McGeorge Law Review

Volume 33 | Issue 3 Article 7

1-1-2002

Convergence of the First Amendment and the Withholding of Information for the Security of the Nation: A Historical Perspective and the Effect of September 11th on Constitutional Freedoms

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I. INTRODUCTION

Throughout our nation's history, Americans have struggled with the convergence of freedoms guaranteed by the First Amendment and the need for secrecy of government actions designed to protect the security of the United States.[1] Historically, the First Amendment was deemed a necessary addition to the Constitution in order to effectuate a government "by the people" and to ensure that tyranny would not go unnoticed.[2] These concerns remain centuries after the First Amendment's adoption.[3] As evidenced by the September 11th (hereinafter 9-11) terrorist attacks on America, the need for secrecy in national defense is arguably at its all time greatest.[4] When coupled with the age of high speed and highly technical access to information, it is no surprise that the leaders of this country demand that the press, public access to information, and the spread of information, all of which may be particularly sensitive to national defense, are restricted in some manner.[5]

This comment will address the history underlying the constitutionally guaranteed First Amendment freedoms and the effects on those freedoms following the 9-11 terrorist attacks. Part II will address the historical role of the Court and Congress in limiting access to information for purposes of national security, while ensuring those limitations do not offend the guarantees provided in the Constitution. Part III documents some restrictive actions taken in response to 9-11 that potentially infringe on First Amendment rights. Part IV concludes this comment by addressing whether the restrictions placed on the freedom of the press and the public's right to access information run counter to the First Amendment or whether such restrictions are sanctioned to protect the security of the nation.

II. THE HISTORICAL AND LEGAL BACKGROUND OF THE FREEDOMS ENUMERATED IN THE FIRST AMENDMENT

A. Freedom of the Press: From English Law and the First Amendment to the Pentagon Papers

The current state of the First Amendment's guarantee of freedom of the press can best be seen by reviewing its history and the struggle to maintain it.

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1. *See infra* Part II (comparing the historical background of First Amendment freedoms and the limitations on those freedoms in the name of national security).

2. *See infra* Part II.A (discussing the First Amendment's guarantee of freedom of the press).

3. *See infra* Part III (discussing the contemporary need for the First Amendment freedoms afforded to the public and press and the concurrent need for limitations on those freedoms for purposes of national security following the September 11, 2001 terrorist attacks on America).

4. *Id.*

5. *See infra* Part III (discussing various restrictions placed on public access to information at the request of government leaders following 9-11).

1. Suppression of Freedom Under English Law

The protections afforded under the Constitution arose from the reaction of the framers to the restraint of free speech and press under English law.[6] Several forms of prior restraint were used to keep ideas deemed "obnoxious" at bay, including licensing, the threat of punishment for constructive treason, and the law of seditious libel.[7]

Following the introduction of printing in England in 1476, the English government was greatly concerned about the publication of "undesirable opinions."[8] As a result, the crown claimed the right to control all printed material.[9] All publications were submitted to government officials who reviewed the written work and censored any "objectionable passages."[10] The officials were authorized by the crown to either deny or approve a license to publish the work.[11] Publication without an official license or "imprimatur" was considered a criminal act.[12] Licensing remained a part of English law until 1725, when the authorizing legislation expired.[13]

Another method used to control written or printed works deemed undesirable was the threat of punishment for "constructive treason."[14] Although abandoned in 1720 because the law and its corresponding punishment of death were deemed too drastic, before that date constructive treason served as a serious reminder to printers who considered violating the law.[15] In one notable case, a printer was hanged, drawn, and quartered for possession of proofs of a book which suggested the "king was accountable to the people, and that the people were entitled to self governance."[16]

English law also prohibited criticism of the government through the use of the doctrine of seditious libel which prohibited "any false news or tales whereby discord or occasion of discord or slander may grow between the king and his

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6. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 11.1.1, 748 (Aspen Law & Business 1997).

7. GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 993 (4th ed. 2001).

8. *Id.; see generally* LEONARD W. LEVY, EMERGENCE OF A FREE PRESS chs. 3-15 (Oxford University Press 1985); FRED SIEBERT, FREEDOM OF THE PRESS IN ENGLAND 1476-1776, 41-87, 127-269 (University of Illinois Press at Urbana 1952) (discussing the system of "prior restraint" and the subsequent expiration without renewal of the English laws governing publication).

9. STONE, *supra* note 7, at 993.

10. *Id.* at 993-94.

11. *Id.* at 994.

12. *Id.*

13. *Id.* at 995.

14. *Id* at 994. English law, as enumerated in the statute 25 Edward III (1352) defined treason as "(1) compassing or imagining the king's death, (2) levying war against the king, or (3) adhering to his enemies." *Id.* English judges extended the law of treason to cover written and printed matter in the seventeenth century. *Id.*

15. *Id.*

16. *Id.*; *see also* SIEBERT, *supra* note 8, at 265-69 (discussing the law of treason and describing the case of John Twyn, the first English printer to be tried and convicted under the expanded law of treason).

people or the great men of the realm."[17] The doctrine was expanded in 1606 to include criminal punishment not only for false libel, but also for true libel, which was considered far worse because it could not be disproved.[18] The doctrine of seditious libel was considered necessary because, as "explained by Chief Justice Holt in 1704, '[i]f people should not be called to account for possessing [others] with an ill opinion of the government, no government can subsist. For it is very necessary for all governments that the people should have a good opinion of it.'"[19]

The English laws of licensing, constructive treason, and seditious libel likely deterred the voicing of any ill opinions contrary to the government of England. Similarly, prior to the drafting of the Constitution, Colonial American dissenters likely felt the ill effects of censorship of ideas deemed pernicious to the government.

2. *Suppression of Dissent in Colonial America*

Early American colonial law governing freedom of expression imitated the laws of England.[20] While fewer prosecutions for seditious libel occurred,[21] renegades were discouraged and prosecutions for "seditious expression" continued.[22]

In a noteworthy colonial case, James Franklin, Benjamin Franklin's older brother, was prosecuted and convicted for "High affront to this Government."[23] Franklin published a notice in the *New England Courant* stating that the government was preparing to send a ship after coastal pirates "sometime this month, wind and weather permitting."[24] The Massachusetts Assembly considered this an insinuation that the government was not effectively dealing with the pirates and imprisoned Franklin for the rest of the session.[25]

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17. *See* STONE, *supra* note 7, at 994 (quoting Sir Edward Coke's report of a Star Chamber case of 1606).

