, “they do judge those who do.”<sup>10</sup> Thus, it has been argued that “[t]he dominant purpose of the First Amendment was to prohibit . . . governmental suppression of embarrassing information” and that “[s]ecrecy in government is fundamentally anti-democratic.”<sup>11</sup>

The view that access to information is the foundation upon which other freedoms rest has significant historical support.<sup>12</sup> For example, when criticizing the Sedition Act of 1798, enacted at the end of the 18<sup>th</sup> century, one of our founders, James Madison, referred to the freedom to “examine public characters and measures, and of free communication thereon” as “the only effectual guardian of every other right.”<sup>13</sup> In the 19<sup>th</sup> century, legal philosopher Jeremy Bentham added that “in comparison of publicity, all other checks are of small account.”<sup>14</sup> Similarly, in the late 20<sup>th</sup> century former Supreme Court Justice William Brennan claimed that the exercise of public debate and other civic behavior rests on the “antecedent assumption” that it “must be informed.”<sup>15</sup> When specifically considering the intent of our founders, legal historian Harold Cross argued that “the struggle for freedom of speech and of the press bars any notion that the men of 1791 intended to provide for freedom to disseminate such information but to deny freedom to acquire it.”<sup>16</sup>

On the other hand, there is historical evidence that the extent of the right to access information is not as robust as such esteemed advocates suggested. Apparently, at least some of our founders were not greatly concerned with the right of access. Evidence of the lack of concern for the free flow of information includes the secret proceedings at the Constitutional Convention of 1787, the closed debate concerning the adoption of the Bill of Rights, and the private meetings of the United States Senate prior to 1795.<sup>17</sup> In addition, some

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10. Marci A. Hamilton & Clemens G. Kohnen, *The Jurisprudence of Information Flow: How the Constitution Constructs the Pathways of Information*, 25 CARDOZO L. REV. 267, 272 (2003).

11. *New York Times Co. v. United States*, 403 U.S. 713, 723-24 (1971) (Douglas, J., concurring).

12. See, e.g., HAROLD CROSS, *THE PEOPLE’S RIGHT TO KNOW* xiii-xiv (1954); Timothy B. Dyk, *News Gathering, Press Access, and the First Amendment*, 44 STAN. L. REV. 927, 959 (1992).

13. Dyk, *supra* note 12, at 959.

14. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569 (1980) (quoting JEREMY BENTHAM, 1 *RATIONALE OF JUDICIAL EVIDENCE* 524 (1827)).

15. *Id.* at 587 (Brennan, J., concurring).

16. CROSS, *supra* note 12, at 131-32.

17. See Martin E. Halstuk, *Policy of Secrecy-Pattern of Deception: What Federalist Leaders Thought About a Public Right to Know, 1794-98*, 7 COMM. L. & POL’Y 51, 57-60 (2002).

of the earliest United States legislation on record authorized executive branch departments to withhold documents from the public at their discretion.<sup>18</sup>

Delineating the extent of the public's right of public access to information is complicated by the fact that the Supreme Court has never specifically ruled there is a universal constitutional right of access. Although the Court has held that such a right exists in particularized settings, its rulings regarding the right of access have been limited to specific settings.<sup>19</sup>

#### *The Right of Access to Judicial Proceedings*

Perhaps the most well articulated case dealing with the right of access to information is the Supreme Court's 1980 opinion in *Richmond Newspapers v. Virginia*, which held that the press and public have a First Amendment right of access to trial proceedings.<sup>20</sup> Justice Burger, writing for the plurality, explained that it was "not crucial whether we describe this right to attend criminal trials . . . as a 'right of access,' or a 'right to gather information.'"<sup>21</sup> Openness, Justice Burger said, "may be seen as assured by the amalgam of the First Amendment guarantees of speech and press."<sup>22</sup> He further claimed that access was relevant to the First Amendment right of assembly, in part because "[p]eople assemble in public places not only to speak or to take action, but also to listen, observe, and learn."<sup>23</sup> Thus, when the Court ruled in *Richmond Newspapers* that the public had a First Amendment right to attend trials, it found that access was guaranteed specifically because access fostered First Amendment values.<sup>24</sup>

Given such broad pronouncements about the strength of the right of access, the Court could have easily ruled that the right is fundamental and not merely limited to judicial proceedings. However, the Court did not do so.<sup>25</sup> In fact, in a concurring opinion, Justice Brennan articulated two important considerations he believed the Court should use in determining whether access in particular settings was warranted.<sup>26</sup> The first consideration was whether there was a sufficient tradition of openness justifying access "to particular proceedings or

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18. See Papandrea, *supra* note 3, at 48 (discussing the Housekeeping Statute of 1789, 1 Stat. 68 (1789)).

19. See generally, Eugene Cerruti, "Dancing in the Courthouse:" *The First Amendment Right of Access Opens a New Round*, 29 U. RICH. L. REV. 237 (1995).

20. 448 U.S. 555, 581 (1980).

21. *Id.* at 576 (citations omitted).

22. *Id.* at 577.

23. *Id.* at 578.

24. *Id.* at 580.

25. *Id.* at 585-86.

26. *Richmond Newspapers*, 448 U.S. at 589 (Brennan, J., concurring).

information.”<sup>27</sup> The second consideration was whether there was a structural value of openness—that is, whether access benefited the process at issue.<sup>28</sup>

Using this two-part experience and logic rationale, the Court in subsequent cases ruled that the right of public access extended to settings ancillary to the trial itself, such as jury selection<sup>29</sup> and pretrial hearings.<sup>30</sup> In addition, lower courts applying the Court’s *Richmond Newspapers* rationale found a right of access to civil trials, administrative proceedings, and some fact-finding hearings.<sup>31</sup> However, the Supreme Court has always stopped short of concluding that the right of access is guaranteed in settings other than judicial proceedings and those ancillary to them.<sup>32</sup>

### *A Lack of Access in Non-Judicial Settings*

In some contexts, the Court has specifically rejected the argument that the First Amendment mandates a right of access to government activities and information.<sup>33</sup> Rulings by the Supreme Court in three pre-*Richmond Newspapers* cases are often cited to support the argument that the First Amendment does not guarantee a right of access to such information.<sup>34</sup> In *Pell v. Procunier* and *Saxbe v. Washington Post Co.*, journalists challenged a California prison rule and a Federal Bureau of Prisons rule, respectively, which prohibited media interviews with particular inmates of the media’s choosing.<sup>35</sup> In *Houchins v. KQED* the media challenged a local sheriff’s denial of access to a portion of a jail.<sup>36</sup> In each case, the Court ruled that journalists did not have a constitutional right of particularized access to such facilities beyond that enjoyed by the general public.<sup>37</sup>

Although the Court was dealing with media rights of access in these three cases, the implication was that the public did not have such a right of access, which is why the media also lacked the right.<sup>38</sup> In an earlier case, the Court provided illustrative examples of settings where the media, and by implication

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27. *Id.* This is sometimes referred to as “experience.” See, e.g., *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 695 (6th Cir. 2002).

28. *Richmond Newspapers*, 448 U.S. at 589, 598. This is sometimes referred to as “logic.” See, e.g., *Detroit Free Press*, 303 F.3d at 695.

29. *Press Enterprise Co. v. Superior Court*, 464 U.S. 501, 513-14 (1984).

30. *Press Enterprise Co. v. Superior Court*, 478 U.S. 1, 10 (1986).

31. For a recent review of representative cases see *Detroit Free Press*, 303 F.3d at 695.

32. *Richmond Newspapers*, 448 U.S. at 585.

33. See, e.g., *Houchins v. KQED, Inc.*, 438 U.S. 1, 15-16 (1978); *Pell v. Procunier*, 417 U.S. 817, 834-35 (1974); *Saxbe v. Washington Post Co.*, 417 U.S. 843, 849-50 (1974).

34. *Houchins*, 438 U.S. at 15-16; *Pell*, 417 U.S. at 834-35; *Saxbe*, 417 U.S. at 849-50.

35. *Pell*, 417 U.S. at 819; *Saxbe*, 417 U.S. at 844.

36. *Houchins*, 438 U.S. at 3.

37. *Houchins*, 438 U.S. at 15-16; *Pell*, 417 U.S. at 834-35; *Saxbe*, 417 U.S. at 850.

38. See, cases cited *supra* note 37.

the public, have traditionally been excluded.<sup>39</sup> These examples include “grand jury proceedings,” Supreme Court conferences, “meetings of other official bodies gathered in executive session,” “meetings of private organizations,” and “scenes of crime or disaster.”<sup>40</sup>

The Supreme Court confirmed this limited view of access rights as recently as 1999.<sup>41</sup> In *Los Angeles Police Department v. United Reporting Publishing Corp.*,<sup>42</sup> the Court rejected a First Amendment challenge to a California law denying access to the addresses of arrestees when sought to sell a product or service.<sup>43</sup> The Court noted that, because the case involved “nothing more than a governmental denial of access to information in its possession,” the State could have gone even further and decided “not to give out arrestee information at all without violating the First Amendment.”<sup>44</sup> Even Justices Stevens and Kennedy, who dissented because they felt the law was an improper violation of commercial speech rights, acknowledged that denying access to arrestee addresses would not have violated the First Amendment.<sup>45</sup>

#### *Judicial Hints of a Right of Access in Cases Addressing Other First Amendment Rights*

In general, the above cases illustrate that, outside of judicial proceedings, the Court has been reluctant to compel the government to disclose information on the theory that the public had a First Amendment right to access it. However, in cases dealing with other First Amendment rights, the Court has, at times, suggested that the right of access deserves constitutional protection.<sup>46</sup> For example, when addressing a Michigan obscenity law banning materials tending to corrupt “the morals of youth,” the Court ruled that the law was unconstitutionally overbroad, because it limited “the adult population of Michigan to reading only what is fit for children.”<sup>47</sup> When reviewing a Georgia law prohibiting the possession of obscene materials, the Court declared it is “well established that the Constitution protects the right to receive information and ideas.”<sup>48</sup> In the same case, the Court also declared, “[i]f the First Amendment means anything, it means that a State has no

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39. *Branzburg v. Hayes*, 408 U.S. 665, 684-85 (1972).

40. *Id.*

41. *Los Angeles Police Dep’t v. United Reporting Publ’g Corp.*, 528 U.S. 32, 34 (1999).

42. *Id.*

43. *Id.*

44. *Id.* at 40.

45. *Id.* at 45 (Stevens, J., dissenting). Justice Kennedy joined in Justice Steven’s dissent. *Id.* at 44.

46. *See, e.g., Butler v. Michigan*, 352 U.S. 380, 384 (1957).

47. *Id.* at 383.

48. *Stanley v. Georgia*, 394 U.S. 557, 564 (1969).



business telling a man, sitting alone in his own house, what books he may read or what films he may watch.”<sup>49</sup>

The same year, the Supreme Court upheld a portion of the FCC’s fairness doctrine requiring broadcasters to provide a right of reply to a person disparaged during the broadcast of a controversial issue.<sup>50</sup> In upholding the regulation, the Court acknowledged that the public has a right to “suitable access to social, political, esthetic, moral and other ideas and experiences.”<sup>51</sup> The Court stressed that the First Amendment protects “an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee.”<sup>52</sup>

Recently, the right of access to information arose in *United States v. American Library Association*.<sup>53</sup> In that case, the Court upheld the constitutionality of the Children’s Internet Protection Act (“CIPA”), which requires libraries to install internet filtering software on computers as a condition to receiving certain federal grants.<sup>54</sup> Citing *Stanley v. Georgia*, Justice Breyer indicated in his concurring opinion that the right to receive information is protected by the First Amendment.<sup>55</sup> Therefore, he asserted that the constitutionality of CIPA should have been tested with more exacting scrutiny than the “rational basis” test used by the plurality, specifically because it “restricts the public’s receipt of information.”<sup>56</sup> Similarly, Justice Souter, with whom Justice Ginsburg joined in dissent, argued that strict scrutiny should have been used to test the constitutionality of CIPA because of the potential for internet filters to violate an adult patron’s First Amendment right to access material of their choosing.<sup>57</sup>

#### *Cases Affirming a General First Amendment Right of Access*

Although none of the cases in which the Court recognized a right to information dealt with compelling the government to disclose government information or activities, the cases did establish there is at least some protection for the right of individuals to “receive information and ideas,”<sup>58</sup>

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49. *Id.* at 565.

50. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969).

51. *Id.* at 390.

52. *Id.*

53. 539 U.S. 194, 214 (2003).

54. *Id.*

55. *Id.* at 216 (Breyer, J., concurring) (citing *Stanley v. Georgia*, 394 U.S. 557 (1969)).

56. *Id.*

57. *Id.* at 242-43 (Souter, J., dissenting).

58. *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972); *see also*, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576 (1980).

particularly from each other.<sup>59</sup> This includes the right to receive corporate political communications,<sup>60</sup> advertising,<sup>61</sup> labor union communications,<sup>62</sup> door-to-door solicitations,<sup>63</sup> and postal mail without having to take the affirmative step of requesting it.<sup>64</sup> This right to information is based on the premise 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.”<sup>65</sup>

In addition to the Supreme Court, some lower courts have recognized that the First Amendment protects public access to information.<sup>66</sup> For example, federal courts have ruled that statutes prohibiting exit interviews of voters near polling places violated the media’s right to gather information.<sup>67</sup> Similarly, courts have held that the First Amendment bars the police from unduly interfering with the media’s newsgathering activities.<sup>68</sup> Courts have even ruled that the government can be compelled to release records pursuant to citizens’ right of access to public records that is both rooted in the common law and protected by the First Amendment.<sup>69</sup> In *Richmond Newspapers* the Supreme Court also recognized that the right to attend trials was rooted in the common law.<sup>70</sup>

In all, one could argue that recognition of a public right of access has been gaining ground in the United States,<sup>71</sup> and that the dissents of Stevens, Brennan, and Powell in *Houchins* were validated by the Supreme Court in

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59. See, e.g., *Grosjean v. Am. Press Co.*, 297 U.S. 233, 249-50 (1936) (discussing the right of members of society to share information regarding their common interests).

60. *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 794-95 (1978).

61. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

62. *Thomas v. Collins*, 323 U.S. 516 (1945).

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

64. *Lamont v. Postmaster Gen.*, 381 U.S. 301 (1965).

65. *First Nat’l Bank of Boston*, 435 U.S. at 783.

66. See, e.g., *Daily Herald v. Munro*, 838 F.2d 380 (9th Cir. 1988) (invalidating a state law that prohibited exit interviews within 300 feet of polling places); see also, *CBS Inc. v. Smith*, 681 F. Supp. 794, 806 (S.D. Fla. 1988) (invalidating 150 foot restriction on such interviews).

67. *Daily Herald*, 838 F.2d at 389; *CBS*, 681 F. Supp. at 806.

68. See, e.g., *Fordyce v. City of Seattle*, 55 F.3d 436, 438-40 (9th Cir. 1995); *Connell v. Town of Hudson*, 733 F. Supp. 465, 469-471 (D.N.H. 1990); see also, Barry P. McDonald, *The First Amendment and the Free Flow of Information: Towards a Realistic Right to Gather Information in the Information Age*, 65 OHIO ST. L.J. 249 (2004) (providing an excellent review of cases relevant to the right to gather information).

69. *Providence Journal Co. v. McCoy*, 94 F. Supp. 186, 195-96 (D.R.I. 1950) (ruling that the state could not withhold information regarding tax cancellations and abatements).

70. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 564-75 (1980).

71. For an interesting discussion of the growth of the “right to know” movement in the U.S. see Pack, *supra* note 3, at 816-17.

*Richmond Newspapers*.<sup>72</sup> The Sixth Circuit Court of Appeals expressed this perception when it ruled that the Bush administration's practice of closing deportation hearings violated the First Amendment.<sup>73</sup> The Sixth Circuit court asserted that "it is clear that the Court has since moved away from its position in *Houchins* and recognizes that there is a limited constitutional right to some government information."<sup>74</sup>

However, until the Supreme Court specifically extends the rationale of *Richmond Newspapers* and its progeny beyond judicially related contexts, the extent of the First Amendment right of access to information will be contested. The fact that the Court only addressed the issue squarely in *Richmond Newspapers* and its progeny has left scholars to interpret the extent of the right by looking to disparate decisions, rendered in an array of unrelated cases, that provide little guidance on the precise extent of the right.<sup>75</sup> In fact, when it comes to the question of requiring the government to take affirmative steps to assure access to government activities or information, two former Supreme Court Justices intimated that it is up to the political process (*e.g.*, Congress) rather than the Constitution, to determine what information the public can obtain and the conditions under which it can be obtained.<sup>76</sup>

#### LEGISLATION: FREEDOM OF INFORMATION ACT (FOIA)

The public's right of access to government information has been addressed in the political process. Congress and all state legislatures have passed open meeting and/or open record laws that require varying degrees of government openness and transparency.<sup>77</sup>

At the federal level, the Freedom of Information Act ("FOIA")<sup>78</sup> has been the most comprehensive legislation guaranteeing public access to government records.<sup>79</sup> FOIA, enacted in 1966 (and amended various times over the

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72. See Papandrea, *supra* note 3 at 41-44 for a discussion of these dissents that evidences their consistency with the *Richmond Newspapers* decision.