18. *Id.*

19. *Id.* (quoting Rex v. Tutchin, 14 Howell's State Trials 1095, 1128 (1704)).

20. *See* STONE, *supra* note 7, at 995 (showing that colonial America had its own trials for seditious libel).

21. *Id.* One of the most noteworthy colonial prosecutions for seditious liable was that of John Peter Zenger, the publisher of the New York Weekly Journal, in 1735. Zenger was accused of criticizing the Governor General of New York. *Id.* His argument, made by his attorney, Alexander Hamilton, was that the truth should be an absolute defense to the crime of seditious libel. *Id.* The court rejected this argument, but the jury disregarded the judge's instructions and the law and found Zenger "not guilty." *Id. See* CHEMERINSKY, *supra* note 6, at 749 (noting that while there were fewer seditious libel trials in America than in England, America had other ways of controlling objectionable speech). For a more detailed discussion of this famous trial, please see also VINCENT BURANELLI, THE TRIAL OF PETER ZENGER (New York University Press 1957).

22. STONE, *supra* note 7, at 995.

23. *Id.*

24. *Id.*

25. *Id.*

Although not bound by English law, a colonial American community "tended to be a tight little island clutching its own respective orthodoxy and . . . eager to banish or extralegally punish unwelcome dissidents."[26] Debate continues over whether the drafting of the First Amendment was in response to the continuing suppression of free speech, deemed essential to a government "of the people," or whether the drafters were merely rejecting the prior constraint of the English law.[27] In either case, by the end of the eighteenth century, freedom of speech was guaranteed by the Constitution, and the laws of England consisting of prior restraint on publication were in effect abandoned.[28]

3. *The First Amendment and Following*

In 1791 the First Amendment was added to the Constitution providing, "[c]ongress shall make no law . . . abridging the freedom of speech, or of the press . . . ."[29] On its face the language appears absolute. However, the Supreme Court has never accepted this view.[30] In fact, substantial disagreement exists concerning the intent of the drafters.[31] One theory is that the drafters intended to adopt the "Blackstonian" view that the freedoms enumerated are, in essence, freedoms from prior restraint on publication or licensing.[32] Others argue that the framers must have had a different intent than merely the riddance of licensing, as that law expired in England in 1695 and in colonial America by 1725.[33] There may never be agreement on the intent of the drafters of the First Amendment. However, not more than seven years following the amendment, in 1798,

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26. LEVY, *supra* note 8, at 16.

27. *See id.* at 12-15 (stating that the commonly accepted conclusion that the framers of the First Amendment intended to abolish the law of seditious libel is in error); *c.f.* ZECHARIAH CHAFEE JR., FREE SPEECH IN THE UNITED STATES 18 (Harvard University Press 1941) (noting that the framers of the First Amendment were not as concerned with the continuation of the English licensing laws, which had expired by 1725, as they were with the danger presented to political writers and speakers, who were frequently prosecuted under the law of seditious libel).

28. *See infra* Part II.A.3.

29. U.S. CONST. amend. I.

30. *See* Elrod v. Burns, 427 U.S. 347, 360 (1976) (noting that restraints on the freedoms of the First Amendment are permissible for "appropriate reasons").

31. STONE, *supra* note 7, at 995-96.

32. *Id.*; *see also* WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 151-52 (Callaghan and Company 1899) (summarizing the law of seditious libel as follows:

> The liberty of the press . . . consists in laying no *previous* restraints upon publication, and not in freedom from censure for criminal matter when published . . . [t]o subject the press to the restrictive power of a licenser . . . is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government. But to punish (as the law does at present) any dangerous or offensive writings, which, when published, shall on a fair and impartial trial be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order, of government and religion, the only solid foundations of civil liberty.).

33. *See* CHAFEE, *supra* note 27, at 18-20 (propounding the argument that the drafters intended to address the fear of prosecution for seditious libel of political writers and speakers through the First Amendment).

Congress adopted the Alien and Sedition Act of 1798 [34] with the participation of many of the Constitution's drafters and ratifiers.[35]

The Alien and Sedition Act, enacted in response to hostility surrounding the impending war with France,[36] prohibited the publication of "false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States . . . ."[37] However, unlike earlier English law, the Act provided for a defense of truth and required the establishment of malicious intent for conviction.[38]

The Alien and Sedition Act's passage was encouraged by its drafters in response to the perceived "fear and hostility in segments of the U.S. population" attributed to the ideas brought forward in the French Revolution.[39] They believed the required showing of malicious intent and the defense of truth eliminated from the Act undesirable aspects of English common law.[40] The constitutionality of the Act was never decided by the Supreme Court, but it was upheld by lower federal courts without dissent.[41] The Act expired without renewal in 1801.[42]

4. The Enumerated Freedoms in the Twentieth Century

The next challenge to the freedoms enumerated in the First Amendment came by way of the Espionage Act of 1917[43] and the Sedition Act of 1918.[44] The Espionage Act, enacted two months following America's official entry into World War I, prohibited various activities during times of war.[45] Criminal acts included:

> willfully mak[ing] or convey[ing] false reports or false statements with intent to interfere with the . . . success . . . of the United States or promot[ing] the success of its enemies . . . caus[ing] or attempt[ing] to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or . . . willfully obstruct[ing] the recruiting or enlistment service of the United States . . .[46]

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34. Act of July 14, 1798, ch. 74, 1 Stat. 596, §§ 1-2.
35. CHEMERINSKY, *supra* note 6, at 750.
36. STONE, *supra* note 7, at 997.
37. Act of July 14, 1798, ch. 74, 1 Stat. 596, § 2.
38. *Id.* § 3; CHEMERINSKY, *supra* note 6, at 750.
39. STONE, *supra* note 7, at 997.
40. *Id.*
41. *Id.*
42. *Id.*
43. Act of June 15, 1917, ch. 30, 40 Stat. 219, tit. I, § 3.
44. Act of May 16, 1918, ch. 75, 40 Stat. 553, § 1.
45. Act of June 15, 1917, ch. 30, 40 Stat. 219, tit. I.
46. *Id.* § 3.