73. *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 695 (6th Cir. 2002).

74. *Id.*

75. *Richmond Newspapers, Inc.*, 448 U.S. at 580-81.

76. See *Houchins v. KQED*, 438 U.S. 1, 12 (1978) (Chief Justice Warren Burger asserted in his majority opinion that determining whether a penal institution should be open was "clearly a legislative task that the Constitution has left to the political processes."); see also, Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 636 (1975) (Justice Stewart stated that "the public's interest in knowing about its government is protected by the guarantee of a Free Press, but the protection is indirect. . . . The Constitution, in other words, establishes the contest, not its resolution. Congress may provide the resolution . . . through carefully drawn legislation").

77. For a general overview of access to records and open meeting laws, see KENT R. MIDDLETON, ET AL., *THE LAW OF PUBLIC COMMUNICATION* 474-513 (1997).

78. Freedom of Information Act, 5 U.S.C. § 552 (2000), *amended by* Pub. L. No. 107-306, 110 Stat. 3048 (2003).

79. *Id.*

years),<sup>80</sup> permits “any person” to obtain information in the possession of a federal agency regardless of the requester’s reasons for requesting the records or what they intend to do with the information obtained.<sup>81</sup> Accordingly, FOIA provides a presumption of access.<sup>82</sup> If a federal agency feels that records in its possession are not subject to disclosure, the burden is on the government to show that the information should not be divulged.<sup>83</sup>

FOIA provides nine exemptions that permit a federal agency to withhold information under specific circumstances.<sup>84</sup> Information exempt from disclosure includes (1) information classified in the interest of protecting “national defense or foreign policy,” (2) information pertaining to an agency’s personnel rules and practices, (3) information protected from disclosure pursuant to another statute, (4) privileged or confidential “trade secrets and commercial and financial information,” (5) information not available by law to a party “other than an agency in litigation with the agency,” (6) personnel, medical, and similar files that would constitute an invasion of personal privacy if disclosed, (7) records maintained for law enforcement reasons, (8) information pertaining to financial institution supervision or regulation, and (9) geological and geophysical information pertaining to wells.<sup>85</sup>

FOIA’s presumption of public access to government records, subject only to these enumerated exemptions, has generated significant litigation in which courts have had to interpret whether the exemption(s) being relied on by the government justified denial of access.<sup>86</sup> Executive branch secrecy during the War on Terrorism has stimulated some of this litigation.<sup>87</sup>

#### GOVERNMENT SECRECY AND INFORMATION ACCESS IN THE WAR ON TERRORISM

In *Houchins*, the Supreme Court suggested that the First Amendment does not require that the government provide access to its facilities, activities, and records.<sup>88</sup> However, that suggestion has never been the uniform position of all Justices. In cases decided both before and after *Houchins*, the Supreme Court

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80. For a brief review of significant amendments, see DWIGHT L. TEETER ET AL., *LAW OF MASS COMMUNICATIONS: FREEDOM AND CONTROL OF PRINT AND BROADCAST MEDIA* 437-40 (1989).

81. § 552(a)(3); *see also* Papandrea, *supra* note 3, at 50.

82. § 552(a)(3).

83. § 552(a)(4)(B).

84. § 552(b).

85. § 552(b).

86. For recent cases see The Department of Justice, Freedom of Information Case List, May 2002, [www.usdoj.gov/04foia/cl-tofc.html](http://www.usdoj.gov/04foia/cl-tofc.html) (last visited Jan. 15, 2006).

87. *See, e.g.*, *Ctr. for Nat’l Sec. Studies v. U.S. Dep’t of Justice*, 331 F.3d 918, 932 (D.C. Cir. 2003); *Am. Civil Liberties Union v. U.S. Dep’t of Justice*, 265 F. Supp. 2d 20, 21 (D.D.C. 2003).

88. *See Houchins v. KQED*, 438 U.S. 1, 4 (1978).

and lower courts recognized at least some degree of constitutional protection of the public's access rights.<sup>89</sup> Congress has also opened the doors to government through legislation such as FOIA and the Sunshine Act,<sup>90</sup> which require access to government records and meetings, respectively. Most state legislatures have passed similar legislation creating a presumption of openness to government records and meetings.<sup>91</sup>

However, the War on Terrorism presents new challenges to increased openness and has stimulated debate about the extent of the right of the public to receive information about government activities related to the war. Wars tend to heighten the tension between citizens' desire for information about the government's wartime activities and the government's desire to control access in order to protect national security.

Assuming *arguendo* that the First Amendment does protect a "right of access" to information, like other First Amendment rights, the right is not absolute. It can be outweighed by more salient countervailing government interests. National security is one significant and broad government interest that has been used extensively by the Bush administration during the War on Terrorism to deny the public access to information concerning its wartime activities.<sup>92</sup>

Judicial confusion regarding the right of access to information reflected in the above cases, coupled with the reluctance of courts to compel disclosure of information that allegedly could harm national security, has been apparent during the War on Terrorism. Below, I will discuss a few poignant examples that have generated the most attention in the last few years.

#### *FOIA during the War on Terrorism*

The strain between public FOIA rights and government initiatives taken in the War on Terrorism has been the subject of wide discussion.<sup>93</sup> One overarching issue has been the Bush administration's apparent proclivity to hide its activities from public view.<sup>94</sup>

For example, in October 2001, Attorney General Ashcroft directed agencies to exercise a more restrictive interpretation of FOIA requests than that

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89. See *e.g.*, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980); *Providence Journal Co. v. McCoy*, 94 F. Supp. 186, 196 (D.R.I. 1950).

90. See MIDDLETON ET AL., *supra* note 77, at 513 (discussing the Sunshine Act of 1976, which requires federal agencies to conduct open meetings).

91. *Id.*

92. Papandrea, *supra* note 3, at 35.

93. See, *e.g.*, Anderson, *supra* note 3, at 1605; McDermott, *supra* note 3, at 671; O'Reilly, *supra* note 3, at 809; Steinzor, *supra* note 3, at 642-43; Wells, *supra* note 3, at 451-52.

94. See Papandrea, *supra* note 3, at 35.

taken during the Clinton administration.<sup>95</sup> Whereas the Clinton administration interpreted FOIA to facilitate public access to documents, the Bush administration's approach arguably impedes access by pledging Department of Justice support of non-disclosure decisions (provided there is a "sound legal basis" for them) and encouraging use of FOIA exemptions.<sup>96</sup>

Shortly after the Attorney General's October 2001 directive, Andrew Card, the President's Chief of Staff, directed federal agencies to interpret FOIA exemptions carefully and to withhold not only classified documents, but also sensitive information even if it was unclassified and not specifically exempted under FOIA.<sup>97</sup> He also directed agencies to review their records to insure that information in their control was properly classified.<sup>98</sup>

The President also has acted to reduce the amount of government information available to the public.<sup>99</sup> As referenced above, FOIA exempts from disclosure information classified pursuant to an Executive Order for the preservation of national security.<sup>100</sup> On March 25, 2003, President Bush increased the scope of material subject to this exemption by issuing Executive Order 13,292.<sup>101</sup> The order encourages the classification of information in the hands of federal agencies and the reclassification of information that had previously been released.<sup>102</sup>

Congress has supported the executive branch's efforts toward secrecy. For example, the Homeland Security Act,<sup>103</sup> passed at the President's urging, specifically directs the President to "safeguard homeland security information that is sensitive but unclassified."<sup>104</sup> Congress also passed the Critical Information Infrastructure Act ("CIIA").<sup>105</sup> The CIIA encourages private sector entities (*e.g.*, corporations) to share information with the government by providing them with immunity from civil liability in return for submitting

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95. Memorandum from Attorney General John Ashcroft for Heads of all Federal Departments and Agencies (October 12, 2001) *available at* [www.usdoj.gov/04foia/011012.htm](http://www.usdoj.gov/04foia/011012.htm) (last visited Jan. 15, 2006).

96. *Id.*

97. Memorandum from Andrew Card Jr., assistant to the President and Chief of Staff, for Heads of Executive Departments and Agencies (March 19, 2002), *available at* [www.usdoj.gov/oip/foi/post/2002foi/post10.htm](http://www.usdoj.gov/oip/foi/post/2002foi/post10.htm) (last visited Jan 15, 2006).

98. *Id.*

99. *See, e.g.*, Exec Order No. 13,292, 68 Fed. Reg. 15315 (Mar. 25, 2003).

100. 5 U.S.C. § 552(b)(1) (2005).

101. Exec Order No. 13,292, 68 Fed. Reg. 15315 (Mar. 25, 2003).

102. *Id.*

103. Homeland Security Act, Pub. L. No. 107-296, 116 Stat. 2135 (2002) (codified as amended in scattered sections of 6 U.S.C.).

104. 6 U.S.C. § 482(a)(1)(B) (2005).

105. The CIIA is part of the Homeland Security Act. *See, e.g.*, Homeland Security Act, Pub. L. No. 107-296, 116 Stat. 2135 (2002) (codified as amended in scattered sections of 6 U.S.C.).

critical infrastructure information to the government.<sup>106</sup> Critical infrastructure information is “information not customarily in the public domain and related to the security of critical infrastructure or protected systems.”<sup>107</sup>

An important provision of the Act provides that critical infrastructure information submitted to the government “shall be exempt from disclosure” under FOIA,<sup>108</sup> and “shall not . . . be used or disclosed by any officer or employee of the United States.”<sup>109</sup> The Department of Justice has taken the position that information voluntarily submitted to the Department of Homeland Security pursuant to the CIIA is exempt from disclosure under section 552(b)(3) of FOIA.<sup>110</sup>

In addition to congressional support for the President’s restrictive FOIA approach, there has been significant judicial support as well.<sup>111</sup> The first major case in which FOIA was used in an attempt to force the executive branch to disclose information during the war on terrorism was *Center for National Security Studies v. U.S. Department of Justice*.<sup>112</sup> The case arose when several public interest groups sought to compel the government to release information regarding the number of people detained in the War on Terrorism, their identities, the identities of their lawyers, the reasons for detainment, and where detainees were being held.<sup>113</sup> The Department of Justice argued that FOIA exemptions 7(A), (C), and (F) justified withholding the information.<sup>114</sup> Despite agreeing that FOIA did not exempt the bulk of the material sought, the district court specifically rejected the plaintiffs’ argument that they were entitled to the information pursuant to the First Amendment and common law right of access to public records.<sup>115</sup>

The D.C. Circuit Court of Appeals reversed the district court’s order rejecting the government’s claim that the material was exempt.<sup>116</sup> The D.C. Circuit Court of Appeals held that the current threat of terrorism warranted the exercise of judicial deference to the judgment of the executive branch in light

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106. Public Citizen, FOIA and Homeland Security Issues, [http://www.citizen.org/litigation/free\\_info/foic\\_lr/otherstatutes/index.cfm](http://www.citizen.org/litigation/free_info/foic_lr/otherstatutes/index.cfm).

107. 6 U.S.C. § 131(3)

108. § 133(a)(1)(A).

109. § 133(a)(1)(D).

110. U.S. Department of Justice Office of Information and Privacy, *Homeland Security Law Contains New Exemption 3 Statute*, available at <http://www.usdoj.gov/oip/foiapost/2003foiapost4.htm>.

111. *See generally* *Ctr. for Nat’l Sec. Studies v. U.S. Dep’t of Justice*, 215 F. Supp. 2d 94 (D.D.C. 2002).

112. *Id.* at 94.

113. *Id.* at 97.

114. *Id.* at 100. The exemptions are codified at 5 U.S.C. §552(b)(7)(A), (C) & (F) (2005).

115. *Ctr. for Nat’l Sec. Studies*, 215 F. Supp. 2d at 111-12.

116. *Ctr. for Nat’l Sec. Studies v. U.S. Dep’t of Justice*, 331 F.3d 918, 937 (D.C. Cir. 2003).

of national security implications.<sup>117</sup> Requiring little proof of actual national security dangers of disclosure, the appellate court stated that the government's counterterrorism officials were in the best position to make this predictive judgment.<sup>118</sup>

Like the district court, the circuit court also rejected the argument that the First Amendment required disclosure.<sup>119</sup> The court applied a very narrow reading of the right of access, specifically stating that "[t]he narrow First Amendment right of access to information recognized in *Richmond Newspapers* does not extend to non-judicial documents that are not part of a criminal trial."<sup>120</sup> Therefore, according to the court, the First Amendment was not even "implicated by the executive's refusal to disclose the identities of the detainees and information concerning their detention."<sup>121</sup>

In a dissenting opinion, Judge Tatel lamented that "the court's uncritical deference to the government's vague, poorly explained arguments for withholding broad categories of information about the detainees, as well as its willingness to fill in the factual and logical gaps in the government's case, eviscerates both FOIA itself and the principles of openness in government that FOIA embodies."<sup>122</sup> Hinting at greater sensitivity for the plaintiff's First Amendment argument than that exhibited by the majority, Judge Tatel stated that:

[a]lthough this court overlooks it, there is another compelling interest at stake in this case: the public's interest in knowing whether the government, in responding to the attacks, is violating the constitutional rights of the hundreds of persons whom it has detained in connection with its terrorism investigation . . . . Just as the government has a compelling interest in ensuring citizens' safety, so do citizens have a compelling interest in ensuring that their government does not, in discharging its duties, abuse one of its most awesome powers, the power to arrest and jail.<sup>123</sup>

Thus, like numerous prior right of access cases, the circuit court's opinion was not unanimous.<sup>124</sup> The judges disagreed on the extent to which the public had a right to know what its government was doing.<sup>125</sup>

Another important post-9/11 FOIA case implicating public access rights dealt with the government's refusal to release information regarding its

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117. *Id.* at 926-27.

118. *Id.* at 928.

119. *Id.* at 935.

120. *Id.* at 934.

121. *Ctr. for Nat'l Sec. Studies.*, 331 F.3d at 935.

122. *Id.* at 937 (Tatel, J., dissenting).

123. *Id.* at 937-38 (Tatel, J., dissenting).

124. *Id.* at 937 (Tatel, J., dissenting).

125. *Id.*



surveillance activities enhanced by the U.S.A. PATRIOT Act.<sup>126</sup> In *American Civil Liberties Union v. U.S. Department of Justice*,<sup>127</sup> the ACLU and other civil liberties groups sought, in part, “records containing aggregate statistical information revealing how often DOJ had used the Act’s new surveillance and search provisions: roving surveillance under section 206; pen registers/trap and trace devices under section 214; demands for production of tangible things under section 215; and sneak and peek warrants under section 213.”<sup>128</sup> The Justice Department argued that the information was exempt from disclosure primarily pursuant to FOIA’s national security exemption because the information could aid terrorists and harm national security.<sup>129</sup>

At least acknowledging a public right of access, the district court judge noted that “it must be recognized that FOIA represents a carefully considered balance between the right of the public to know what their government is up to and the often compelling interest that the government maintains in keeping certain information private, whether to protect particular individuals or the national interest as a whole.”<sup>130</sup> However, relying on affidavits from government officials, the judge granted the government’s motion for summary judgment, stressing that although the “plaintiffs’ arguments in favor of disclosure are not without force, they are ultimately insufficient to overcome the agency’s expert judgment that withholding the disputed information is authorized . . . because it is reasonably connected to the protection of national security.”<sup>131</sup>

In short, in two of the most important post-9/11 FOIA challenges to government non-disclosure, federal courts granted the executive branch significant latitude to determine for itself what information should be made public.

#### *Deportation Hearings and Military Trials During the War on Terrorism*

In addition to FOIA matters, the Bush administration’s practice of controlling the disclosure of information has been reflected in the administration’s handling of deportation hearings and its authorization to establish military tribunals to try alleged foreign terrorists captured by the United States. Although there are a host of legal issues implicated by these initiatives, the fact that the executive branch has authorized the closure of each of these types of proceedings is the most relevant issue.

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126. *Am. Civil Liberties Union v. U.S. Dep’t of Justice*, 265 F. Supp. 2d 20, 21 (D.D.C. 2003).

127. *Id.*

128. *Id.* at 25.

129. *Id.* at 21. The exemption is codified at 5 U.S.C. § 552(b)(1).

130. *Am. Civil Liberties Union*, 265 F. Supp. 2d at 27.

131. *Id.* at 30.