The Sedition Act, enacted merely eleven months following the Espionage Act, criminalized writing or publishing anything:

> disloyal, profane, scurrilous, or abusive language intended to cause contempt or scorn for the form of government of the United States, the Constitution, or the flag; to urge the curtailment of production of war materials with the intent of hindering the war effort; or to utter any words supporting the cause of any country at war with the United States.[47]

Several notable cases were prosecuted under the Espionage Act for possessing or publishing material considered in violation of it.[48] In all, approximately two thousand prosecutions were initiated by the government during World War I.[49]

The Acts above illustrate the routes taken by the government to restrict speech deemed offensive to the system, both through restraining information before it is published and criminal sanctions following publication. Although the criminalization of some forms of speech still remains, prior restraint of publication has consistently been held unconstitutional.[50] However, prior restraint of publication based on interests of national security received its first real contemporary challenge in 1971 in the landmark case of *New York Times v. United States*.[51]

5. *The Pentagon Papers and National Security: New York Times v. United States*

Between June 12 and June 18, 1971, the New York Times and the Washington Post began publishing a series of articles containing a forty-seven-volume Department of Defense study. [52] The study was coined the "Pentagon Papers," and it was purported to include secret military information including

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47. *See* STONE, *supra* note 7, at 1006 (detailing the provisions of the Sedition Act of 1918).

48. *See, e.g.*, Shaffer v. United States, 255 F. 886 (9th Cir. 1919) (convicting Shaffer of violation for mailing a book, "The Finished Mystery," containing "treasonable, disloyal, and seditious utterances . . ." Although Shaffer argued lack of intent, the court found presumed intent, "hostile attitude of his mind" regarding the war and that the book was intentionally concealed on his premises). *Id.* Masses Publ'g Co. v. Patten, 244 F. 535 (S.D.N.Y. 1917) (granting a journal publisher a preliminary injunction, forbidding the postmaster from refusing to allow access to the United States mail and refusing to mail a monthly issue of the publication); Schenck v. United States, 249 U.S. 47 (1919) (affirming a conviction for sending a circular to men who had been drafted urging them "to obstruct the recruiting and enlistment service.").

49. STONE, *supra* note 7, at 1006.

50. *See* Neb. Press Assn. v. Stuart, 427 U.S. 539, 559 (1976) (declaring "prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights"); *see also* N.Y. Times v. United States, 403 U.S. 713, 714 (1971) (quoting Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963) that prior restraint carries a heavy presumption against constitutional validity).

51. 403 U.S. 713 (1971).

52. STONE, *supra* note 7, at 1077.

detailed military operations and the content of diplomatic negotiations.[53] The government sought to enjoin further publication of the transcripts to protect national security.[54] Only eighteen days following the government's request for injunctive relief in the lower court, and following contradictory treatment by the circuit courts,[55] the cases were consolidated for review. The Supreme Court ruled that the injunction placed on the New York Times or the Washington Post was an impermissible prior restraint under the First Amendment.[56]

There were ten separate opinions written by the Court: a per curiam opinion and a separate opinion by each Justice.[57] The per curiam opinion simply stated that the government failed to meet its burden of proof in light of the heavy presumption that prior restraints on publication are impermissible under the Constitution.[58]

In separate concurring opinions, Justices Black and Douglas denied the use of an injunction to stop publication.[59] Justice Black was particularly adverse to using an injunction stating that "every moment's continuance of the injunctions against these newspapers amounts to a flagrant, indefensible, and continuing violation of the First Amendment."[60] Justice Douglas noted that "[t]he dominant purpose of the First Amendment was to prohibit . . . the widespread use of the common law of seditious libel to punish the dissemination of material that is embarrassing to the powers-that-be."[61] Whether these Justices would have so ruled had they actually found proof of a threat to national security is debatable.

Justice Brennan's concurring opinion argued for the use of strict scrutiny in cases of prior restraint and noted that the attempt to enjoin publication of the Pentagon Papers, even for the time it took for the case to be heard by the Court, fell far short of that standard.[62] Justices White and Stewart also concurred stating that the government could not block publication of the information unless it could show that the information would result in "direct, immediate, and irreparable damage" to the Nation.[63]

Justice White specifically noted that, although an injunction could not be issued to stop publication,[64] those who publish sensitive information are not

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53. *Id.*

54. *Id.*

55. *See* United States v. N.Y. Times Co., 444 F.2d 544 (2d Cir. 1971) (allowing injunction to restrain publication); United States v. Wash. Post Co., 446 F.2d 1327 (D.C. Cir. 1971) (affirming district court's denial of injunctive relief).

56. *N.Y. Times*, 403 U.S. at 713-15.

57. *Id.* at 714.

58. *Id.*

59. *Id.* at 714-15, 723-24.

60. *Id.* at 714-15.

61. *Id.* at 723-24.

62. *Id.* at 725-27.

63. *Id.* at 730.

64. *Id.* at 740.

alleviated of the threat of criminal sanctions on the basis of the content of published material.[65] In addition to the Espionage Act of 1917, several provisions of the United States Code[66] provide for criminal penalties for unauthorized possession or access to information which could be used to injure the United States or secure an advantage to a foreign nation.[67]

The dissenting opinions of Chief Justice Burger, Justice Harlan, and Justice Blackman primarily focused on the lack of time given to review the material allegedly constituting a threat to national security.[68] According to *New York Times* the court is not likely to stop or prohibit publication based on national security concerns unless the "direct, immediate and irreparable harm" standard is met.[69]

Throughout the two centuries since the drafting of the First Amendment, freedom of the press has endured great changes which have both contracted and expanded the scope of its boundary.[70] The First Amendment may have been an outright rejection of the restrictions of English law or simply a template to meet the demands of a growing and changing democracy.[71]

B. The Boundaries of Access to Information and the Freedom of Information Act

Although the *New York Times* Court held that the government may not place prior restraints on publication, the freedom of the press has been limited by other rulings of the Court.[72] The Court has held that, except in criminal trials,[73] the Constitution does not confer any special rights upon the press to access or gather information.[74] In fact, the Court has specifically noted that, although the press has the right to gather news in any manner within the law, it "has never intimated a First Amendment guarantee of a right of access to all sources of information

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65. *Id.* at 735-40.

66. 18 U.S.C.A. §§ 792-799 (West 2000).

67. *See, e.g., N.Y. Times*, 403 U.S. at 737 n.8 (discussing 18 U.S.C. § 793(e), which provides that: [w]hoever having unauthorized possession of, access to, or control over any document, writing . . . or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates . . . the same to any person not entitled to receive it . . . is guilty of an offense punishable by 10 years in prison, a $10,000 fine, or both).