*Deportation Hearings.* On September 21, 2001, Chief Immigration Judge Michael Creppy instructed immigration judges to close deportation hearings designated as “special interest” proceedings.<sup>132</sup> The media quickly challenged the practice of conducting these hearings in secrecy.<sup>133</sup> Unfortunately, the two federal appellate courts that heard the challenges to the practice disagreed about whether the hearings could be closed.<sup>134</sup>

In *Detroit Free Press v. Ashcroft*, the Sixth Circuit Court of Appeals ruled that closing deportation hearings violated the First Amendment rights of the press and public.<sup>135</sup> In *North Jersey Media Group v. Ashcroft*, the Third Circuit Court of Appeals ruled that closure was justified, based on the government’s assertion that national security mandated closure.<sup>136</sup>

Both courts relied upon the Supreme Court’s “experience and logic” rationale elaborated in *Richmond Newspapers* and its progeny.<sup>137</sup> However, whereas the Sixth Circuit felt there was a tradition of open deportation hearings, the Third Circuit disagreed, citing examples of instances when hearings may not be conducted in places open to the public (*e.g.*, private homes or prisons).<sup>138</sup> In addition, the Sixth Circuit felt that openness enhanced the structural value of the process by ensuring that the hearings were conducted properly and informed the public.<sup>139</sup> The Third Circuit court, however, felt that the “flip side” had to be considered: the potential negative effects of openness on national security.<sup>140</sup> Ultimately, a divided Third Circuit decided that the risk to national security outweighed the benefits that openness might provide.<sup>141</sup>

*Military Tribunals.* Unlike post-9/11 deportation hearings, military trials of alleged terrorists have been authorized by the President, but not yet

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132. See *North Jersey Media Group v. Ashcroft*, 308 F.3d 198, 202-03 (3rd Cir. 2002) (discussing Judge Creppy’s directive). Special interest proceedings include those involving persons who “might have connections with, or possess information pertaining to, terrorist activities against the United States.” *Id.* at 202 (citing a declaration of Dale L. Watson, Executive Assistant Director for Counterterrorism and Counterintelligence).

133. *Id.* at 203-04.

134. *Id.* at 221; *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 700 (6th Cir. 2002).

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

136. 308 F.3d at 221.

137. *Id.* at 204-05; *Detroit Free Press*, 303 F.3d at 684-85.

138. Compare *Detroit Free Press*, 303 F.3d at 701, with *North Jersey Media Group*, 308 F.3d at 212.

139. See *Detroit Free Press*, 303 F.3d at 703-05 (identifying several values served by public access to immigration hearings, including: serving a check on the executive branch, ensuring that the government did its job properly, serving as a catharsis for the public, enhancing a perception of fairness, and providing information about public affairs).

140. *North Jersey Media Group*, 308 F.3d at 217.

141. *Id.*

conducted.<sup>142</sup> Like deportation hearings, the executive branch has asserted the authority to close them in the interest of national security.<sup>143</sup> President Bush issued the order authorizing military tribunals on November 13, 2001.<sup>144</sup> The order empowered the Department of Defense to issue rules and regulations that would govern the military proceedings.<sup>145</sup> Shortly thereafter, the Department of Defense issued a military order setting forth parameters for the military commission proceedings.<sup>146</sup> Section 6B(3) of the Department of Defense Order provides that proceedings can be closed to protect classified or classifiable information, information protected from disclosure by rule or law, the safety of trial participants, intelligence and law enforcement sources, and national security interests.<sup>147</sup>

Although military trials of alleged terrorists have not yet been conducted, the D.C. Circuit Court of Appeals recently cleared the way for the trials to proceed.<sup>148</sup> In *Hamdan v. Rumsfeld*,<sup>149</sup> the D.C. Circuit ruled that alleged al Qaeda terrorists designated by the Pentagon as “enemy combatants” are not prisoners of war covered by the Geneva Convention of 1949 and can be tried before the President’s military commissions.<sup>150</sup> The court also ruled that Congress properly authorized use of the tribunals,<sup>151</sup> and found that Supreme Court precedent upheld the use of such tribunals during World War II.<sup>152</sup>

One aspect of those World War II military trials the *Hamdan* court did not reference is the fact that they were closed proceedings.<sup>153</sup> However, they occurred long before the Supreme Court’s *Richmond Newspapers* decision.<sup>154</sup> The application of the *Richmond Newspapers* experience and logic rationale by the Sixth and Third Circuit Courts of Appeal when assessing the First Amendment right of access to “special interest” deportation hearings suggest it

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142. See Military Order: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001).

143. *Id.* at 57,835.

144. *Id.* at 57,833.

145. *Id.* at 57,834.

146. Department of Defense Military Commission Order No. 1 (March 21, 2002), available at [www.findlaw.com/hdocs/docs/dod/dod032102milcomord1.pdf](http://www.findlaw.com/hdocs/docs/dod/dod032102milcomord1.pdf).

147. *Id.*

148. *Hamdan v. Rumsfeld*, 415 F.3d 33, 40-41 (D.C. Cir. 2005).

149. *Id.*

150. *Id.*

151. See e.g., Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001); see also, 10 U.S.C. § 821 and § 836, (cited as authority in the President’s Military Order).

152. See *In re Yamashita*, 327 U.S. 1, 9 (1946); *Ex parte Quirin v. Cox*, 317 U.S. 1, 20-21 (1942).

153. For a brief description of the closed proceedings of the *Ex parte Quirin* defendants, see Papandrea, *supra* note 3, at 76-78.

154. Compare *In re Yamashita*, 317 U.S. at 1 (decided in 1946) and *Ex parte Quirin*, 317 U.S. at 1 (decided in 1942), with *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980) (decided in 1980).

is relevant to proceedings implemented during the War on Terrorism.<sup>155</sup> The *Richmond Newspapers* rationale also has been found applicable to military proceedings.<sup>156</sup> Since 1985, the Court of Military Appeals has maintained a presumption that military court martial proceedings must be open.<sup>157</sup> The fact that the President drew on the Code of Military Justice when authorizing the use of military tribunals in the War on Terrorism arguably assumes the applicability of this presumption of openness.<sup>158</sup> However, the President also asserted the authority to close these tribunals.<sup>159</sup>

Because the President's military tribunals, like those conducted during and in the aftermath of World War II, are subject to closure by the executive branch, closure of one or more of the tribunals in the interest of national security could trigger a debate between government secrecy and public access rights that is unique to wartime (the military trials of enemy combatants) and has never been addressed by the Supreme Court.<sup>160</sup> In addition, because military tribunals are forums that are very similar to civilian trials, which the Supreme Court has indicated must be open, their closure, like FOIA disputes and closed deportation hearings, would represent an important front in the tension between openness and government secrecy in the War on Terrorism.<sup>161</sup>

#### *Some Additional Examples of Government Suppression of Information*

The Bush administration's efforts to control disclosure of information in FOIA matters, deportation hearings, and military trials of terrorists are examples of initiatives implemented during the War on Terrorism that arguably affect the public's access to information. Although too numerous to detail here, it is worthwhile to reference a few additional initiatives aimed at controlling public access and government transparency.<sup>162</sup>

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155. See *supra* notes 136-142 and accompanying text.

156. *United States v. Hershey*, 20 M.J. 433, 436 (C.M.A. 1985).

157. *Id.* at 435.

158. See Military Order: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001). The President cited 10 U.S.C. 821 and 10 U.S.C. 836 (Articles 21 and 36 of the Uniform Code of Military Justice).

159. Military Order: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833, 57,835 (Nov. 13, 2001).

160. See generally Paul Haridakis, *The War on Terrorism: Military Trials and the First Amendment*, 9 COMM. L. & POL'Y 317 (2004) (discussing military trials and a right of access).

161. *Id.*

162. For a more comprehensive list and examination of examples in which the executive branch has withheld information from the public and Congress, see Minority Staff Special Investigations Division, United States House of Representatives Committee on Government Reform, *Secrecy in the Bush Administration*, (prepared for Rep. Henry A. Waxman), available at [http://democrats.reform.house.gov/features/secrecy\\_report/index.asp](http://democrats.reform.house.gov/features/secrecy_report/index.asp) (hereinafter Minority Staff Investigations Division).