68. *Id.* at 748-63.

69. *Id.* at 730.

70. *Supra* Part II.A.1-4.

71. *Supra* Part II.A.3.

72. *See, e.g.*, Pell v. Procunier, 417 U.S. 817, 834 (1974) (noting that the Constitution does not require the government to allow the press more access to information than that afforded to the general public); Saxbe v. Wash. Post Co., 417 U.S. 843, 843 (1974) (upholding regulations prohibiting the press from interviewing particular inmates).

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

74. *Supra* note 72.

within governmental control."[75] According to the Court, the First Amendment does not compel the government to supply the press with information.[76] Essentially, the right of the press to gather information is generally the same as those of the public and may be limited accordingly.[77]

However, the freedom to access information pertaining to government functioning still constitutes primary importance in a democratic system of the people.[78] This right to information was enumerated by statute in 1966 through the adoption of the Freedom of Information Act (FOIA).[79] The Act, one of the primary channels of information-gathering for the press and for ordinary citizens, is based on the premise that access to government information is essential for citizens of a democracy to make informed decisions.[80]

FOIA allows any citizen to obtain federal agency records upon written request.[81] While most records are obtainable, a federal agency may refuse to release information under nine legal categories exempted by law.[82] One of these categories explicitly exempts disclosure of information classified for purposes of national defense and security.[83] For example, non-disclosure of confidential information has been held constitutional where the information pertains to "secret" internal governmental affairs.[84] These exemptions are not mandatory.[85] Although not a complete authority for public access to any government information,

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75. Houchins v. KQED, Inc., 438 U.S. 1, 9 (1978).

76. *Id.*

77. *Id.* at 11.

78. *Infra* note 80.

79. 5 U.S.C.A. § 552 (West 1996 & Supp. 2002).

80. *See* H.R. REP. NO. 104-795, at 6-7 (1996) (noting the importance of the FOIA, its historical evolution, and the need for an informed public); *see also* Cent. Intelligence Agency v. Sims, 471 U.S. 159, 182 (1985) (Marshall, J., dissenting) (noting the FOIA, "established a broad mandate for disclosure of governmental information by requiring that all materials be made public 'unless explicitly allowed to be kept secret by one of the exemptions. . . .'" (quoting S. REP. NO. 89-813, at 10 (1965)). Justice Marshall also stated that, "Congress, it is clear, sought to assure that the Government would not operate behind a veil of secrecy, and it narrowly tailored the exceptions to the fundamental goal of disclosure." *Id.*

81. 5 U.S.C.A. § 552.

82. *Id.* § 552(b); *see also* American Civil Liberties Union, *Using The Freedom Of Information Act: A Step-by-Step Guide*, 5-8, *available at* http://www.aclu.org/library/foia.html (copy on file with the *McGeorge Law Review*) (listing the exempted records as those addressing national security, internal agency rules, information specifically exempted by another statute, confidential business information, internal government memos, private matters, law enforcement investigations, regulation of financial institutions, and geological and geophysical information regarding oil well locations).

83. 5 U.S.C.A. § 552(b)(1)(A).

84. *See, e.g., Sims*, 471 U.S. at 159 (discussing the withholding of "secret information" contained in CIA brainwashing and interrogation projects); *see also* Exec. Order No. 12,958, 60 Fed. Reg. 19,825 (Apr. 20, 1995) (defining "national security" and setting standards for classification of government information for purposes of national security).

85. 5 U.S.C.A. § 552(b)(1)(A), (b)(3) (noting exceptions to disclosure requirements including "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order" and matters specifically exempted from disclosure where there is no discretion on the issue and the department specifically establishes criteria for withholding information or refers to the types of matter to be withheld).

the FOIA requires the government to bear the burden of proof upon denial of any request, thereby creating an effective means for any citizen to access non-exempt information.[86]

The FOIA has undergone various amendments since its inception, delineating its scope and clarifying the requirements of government agencies charged with providing information to the public in a timely fashion.[87] Notably, the Electronic Freedom of Information Amendments of 1996[88] carves out a provision for expedited processing of agency requests for the press. When the requesting party is a person primarily engaged in disseminating information, records may be received within ten days if a "compelling need," defined as "an urgency to inform the public concerning actual or alleged Federal Government activity," is shown.[89]

In sum, prior to 9-11, the boundaries of the press and the public's right to access government information appeared relatively clear. In *New York Times*, despite the extraordinary circumstances of the case, the United States Supreme Court explicitly rejected the application of historical laws restricting the press and held that a prior restraint of publication is unconstitutional.[90] Through the FOIA, Congress codified the right to access any government information not expressly exempted by statute.[91] Moreover, in light of the fact that the public and the press have the right to access this information, any information withheld for purposes of national security must be specifically exempted by statute or classified according to executive order.[92]

However, following the terrorists attacks of 9-11, open access to government information by the press and the public, previously determined to be constitutionally guaranteed, clearly conflicts with the need to withhold information for the security of the nation.[93] The resolution of this conflict necessitates inquiry into how to protect the liberties of the press and the public as enumerated in the Constitution, while at the same time ensuring national security.[94]

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86. H.R. REP. NO. 104-795, at 6.
87. *Id.* at 7-11.
88. 5 U.S.C.A. § 552(a)(2)(E) (West 1996 & Supp. 2002).
89. *Id.*
90. 403 U.S. 713.
91. 5 U.S.C.A. § 552.
92. Richmond Newspapers v. Virginia, 448 U.S. 555 (1980).
93. *See infra* Part IV (describing the nation's need for information versus national security).
94. *Id.*

III. THE WAR ON TERRORISM AND THE RESTRICTIONS ON ACCESS TO INFORMATION FOLLOWING THE 9-11 ATTACKS

As our Nation continues its campaign to eradicate the threat of terror within its borders and abroad, the importance of access to information about the progression of this campaign is immediate. If, as a democratic society, the peoples' will is expressed through the actions of governmental leaders, access to information necessary to carry out that charge is critical. This ideal was illuminated by Chief Justice Hughes in 1937 when he stated:

> The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.[95]

However, as evidenced by several noteworthy restrictions placed on the access to information, prior to and immediately following the 9-11 terrorist attacks, the right of the press and the public to gain access to government information has been severely restricted for purposes of "national security."[96]

A. Freedom of the Press, the Right to Gather News, and the Use of the "Press Pool"

Although the press has never secured the "right" to gather news in any manner it deems appropriate, there has long been a symbiotic but tenuous relationship between the military and the press. However, the current method of reporting on military operations can hardly be categorized as "free" press in the manner arguably intended by the framers of the Constitution.

Beginning with the widespread coverage of the Vietnam war, the United States Department of Defense and members of the press have continually sparred over access to information, or the lack thereof, and the nature of what may be reported regarding United States military operations.[97] Historically, in both World

95. *See* De Jonge v. Oregon, 299 U.S. 353, 365 (1937) (noting the opposition of the Court to punishing a man for attending a lawful meeting held by Communists).

96. *See infra* Part III.A-C (discussing restrictions placed on press access to wartime coverage such as restrictions on access to government map, satellite, and photographic information, and the government's approval of denial of FOIA requests).

97. *See* Malcolm W. Browne, *The Military vs. The Press: A Correspondent's Account*, N.Y. TIMES, Mar. 3, 1991, (Magazine), at 27 (detailing the correspondent's, who covered wars in Vietnam, Cambodia,

War II and Vietnam, members of the press had relative freedom to report on American forces in action.[98] Although press reports were censored by the military for sensitive material, the reporters were given wide access to both combat and troops.[99] But due to widespread reporting of the government's failures in the Vietnam war, notwithstanding President Lyndon Johnson's assurances of a "winnable" war, the press was viewed by the Department of Defense as a force to be reckoned with and not to be ignored.[100] As a result, during the military conflicts in Grenada and Panama, the press was completely left behind.[101]

The Department of Defense, responding to the objections of the media regarding their complete lack of access, instituted an elaborate system of "press pools" designed to limit the concern over potential "security" breaches.[102] The press pool is essentially a select group of reporters and photojournalists who are allowed access to war zones in exchange for an agreement to comply with Department of Defense requirements.[103]

The use of press pools was implemented in 1990 and continued throughout the Gulf War.[104] However, due to the requirements that reporters sign the agreement to comply with "guidelines" and "ground rules" which, among other restrictions, included a binding agreement to allow a security review of everything reported, many reporters were disillusioned with the Department of Defense's management of press relations. Reporters had to be accompanied by an "escort" at all times,[105] and their reports were censored capriciously for any material deemed a security risk.[106]

Punjab, Bangladesh, North Africa, and Latin America, account of his participation in reporting on the Gulf War).

98. *See* Jason DeParle, *After the War; Long Series of Military Decisions Led to Gulf War News Censorship, Part One,* N.Y. TIMES, May 5, 1991, at A9 (discussing the historical background of using press pools for media coverage of war).

99. *Id.* (noting the decision to confine reporters to "official pools" in the Gulf War "represented a departure not only from Vietnam, but also from World War II.").

100. *Id.* (noting that the military had been thinking about the press long before the Iraqi invasion of Kuwait and quoting retired Major General Winant Sidle, chief military spokesman, as stating, "[o]ne thing Vietnam did to us is nobody says, 'Oh, don't worry about public affairs.'").

101. *Id.*

102. Browne, *supra* note 97 at 2-3.

103. *Id.*

104. *See* DeParle, *supra* note 98 (discussing press coverage in the Persian Gulf).

105. Browne, *supra* note 97, at 5-7.

106. *See id.* (detailing his account of "censorship" of material). After Browne and his colleague submitted their dispatches to an escort officer, who found nothing within it to censor or flag as objectionable, they were awoken at three o'clock in the morning by a wing commander who had spotted passages he regarded as improper. *Id.* None of the passages had anything to do with security. *Id.* "In Frank's copy, the adjective 'giddy,' used to describe the pilots, ha[d] been changed to 'proud.'" *Id.* In the author's own copy, the words "fighter-bomber" had been changed to "fighter." *Id.* After agreeing to the proposed changes, on the condition that the copy be immediately sent to the pool headquarters in Dhahran, the authors found out the next morning that the copy had actually been sent to officials in Nevada, who determined everything the journalists wrote was a breach of security. *Id.*

As a result of these strict requirements, many reporters simply gave up hope of receiving any quality time in the field, or reporting significant information as a member of a press pool in the Gulf War and decided to travel on their own, in direct violation of Saudi and American military regulations.[107] Several reporters were caught in violation of the law, jailed, and threatened with revocation of their press credentials and visas.[108]

The media has expressed its concern to the Department of Defense over the Department "inhibit[ing] news coverage of combat operations by forcing reporters and photojournalists into small pools under the control of military officials and by attempting to exercise editorial control over news content."[109] Reporters also seriously question whether the Department of Defense's policy on war coverage is prudent when conflicts are presented to the American public in a way that makes them appear "painless" when in fact thousands of people may have died.[110] The war was portrayed in such a detached manner that the public had no way of knowing the number of casualties which may have ranged from fifty to one hundred thousand.[111] Another reporter, Malcolm Browne, lamented that the press pool system in the Gulf War made journalists "essentially unpaid employees of the Department of Defense."[112] Days before the start of the Gulf War, nine news organizations protested and filed a lawsuit challenging the rules governing press pools.[113] However, by the time the suit reached the courts, the Gulf War was over, and the issue therefore became moot.[114]

In 1992, the Pentagon and the news media reached an agreement about how the press would cover military operations.[115] The agreement stated that "open and independent" reporting would be the norm and provided guidelines for the relationship between the Department of Defense and the press.[116] Provisions allowing journalists access to all major military units, including special forces, where feasible, were included.[117] The agreement also allowed reporters to use

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107. *Id.*

108. *Id.* (noting that three reporters from the New York Times, one from The Washington Post, two from the Associated Press, and one from Cox Newspapers, among others, were all arrested and detained by American military authorities at some point during the Gulf War).

109. The Reporters Committee for Freedom of the Press, *Letter to Bush Administration and Congressional Leaders Regarding War Coverage*, Oct. 17, 2001, *available at* http://www.rcfp.org/news/documents/20011017rumsfeld.html [hereinafter *Letter to Bush Administration*] (copy on file with the *McGeorge Law Review*).

110. *See* DeParle, *supra* note 98 (noting the comments of Ted Koppel, host of the ABC News program "Nightline," regarding the policy on war coverage).