*Congressional Action.* Although the Bush administration has received substantial criticism for dissuading disclosure of information, the administration often has been acting pursuant to the authority granted to it by Congress.<sup>163</sup> Section 215 of the U.S.A. PATRIOT Act and the CIAA (included as part of the Homeland Security Act) are two particularly noteworthy tools Congress has given the executive branch that specifically mandate nondisclosure of government activity.<sup>164</sup>

Section 215 of the U.S.A. PATRIOT Act<sup>165</sup> enhanced and expanded the ability of the government to obtain records regarding individuals' educational, library, banking, and medical records from institutions that retain them.<sup>166</sup> Section 215 cultivates government secrecy, in effect, by imposing a statutory gag rule on the institutions from which such records are obtained.<sup>167</sup> Specifically, if records are sought or obtained by the FBI, the institutions from which the records are sought or obtained are prohibited from disclosing the FBI's inquiry.<sup>168</sup>

The CIAA imposes a similar de facto gag rule.<sup>169</sup> As referenced above, the CIAA was passed as part of the Homeland Security Act.<sup>170</sup> It encourages private entities to turn critical infrastructure information over to the Department of Homeland Security.<sup>171</sup> The Act gags government employees by providing that those who disclose critical infrastructure information provided by corporations "shall be fined under title 18 of the United States Code, imprisoned not more than 1 year, or both, and shall be removed from office or employment."<sup>172</sup>

*Executive Branch Action.* Although Congress has, to some extent, supported governmental suppression of information during the War on terrorism, the exercise of suppression has most often been carried out by the

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163. See 6 U.S.C. § 133 (2005); 50 U.S.C. § 1861 (2004).

164. 6 U.S.C. § 133; 50 U.S.C. § 1861.

165. 50 U.S.C. § 1861.

166. For comprehensive discussions of Section 215, which expanded the entities from which the FBI could obtain records and lessened the burden for obtaining an order for records under the Foreign Surveillance Act, see Katherine K. Coolidge, "Baseless Hysteria:" *The Controversy Between the Department of Justice and the American Library Association over the USA PATRIOT Act*, 97 LAW LIBR. J. 7 (2005); Anne Klinefelter, *The Role of Librarians in Challenges to the USA PATRIOT Act*, 5 N.C. J.L. & TECH. 219 (2004); Susan Nevelow Mart, *Protecting the Lady from Toledo: Post-USA PATRIOT Act Electronic Surveillance at the Library*, 96 LAW LIBR. J. 449 (2004); Michael J. O'Donnell, *Reading for Terrorism: Section 215 of the USA PATRIOT Act and the Constitutional Right to Information Privacy*, 31 J. LEGIS. 45 (2004).

167. See 50 U.S.C. § 1861(d).

168. *Id.*

169. See 6 U.S.C. § 133(f).

170. See *supra* note 104 and accompanying text.

171. 6 U.S.C. § 133.

172. 6 U.S.C. § 133(f).

executive branch.<sup>173</sup> In addition to closing deportation hearings, authorizing closed military tribunals, and broadly interpreting FOIA exemptions, the Bush administration has taken great pains to cloak other activities in secrecy.<sup>174</sup>

A significant mechanism has been an expansive interpretation and use of legal privileges, including executive privilege.<sup>175</sup> For example, when Congress requested information regarding activities of Vice President Cheney's energy task force, which he impaneled in his capacity as the President's head of national energy policy, the executive branch claimed the information sought was privileged from disclosure.<sup>176</sup> When records of former President Ronald Reagan were due to be released and made available to the public pursuant to the Presidential Records Act of 1978,<sup>177</sup> President Bush invoked executive privilege to restrict disclosure of presidential records to which the public would otherwise have access.<sup>178</sup> Specifically, he issued Executive Order 13,233<sup>179</sup> to eliminate a presumption of disclosure and expand the scope of the records that could be delayed from disclosure.<sup>180</sup> The Executive Order also extended such protection to the Vice President.<sup>181</sup>

In July 2005, the President nominated John Roberts, one of the circuit court judges who ruled in *Hamdan* that the President's military trials could proceed, to fill the vacancy on the United States Supreme Court created when Sandra Day O'Connor resigned.<sup>182</sup> When Congress asked the White House to turn over documents regarding Justice Robert's advice during his tenure in the administrations of former Presidents Ronald Reagan and George H. W. Bush, the administration invoked the attorney-client and attorney work product privileges to withhold documents from disclosure.<sup>183</sup> The administration took a similar approach in the face of congressional requests for documents pertaining to the work product of recently appointed UN Ambassador, John Bolton.<sup>184</sup>

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173. McDermott, *supra* note 3, at 673-79.

174. *Id.* at 679-82.

175. *Id.* at 681-82.

176. For a discussion of the dispute between the White House and Congress, see McDermott, *supra* note 3, at 679-81 and Steinzor, *supra* note 3, at 660.

177. Pub. L. No. 95-591, 92 Stat. 2523 (codified at 44 U.S.C. 2201 *et seq.*).

178. 66 Fed. Reg. 56,025 (Nov. 1, 2001).

179. *Id.*

180. *Id.* at 56,025-26.

181. For more detailed reviews of the Executive Order see McDermott, *supra* note 3, at 681-83 and Steinzor, *supra* note 3, at 661.

182. See Dan Balz & Charles Lane, *A Move to the Right, An Eye to Confirmation*, WASH. POST, July 20, 2005, at A1.

183. See Amy Goldstein et al., *Roberts Resisted Women's Rights: 1982-1986 Memos Detail Skepticism*, WASH. POST, Aug. 19, 2005, at A4.

184. See Douglas Jehl & Carl Hulse, *McCain Urging Accord on Bolton and Secret Documents*, N.Y. TIMES, May 28, 2005, at A3.

The executive branch has been particularly fervent in concealing information pertaining to individuals detained during the War on Terrorism.<sup>185</sup> In addition to providing that military trials of detainees could be closed, the Pentagon has been secretive about the tribunals and potential defendants.<sup>186</sup> The executive branch zealously fought the release of information about detainees in the face of a FOIA request.<sup>187</sup> In addition, it allegedly has withheld information from Congress, restricted press access to Guantanamo Bay, Cuba, required journalists visiting the prison to sign contracts agreeing not to speak to detainees, and ordered secret detentions of prisoners captured during the war in Iraq.<sup>188</sup>

*Judicial Branch.* It is at least worth mentioning that the judicial branch bears some responsibility for the government's non-disclosure of information to the public.<sup>189</sup> Judicial branch acquiescence to government secrecy has come in the form of opinions in which courts exercised significant deference to executive branch actions.<sup>190</sup> Dissents penned in these cases indicate that even some jurists are troubled by the uncritical acceptance of government reasons for withholding information from the public. When the media appealed the Third Circuit's decision in *North Jersey*, the United States Supreme Court declined to hear the appeal, leaving a significant split between the circuits regarding whether the First Amendment rights of access apply in deportation hearings.<sup>191</sup>

#### THE RIGHT OF ACCESS AND SECRECY IN THE WAR ON TERRORISM

The above discussion was intended to provide some illustrative recent examples of the government's efforts to withhold disclosure of certain activities from the public. Most Americans undoubtedly recognize such practices are, at times, in the public interest.<sup>192</sup> However, public access to information regarding the activities of the government, which, ostensibly, are exercised on behalf of the people, is fundamental to the U.S. democratic principle of self-governance.<sup>193</sup> As stated earlier, the people may not rule in a

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185. See Papandrea, *supra* note 3, at 52-53.

186. *Id.* at 53.

187. *Id.* at 64-66.

188. See, e.g., Minority Staff Investigations Division, *supra* note 162, at 62-63.

189. *Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918 (D.C. Cir. 2003); *North Jersey Media Group v. Ashcroft*, 308 F.3d 198 (3rd Cir. 2002).

190. See, e.g., *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 918; *North Jersey Media Group*, 308 F.3d at 198.

191. *North Jersey Media Group v. Ashcroft*, 538 U.S. 1056 (2003).

192. See Papandrea, *supra* note 3, at 69; McDermott *supra* note 3 at 671 (detailing how public access to information could be used by terrorists and threaten national security).

193. Papandrea, *supra* note 3, at 74.

practical sense, but “they do judge those who do.”<sup>194</sup> Accordingly, government efforts at controlling public access, such as those exercised by the government during the War on Terrorism must be scrutinized closely, as such secrecy limits the information in the public domain, which is necessary for maintaining the integrity and accountability of government bodies.