111. *Id.*

112. The Reporters Committee for Freedom of the Press, *Journalists Worry About Restrictions, Access in Impending War*, Sept. 26, 2001, *available at* http://www.rcfp.org/news/2001/0926defens.html [hereinafter *Journalists Worry About Restrictions*] (copy on file with the *McGeorge Law Review*).

113. *Id.*

114. *Id.*

115. *Letter to Bush Administration*, *supra* note 109, at 2.

116. *Id.*

117. *Id.*

their own communications systems to file reports from the field and authorized reporting without restrictions except in "extreme circumstances."[118]

Following the 9-11 terrorist attacks and the start of the War on Terrorism, members of the press called upon the Department of Defense to adhere to the 1992 agreement.[119] But for nearly three months, the press did not succeed in securing cooperation from the Department.[120] Trouble began almost immediately after the attacks when reporters and photographers were ushered away from the World Trade Center.[121] Although reported as isolated incidents, cameras and film were confiscated by police, and reporters were threatened with citation or actually cited for entering restricted areas.[122]

Coverage of the start of the War on Terrorism fared no better. Reporters and photojournalists were kept out of Afghanistan and most of the surrounding region until the end of November 2001,[123] because the Department of Defense and representatives of the media were debating the proper timing to introduce the press.[124] In the meantime, secret maneuvers were undertaken by the military.[125] For example, the October 19th raid by special forces was not confirmed by the Department of Defense, even after it was complete and the information had already been leaked by an insider.[126] On October 22nd, Secretary of Defense, Donald Rumsfeld, denounced whoever leaked information about the raids to the public and stated the leak could have caused the death of American soldiers.[127] However, the broadcasts regarding the October 19th raid were aired after it occurred, arguably lessening the need for secrecy because the Taliban already

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118. *Journalists Worry About Restrictions, supra* note 112; *Letter to Bush Administration, supra* note 109.

119. *Letter to Bush Administration, supra* note 109.

120. The Reporters Committee for Freedom of the Press, *Press Optimistic About Improved Wartime Access*, Dec. 19, 2001, *available at* http://www.rcfp.org/news/2001/1219pentag.html [hereinafter *Press Optimistic About Improved Wartime Access*] (copy on file with the *McGeorge Law Review*) (noting the first break in restricted coverage of the War on Terrorism came on November 27, 2001, almost three months after the 9-11 terrorist attacks on America).

121. The Reporters Committee for Freedom of the Press, *Sporadic Press Restrictions Seen in Aftermath of Terrorist Attacks*, Sept. 19, 2001, *available at* http://www.rcfp.org/news/2001/0919journa.html (copy on file with the *McGeorge Law Review*).

122. *Id.*

123. *Press Optimistic About Improved Wartime Access, supra* note 120, at 5.

124. The Reporters Committee for Freedom of the Press, *Pentagon Rejects Mixing Media With Ground Troops*, Nov. 13, 2001, *available at* http://www.rcfp.org/news/2001/1113offici.html [hereinafter *Pentagon Rejects Mixing Media With Ground Troops*] (copy on file with the *McGeorge Law Review*) (discussing concern over allowing access to journalists because of security concerns and the possibility that publicity could cause "political unrest").

125. The Reporters Committee for Freedom of the Press, *Latest Media-Military Roundtable Offers Press Few Wartime Concessions*, Oct. 25, 2001, *available at* http://www.rcfp.org/news/2001/1025bureau.html [hereinafter *Latest Media-Military Roundtable*] (copy on file with the *McGeorge Law Review*).

126. *Id.*

127. *Id.*

knew about it. Concurrently, the Department of Defense was still discussing putting press pools in the area, but no decisions were made.[128]

On November 8, 2001, members of the press held a seminar at the Brookings Institution to discuss with military officials the need for greater wartime access.[129] The officials continued to refuse access to reporters, claiming concern that publicity could cause political unrest in the region.[130] Finally on November 27, 2001, reporters from the Associated Press, Reuters, and Gannett newspapers were allowed to accompany soldiers into the field.[131]

On December 6, 2001, reporters were locked in a warehouse to prevent them from covering troops killed or wounded by a stray bomb north of Kandahar.[132] The Pentagon apologized in writing stating a decision was made in the field in the heat of battle and that decision was to err on the side of caution.[133]

Perhaps the most intriguing restriction of information came not as a direction from a federal government agency but from the press itself. Following a request by the White House, network executives at ABC News, CBS News, NBC News, Fox News, and CNN all agreed not to air unedited, videotaped statements from Osama Bin Laden and his followers.[134] The executives also agreed to remove from the taped segments "language the government consider[ed] inflammatory."[135]

In sum, from September 11 through November 27, 2001, reporters were prohibited from entering the site of the World Trade Center attack[136] and restricted from reporting from Afghanistan,[137] effectively precluding reports on and details of American involvement in the area. Moreover, the press itself restricted its own content at the request of the government.[138] Throughout this period of time, the government also took action to restrict access by the press and the public to information deemed sensitive in light of the attacks on 9-11.[139]

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128. *Id.*

129. *Pentagon Rejects Mixing Media With Ground Troops*, *supra* note 124.

130. *Id.*

131. *Press Optimistic About Improved Wartime Access*, *supra* note 120.

132. David E. Rosenbaum, *A Nation Challenged: The News Media; Access Limits Were an Error Pentagon Says*, N.Y. TIMES, Dec. 6, 2001, at B2.

133. *Press Optimistic About Improved Wartime Access*, *supra* note 120.

134. The Reporters Committee for Freedom of the Press, *White House Urges TV Networks to Stop Airing Bin Laden Tapes*, Oct. 11, 2001, *available at* http://www.rcfp.org/news/2001/1011majorb.html (copy on file with the *McGeorge Law Review*).

135. *Id.*

136. *See supra* notes 121-22 and accompanying text (describing the way reporters were handled by the police after the World Trade Center was attacked).

137. *See supra* Part III.A (illustrating how reporters were kept out of Afghanistan).

138. *See supra* Part III.A (describing how news executives decided not to air videotapes from Osama Bin Laden).

139. *See supra* Part III.A (detailing government action to restrict wartime coverage); *infra* Part II.B (discussing government restrictions on maps and satellite images).