Although it strains credulity to argue that citizen consent and self-governance can be achieved if information necessary to give consent and engage in self-governance is withheld, the extent to which the Constitution protects the public’s access rights is still being contested.<sup>195</sup> In several cases, the Supreme Court has noted the importance of access to our democracy, and several individual justices have supported the argument that access is constitutionally protected.<sup>196</sup> What has escaped resolution and consensus, though, is the extent of that protection.<sup>197</sup>

There is little dispute that both Congress and the executive branch have taken actions during the War on Terrorism that has limited the amount of information available to the public about the federal government’s wartime activities. However, it is difficult to assess whether those actions have violated the public’s First Amendment right of access, because prior case law suggests that the extent of a right of access is contingent on the setting and type of information involved.<sup>198</sup> Generally, the right of access has been afforded the most protection in judicial settings where the Supreme Court has indicated that the right to attend trials is protected.<sup>199</sup> Courts also have afforded significant protection for a right of access in cases involving willing speakers and willing recipients, and in cases involving challenges to government interference with communication between private entities and citizens.<sup>200</sup> But, the right of

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194. Hamilton & Kohlen, *supra* note 10, at 272.

195. *See e.g.*, *Kentucky Press Ass’n, Inc. v. Kentucky*, 355 F. Supp. 2d 853, 865 (E.D.Ky. 2005) (no right of access to juvenile judicial proceedings); *Youngstown Pub. Co. v. McKelvey*, 2005 WL 1153996, at \*7 (N.D. Oh. 2005) (no constitutional protection for a privileged right of access); *United States v. Gotti*, 322 F. Supp. 2d 230, 250-51 (E.D.N.Y. 2004) (holding no First Amendment right of access existed with respect to sentencing letters).

196. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980). Chief Justice Burger delivered the majority opinion, but Justices Stevens and Brennan each filed concurring opinions endorsing the view that the First Amendment protects a right of access to information. *Id.* at 584 (Stevens, J., concurring); *Id.* at 585 (Brennan, J., concurring). *See also*, *Houchins v. KQED, Inc.*, 438 U.S. 1, 32 (1978) (Stevens, J., dissenting); *Saxbe v. Washington Post Co.*, 417 U.S. 843, 862 (1974) (Powell, J., dissenting).

197. *See generally* *F.B.I. v. Abramson*, 456 U.S. 615, 621 (1982) (noting that the right of access to information under the FOIA depends on the type of information sought).

198. *Id.*

199. *Richmond Newspapers*, 448 U.S. at 580.

200. *U.S. v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 817 (2000) (noting that the citizen is entitled to seek out or reject certain ideas or influences without government interference or control).



access has been deemed to be less salient, if implicated at all, when individuals or entities have tried to compel government actors to disclose information in their possession.<sup>201</sup> In the latter context, the courts seem to have acknowledged that the government should not operate in secrecy outside the eyes and ears of the people.<sup>202</sup> However, the courts have been unwilling to interpret the First Amendment in a manner that arms individual citizens with the ability to demand government disclosure without government consent.<sup>203</sup>

Accordingly, one could argue that recent government initiatives, discussed previously, which have curtailed the accessibility of information have not violated citizen access rights. However, ongoing judicial disharmony regarding the extent to which the First Amendment protects the right of access in different contexts is unsettling in a wartime atmosphere in which the government's compelling interest in preventing terrorism must be balanced against an equally compelling interest of the public for information necessary to find the proper balance between protecting public security and maintaining the integrity and accountability of government bodies.

#### *Executive Branch Wartime Tribunals*

Since the Supreme Court handed down its decision in *Richmond Newspapers*, there has been a quarter of a century of case law confirming that the public has a First Amendment right of access to a variety of criminal, civil, and administrative judicial proceedings.<sup>204</sup> But it is not clear whether that right extends to wartime tribunals established by the executive branch. The Court has never addressed whether the public has a First Amendment right of access to the military trials of enemy combatants captured during a war.

If the Court were called upon to review the closure of such a proceeding, it could interpret its post-World War II precedent in *Richmond Newspapers* to mean that there is a First Amendment right of access mandating the presumption of open military trials. This result would be most acceptable to staunch advocates of government transparency. It also would be consistent with the view expressed by the Sixth Circuit Court of Appeals when it ruled

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201. *Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 935 (D.C. Cir. 2003).

202. *Id.* at 925.

203. *Id.* at 937.

204. *Butterworth v. Smith*, 494 U.S. 624, 632 (1990) (statute prohibiting witness from forever disclosing testimony relating to alleged government misconduct before grand jury violates the First Amendment); *Press-Enterprise Co., v. Superior Court of California for Riverside County*, 478 U.S. 1, 13 (1986) (qualified First Amendment right of access to criminal proceedings applies to preliminary hearings); *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 696 (6th Cir. 2002) (drawing sharp lines between administrative and judicial proceedings would allow the legislature to artfully craft information out of the public eye); *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1070 (3rd Cir. 1984) stating that the (First Amendment embraces a right of access to civil trials as well as criminal trials).

that the public and press had a First Amendment right of access to “special interest” deportation hearings convened during the War on Terrorism.<sup>205</sup>

However, even if the Court ruled that there is a First Amendment right of access, the Court could rule that the right of access is outweighed by the government’s national security interests. This decision would be consistent with recent federal court decisions permitting the executive branch to close special interest deportation hearings<sup>206</sup> and withhold records requested under the FOIA.<sup>207</sup> It also would be consistent with a long history of judicial deference to the executive branch during wartime, even when significant individual liberties were adversely affected.<sup>208</sup>

On the other hand, the Court could avoid the need to balance national security and citizen access rights by ruling that there is no First Amendment right of public access to military trial proceedings. In *Richmond Newspapers*, the Court ruled that a public right of access to criminal trials attached because they had always been open in the United States.<sup>209</sup> Because prior military trials have been closed, such as those conducted during and immediately after World War II (the last time military trials of enemy combatants were conducted), the Court could find that there is an insufficient history of openness to warrant First Amendment access (experience). In addition, it could rule that wartime military trials of enemy combatants are so unique that openness does not enhance the process or administration of justice in such proceedings (logic). The *Hamdan* court hinted at this uniqueness when it distinguished such military commissions from a military court martial.<sup>210</sup>

Thus, even in the case of judicial settings, where the right of access has been most robust, there are significant open questions as to the extent of access rights to particularized wartime judicial proceedings.

### *Compelling the Government to Divulge Records*

Although proponents of disclosure may not be content with the decisions in *Center for National Security Studies v. U.S. Department of Justice*, and *American Civil Liberties Union v. U.S. Department of Justice*, neither decision is inconsistent with prior precedent regarding access to government-controlled

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

206. *North Jersey Media Group v. Aschroft*, 308 F.3d 198, 220 (3rd Cir. 2002).

207. *Ctr. for Nat’l Sec. Studies v. U.S. Dep’t of Justice*, 331 F.3d 918 (D.C. Cir 2003); *Am. Civil Liberties Union v. U.S. Dep’t of Justice*, 265 F. Supp. 2d 20 (D.D.C. 2003).

208. For a representative review of several cases in which courts exercised deference to the political branches during wars and other hostilities, including the current War on Terrorism, see Hon. Shira A. Scheindlin & Mathew L. Schwartz, *With All Due Deference: Judicial Responsibility in a Time of Crisis*, 32 HOFSTRA L. REV. 795, 801-02 (2004); see also, WILLIAM REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* 218 (1998).

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

210. *Hamdan v. Rumsfeld*, 415 F.3d 33, 38 (D.C. Cir. 2005).

information.<sup>211</sup> FOIA established enumerated exemptions to disclosure of government documents.<sup>212</sup> The courts in these recent cases simply found that the information was not subject to disclosure and that the government's reliance on the relevant exemptions was appropriate.<sup>213</sup>

As a practical matter, the First Amendment right of access has been interpreted most narrowly in cases in which access to government facilities or documents was sought.<sup>214</sup> In *Center for National Security Studies*, the D.C. Circuit simply reaffirmed the view that the First Amendment does not "mandate[] a right of access to government information or sources of information within the government's control."<sup>215</sup> In fact, when the Supreme Court recently addressed the constitutional right of access to information outside of a judicial context, it relied on *Houchins*, rather than *Richmond Newspapers*.<sup>216</sup> The Bush administration's extensive use of Executive Orders and legal privileges to withhold information from the public represents zealous reliance on this restrictive view of public access rights.

#### *The Flow of Information between Citizens*

Government interference with the flow of information between citizens is another troubling breach of the right to receive information. There is a long line of precedent recognizing the right of citizens to receive information from each other.<sup>217</sup> However, it does not appear that recent government efforts to protect information from disclosure have included pervasive attempts to interfere with the flow of information between citizens. Then again, Section 215 of the U.S.A. PATRIOT Act and the CIIA come close. Section 215 of the U.S.A. PATRIOT Act forbids private entities or individuals from disclosing government inquiries into their patrons' records.<sup>218</sup> Although there is little evidence of widespread use of Section 215, the secrecy it mandates is designed to limit disclosure of such evidence.<sup>219</sup> Because the House of Representatives

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211. *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 936; *Am. Civil Liberties Union*, 265 F. Supp. 2d at 26-27.