B. Restrictions on Maps, Satellite Images, and Photographs

Government agencies blocked access to information in many areas in reaction to the 9-11 attacks, an obvious example being the curtailing of access to maps and satellite images of Afghanistan. Following 9-11, the Department of Defense bought an exclusive contract with the only domestic provider of high-resolution satellite images of Afghanistan.[140] Likewise, the National Imagery and Mapping Agency, created in 1996 to perform the mapping and imagery services for the Department of Defense and American intelligence agencies, blocked access to and prohibited the selling of or copying of all their topographical maps.[141] The restrictions included directing the U.S. Geological Survey and the Federal Aviation Administration to terminate sales of maps and directing the Library of Congress and the National Archives and Records Administration to deny public access to these maps.[142]

Government agencies also blocked access to information considered a threat to national security by removing such information from their Internet websites.[143] For example, the Department of Energy's Office of Defense Programs page was completely removed from the National Nuclear Security Administration's website.[144] Information regarding national water supplies, energy facilities, and nuclear energy was also removed[145] along with reports detailing the safety, or lack thereof, at chemical plants.[146] Access to information at agencies such as the Federal Aviation Administration, Environmental Protection Agency, and the Internal Revenue Service was also restricted.[147]

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140. The Reporters Committee for Freedom of the Press, *U.S. Military Takes Over Satellite Photos of Afghanistan*, Oct. 19, 2001, *available at* http://www.rcfp.org/news/2001/1019defens.html (copy on file with the *McGeorge Law Review*).

141. The Reporters Committee For Freedom of the Press, *Government Mapping Agency Blocks Access to Certain Maps*, Oct. 3, 2001, *available at* http://www.rcfp.org/news/2001/1003mappin.html (copy on file with the *McGeorge Law Review*).

142. *See id.* (restricting NIMA-made maps, but allowing some nautical and aeronautical maps to be available for navigation).

143. *See* OMB Watch, *The Post-September 11 Environment: Access to Government Information, at* http://www.ombwatch.org/info/2001/access.html (last visited Jan. 27, 2002) (copy on file with the *McGeorge Law Review*) (listing restrictions placed on access to government information following 9-11 with corresponding responsible government agencies).

144. *Id.*

145. *See id.* (noting information was removed from the U.S. Geological Survey (water resources), the Department of Energy's "Information Bridge" database, and the National Nuclear Security Administration's website).

146. *See id.* (noting (1) the restriction on access to Federal Aviation Administration information including "records of accidents and incidents, pilot and maintenance training schools ... and data on enforcement actions," (2) the restrictions on Environmental Protection Agency information including risk management plans, and (3) the restrictions on access to Internal Revenue Service reading rooms).

147. *Id.*

C. Restrictions on Freedom of Information Act Requests

Beginning in 1966 with the passage of the FOIA, the right of the public to access government information has been guaranteed.[148] However, notwithstanding the mandatory disclosure provisions of the FOIA, government agencies may withhold information for purposes of national security,[149] a decision often subject to the determination of the agency itself.[150] Following the 9-11 terrorist attacks, that discretion was substantially enhanced and defended by the Office of the Attorney General.

On October 12, 2001, United States Attorney General, John Ashcroft, rescinded a government-wide directive, put in place in 1993 by then Attorney General, Janet Reno, mandating minimal use of FOIA exemptions.[151] Ashcroft noted that agencies who decide to withhold records could "be assured that the Department of Justice will defend their decisions."[152] The conflict evident between the right of the public to information and issues of national security was also addressed by Ashcroft who wrote, "the 'Department of Justice and this Administration are committed to full compliance with the Freedom of Information Act' and acknowledged that 'only through a well-informed citizenry' can national leaders remain accountable or the American people be assured that 'neither fraud nor government waste is concealed.'"[153]

The Ashcroft memorandum then states "that the department and administration are 'equally committed' to other values, among them 'national security, enhancing the effectiveness of our law enforcement agencies, protecting sensitive business information and, not least, protecting personal privacy.'"[154] However, Ashcroft also stated that "[o]nly if [the agency's] decisions lack a 'sound legal basis' or could lead to an unfavorable court decision that might impair the government's ability to deny records in the future, would the department not support denials."[155]

Attorney General Ashcroft's additional considerations under which FOIA requests will be approved or denied is in direct conflict with the stated purpose of the Act which is to establish the presumptive right of the public to access government information subject to the limitations specifically delineated within

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148. *See* 5 U.S.C.A. § 552 (West 1996 & Supp. 2002) (noting that "[e]ach agency shall make [information] available to the public . . . .").

149. *See id.* § 552 (b) (noting exceptions to the mandatory disclosure provision of 5 U.S.C. § 552).

150. H.R. REP. NO. 104-795, at 6 (1996) (noting that individual agencies are responsible for processing FOIA requests and that the Department of Justice oversees agency compliance with FOIA).

151. The Reporters Committee for Freedom of the Press, *Ashcroft Promises Support for FOI Act Denials*, Oct. 18, 2001, *available at* http://www.rcfp.org/news/2001/1018azgmemo.html [hereinafter *Ashcroft Promises Support*] (copy on file with the *McGeorge Law Review*).

152. *See id.* (contrasting the Ashcroft memorandum with the 1993 Reno memorandum).

153. *Id.*

154. *Id.*

155. *Id.*

the Act itself.[156] Historically, the burden of proof to show the need to withhold information in such cases was placed on the agency.[157] Under the 1993 Reno memorandum, the relevant standard constituted a showing that it was reasonably foreseeable that disclosure would be harmful.[158] Following the October 12, 2001 announcement by the Justice Department, decisions denying disclosure will be upheld unless "they lack a sound legal basis."[159] In general, it seems likely this showing will be met.

IV. THE CONSTITUTION AND NATIONAL SECURITY: HOW FAR IS TOO FAR?

Freedom of the press and access to government information is vital to the success of a growing and changing democracy.[160] However, during a national security crisis, situations may arise when no choice exists but to temporarily forego some civil liberties in order to ensure the safety of our democratic system.[161] For example, according to the Espionage and Censorship Act, disclosure of information such as locations of military installations, photographs of such locations, and disclosure of locations of ground troops is punishable by criminal sanctions.[162] Likewise, under the exceptions of the FOIA, a governmental agency may choose to withhold any information pertaining to national security.[163] Arguably, even the freedom of the press may be lawfully abridged in cases where the disclosure of information would cause irreparable harm to the security of the nation.[164]

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156. H.R. REP. NO. 104-795, at 6 (1996).