212. 5 U.S.C. § 522(b) (2000).

213. *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 937; *Am. Civil Liberties Union*, 265 F. Supp. 2d at 34-35.

214. *Pell v. Procunier*, 417 U.S. 817, 834 (1974) (limiting access of journalists to prisons); *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 936 (limiting government access to information regarding suspected terrorist detainees).

215. *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 934 (citing *Houchins v. KQED*, 438 U.S. 1, 15 (1978)).

216. *See Los Angeles Police Dep't v. United Reporting Publ'g Corp.*, 528 U.S. 32, 40 (1999). For a brief discussion, see *supra* notes 41-44 and accompanying text.

217. *See supra* notes 59-64 and accompanying text.

218. USA PATRIOT ACT of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001) (codified at 50 U.S.C. § 1861).

219. *See id.*

and the Senate recently voted to renew Section 215,<sup>220</sup> the danger of government enforcement of private entity suppression of information remains. The threat of criminal prosecution for release of critical infrastructure information by government employees under the CIIA also poses an ongoing effort to gag those who might disclose information in the government's possession.

#### CONCLUSION

In short, those who might support the exercise of government secrecy during the War on Terrorism have a significant body of jurisprudence on which to draw that suggests that the First Amendment does not protect the right to compel government disclosure of its activities. However, as the representative cases and literature reviewed here indicate, that position has never been universally accepted among scholars or jurists.

The lack of agreement among jurists has been highlighted in recent cases addressing access rights during the War on Terrorism. For example, the Sixth Circuit ruling in *Detroit Free Press* that conducting closed deportation hearings violated the First Amendment was unanimous, three to zero.<sup>221</sup> The Third Circuit's *North Jersey* ruling that closing the hearings did not violate the First Amendment was split, two to one.<sup>222</sup> In addition, both of the federal district court judges whose decisions were appealed in *Detroit Free Press* and *North Jersey* ruled that the practice of closing these deportation hearings violated the First Amendment.<sup>223</sup> Although the D.C. Circuit ruled in *Center for National Security Studies* that the FOIA did not require the government to release information on alleged terrorist detainees, that decision also was split, two to one.<sup>224</sup> Thus, when one considers the views expressed by individual judges in these important post-9/11 right of access cases, it is clear that the majority of them were troubled by the government's secrecy efforts.<sup>225</sup>

Given the lack of agreement among jurists, it is disingenuous to argue that the Constitution does not protect an overarching right of public access to government-controlled information simply because the Supreme Court has not given copious attention to it. The interpretation of constitutional rights is not

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220. USA PATRIOT Improvement Reauthorization Act of 2005, H.R. 3199, 109th Cong. (2005).

221. *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 682, 711 (6th Cir. 2002).

222. *North Jersey Media Group v. Ashcroft*, 308 F.3d 198, 220 (3rd Cir. 2002) (Scalia, J., dissenting).

223. *Detroit Free Press v. Ashcroft*, 195 F. Supp. 2d (E.D. Mich. 2002); *North Jersey Media Group v. Ashcroft*, 205 F. Supp. 2d 288 (D.N.J. 2002).

224. *Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918 (D.C. Cir 2003). Judge D. Tatel was the lone dissenter. *Id.* at 937 (Tatel, J., dissenting).

225. *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 951-52; *Detroit Free Press*, 303 F.3d at 683; *Detroit Free Press*, 195 F. Supp. 2d at 944.

static. Many of the First Amendment rights we now have were not specifically articulated by the Supreme Court until the 20<sup>th</sup> century—often times in cases in which the Court rejected its own precedent.<sup>226</sup> For example, in 1915 the Court ruled that the First Amendment did not protect movies.<sup>227</sup> That decision was overruled in 1952.<sup>228</sup> There was a time when the Court ruled that commercial speech was not protected.<sup>229</sup> That changed in the mid 1970s.<sup>230</sup> There was a time when any criticism of the government considered to be anarchist was not protected.<sup>231</sup> That changed in 1969.<sup>232</sup> There was a time when words tending to affront a listener were considered to be unprotected “fighting words.”<sup>233</sup> That changed in the early 1970s.<sup>234</sup>

In these and a myriad of other cases in which the Supreme Court interpreted the First Amendment to protect what previously had been considered unprotected expression, the Court was not dissuaded by the Constitution’s lack of explicitness, or its own contradictory precedent.<sup>235</sup> As Justice Burger noted in *Richmond Newspapers*, when addressing the argument that the Constitution does not spell out a right to attend trials,

[C]ertain unarticulated rights are implicit in enumerated guarantees. For example, the rights of association and of privacy, the right to be presumed innocent, and the right to be judged by a standard of proof beyond a reasonable doubt in a criminal trial, as well as the right to travel, appear nowhere in the Constitution or Bill of Rights. Yet these important but unarticulated rights have nonetheless been found to share constitutional protection in common with explicit guarantees.<sup>236</sup>

226. See *infra* notes 228, 230, and 232 and accompanying text.

227. *Mutual Film Corp. v. Indus. Comm’n of Ohio*, 236 U.S. 230, 243-44 (1915).

228. *Burstyn v. Wilson*, 343 U.S. 495, 502 (1952).

229. *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942).

230. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 770 (1976).

231. See, e.g., *Whitney v. California*, 274 U.S. 357, 371 (1927); *Schenck v. United States*, 249 U.S. 47 (1919).

232. *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969).

233. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942).

234. See *Cohen v. California*, 403 U.S. 15, 20 (1971); see also, *Gooding v. Wilson*, 405 U.S. 518, 523-25 (1972). Together, these cases evidenced the Court’s departure from its previous “fighting words” doctrine that abusive words not spoken in a face-to-face confrontation could be considered fighting words.

235. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 579 (1980) (noting that the Court has acknowledged that certain unarticulated rights are implicit in the enumerated guarantees of the Constitution); *supra* notes 228, 230, and 232 and accompanying text.

236. *Richmond Newspapers*, 448 U.S. at 579-80.

Accordingly, the Court ruled that the First Amendment guaranteed public access to trial processes, even though just one year earlier the Court questioned whether such access was protected.<sup>237</sup>

Unfortunately, the Court has not specifically extended its rationale in *Richmond Newspapers* to support an overarching First Amendment right of access in settings other than judicial proceedings or those ancillary to them. Given the failure of the Court to resolve the extent of the right of access conclusively, it has been left largely to the political process (*e.g.*, the executive and legislative branches) to define what the government must disclose to the public.<sup>238</sup> In the best of times this is perilous, because it gives government bodies that are accountable to the public the power to determine what information the public will have with which to hold them accountable. In the worst of times, such as times of war, when government actors have never been at their best in defending civil liberties, it is a dire risk to finding the proper balance between individual liberty and government abuse that can come from secrecy.

Paul Rosenzweig of the Heritage Foundation recently stressed that achieving both security and liberty as the nation combats terrorism

is not a zero-sum game . . . . So long as we keep a vigilant eye on police authority, so long as the federal courts remain open, and so long as the debate about governmental conduct is a vibrant part of the American dialogue, the risk of excessive encroachment on our fundamental liberties is remote. The only real danger lies in silence and leaving policies unexamined.<sup>239</sup>

It seems clear that achieving this necessary level of scrutiny is jeopardized if the information needed to engage in such civic participation is not available to United States citizens.

Accordingly, it is time for the Supreme Court to revisit its restrictive view of citizen access rights outside of judicial settings that has been used to support government secrecy. The Court's silence on this issue since September 11, 2001, is deafening. Its careful deliberation is imperative. How the Court assists the United States in resolving the balance between public access rights and government secrecy in the War on Terrorism will have much to say about the extent to which we value First Amendment rights at the beginning of the 21<sup>st</sup> century and how much we value self-governance by and self determination of "the people."

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237. *Gannett v. DePasquale*, 443 U.S. 368, 394 (1979).

238. *See Houchins v. KQED, Inc.*, 438 U.S. 1, 12 (1978) (stating that the determination of whether the government should grant the public access to certain records is "clearly a legislative task which the Constitution has left to the political process").

239. Paul Rosenzweig, *Civil Liberty and the Response to Terrorism*, 42 DUQ. L. REV. 663, 723 (2004).

Therefore, the cry to the Court during the war on terrorism is urgent: *Tear down the walls of government secrecy once and for all.*