157. *Id.*

158. *Ashcroft Promises Support*, *supra* note 151.

159. *Id.*

160. *See N.Y. Times*, 403 U.S. at 728 (Stewart, J., concurring) (noting that

> [i]n the absence of the governmental checks and balances present in other areas of our national life, the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an informed citizenry—in an informed and critical public opinion which alone can here protect the values of democratic government.).

161. *Id.* (stating:

> [i]t is elementary that the successful conduct of international diplomacy and the maintenance of an effective national defense require both confidentiality and secrecy . . . [a]nd within our own executive departments, the development of considered and intelligent international policies would be impossible if those charged with their formulation could not communicate with each other freely, frankly, and in confidence. In the area of basic national defense the frequent need for absolute secrecy is, of course, self-evident).

162. 18 U.S.C.A. § 792-99 (West 2000).

163. 5 U.S.C.A. § 552(b)(1)(A) (West 1996 & Supp. 2002).

164. *See* Schenck v. United States, 249 U.S. 47, 52 (1919) (noting that otherwise lawful speech may lose constitutional protection during times of war); Near v. Minnesota, 283 U.S. 697, 716 (1931) (noting that speech inciting violence and overthrow of the government by force may be suppressed to ensure the security of the community).

Although recent restrictions responded to serious breakdowns in national security,[165] they may be unconstitutional under the First Amendment.[166] Broad categorizing of some of the recent restrictions on the press and the public to access information as constitutional under the umbrella of "national security" is questionable.[167] In some of these cases, the line between withholding information for purposes of "national security" and plain "censorship" is very unclear.[168] A compelling question is also presented concerning whether the limits placed on the gathering of information nullifies the *New York Times* decision upholding the unconstitutionality of prior restraint.

It is apparent, under *New York Times,* that any prior restraint on publication requires a showing of "direct, immediate, and irreparable damage" to the security of the nation.[169] In the context of recent events, the government's attempt to force the press to withhold publication of the contents of the Bin Laden tapes would not withstand a constitutional review under *New York Times* unless the government could show irreparable harm would immediately follow publication of their content.[170] However, in light of the fact the press itself chose to withhold the tapes, any constitutional analysis is precluded.[171]

Nevertheless, it seems the restrictions placed on access to government information through satellite photographs and Internet sites have a less tenuous basis than a broad ban on reporting of information related to the 9-11 attacks, and thus, would likely withstand constitutional review.[172] The United States Criminal Code provides sound authority for withholding pictures of military installations and operations.[173] Restrictions placed on access to government websites are entirely defensible because both Congress and the President have specifically exempted from disclosure information pertaining to military operations, maps, and details of the infrastructure of the nation through the exemptions of the FOIA and by Executive Order.[174]

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165. *See Latest Media-Military Roundtable, supra* note 125 (noting that security leaks could have cost American lives).

166. *See Letter to Bush Administration, supra* note 109 (suggesting steps the government should take honoring its First Amendment obligations).

167. *See id.* (stating that overclassification dulls the ability to determine what really needs protection).

168. *See supra* Part III (discussing the sweeping restrictions on newsgathering, the withdrawal of access to government agency information, and the change in standards for review of FOIA requests).

169. *See supra* Part II.A (discussing the Supreme Court's reversal of an injunction enjoining the publication of military transcripts).

170. *Id.*

171. *See supra* Part III.B (noting that the press voluntarily complied with the request from the White House).

172. *Id.*

173. 18 U.S.C.A. § 795(a) (West 2000).

174. *See supra* Part II.B (discussing the methods of limiting access by legal means).

The conditions placed on the gathering of news following the 9-11 attacks are also questionable restraints because, while the press has never secured the right to access *any* information desired,[175] some of the restrictions, in effect, prevented the press from gathering *any* information, beyond news that could be deemed a risk to national security.[176]

Strikingly, more than three months passed between the 9-11 attacks and the lifting of restrictions on the press reporting on the War on Terrorism.[177] It is simply not plausible that every instance of reportable news occurring during this period of time and relevant to the 9-11 attacks would threaten the security of the Nation. Therefore, it seems that during this three-month ban the press was unconstitutionally restricted from reporting on any information whatsoever.

While arguably the freedoms enumerated by the First Amendment may not encompass a carte blanch right of the press to gather information,[178] it is difficult to determine how these restrictions are all constitutional and do not, in *effect*, constitute a "prior restraint" on publication based on content in the manner addressed in by the Supreme Court in *New York Times*.[179] When the press was blocked from reporting wartime activities for nearly three months following 9-11,[180] this precluded any review of whether potential newsworthy articles could be published. Contrary to the apparent limitation of the press through the use of broad denial of access and the use of press pools,[181] many would argue that when faced with a national crisis the press should have more access to military operations and information, rather than less.[182]

The position taken by the Department of Defense on restricting access through FOIA requests is arguably the least defensible restriction following the 9-11 attacks. From its enactment, the FOIA was intended to provide both a presumptive right to access government information and the means through which both ordinary persons and members of the press may do so.[183] Excluded information was narrowly tailored in order to ensure this right would not be

175. *See supra* notes 72-75 (noting that the press has the same right to access information as the public at large).

176. *See supra* Part III.A (discussing the complete ban on access to the conflict in Afghanistan, the use of press pools, and censorship of news reports).

177. *See supra* Part III.A (noting that restrictions were in place almost immediately after 9-11 and remained until November 27, 2001).

178. *Supra* notes 72-75.

179. *Supra* Part II.A.5; *see N.Y. Times*, 403 U.S. at 714 (stating that, where the United States sought to enjoin publication of the contents of a classified study "any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity").

180. *Supra* Part III.A.

181. *Id.*

182. *Letter to Bush Administration*, *supra* note 109 (noting "a free and autonomous press is as central to the preservation of democracy as is a strong military. Indeed, news organizations have a distinguished history in this country of providing the public with essential information during times of warfare and national crisis.").

183. H.R. REP. NO. 104-795, at 6-7.

abridged by the government.[184] In the 1993 Reno memorandum, the standard used to determine whether records could be withheld was "foreseeable harm."[185] Following the recent Ashcroft memorandum, the standard now appears to be whether the agency's decision "lacks a sound legal basis."[186]

The tenuous nature of this pronouncement is clear upon examination of the historical basis of the FOIA and the explicitly stated showing required by a government agency to justify the withholding of information under the FOIA exemptions. The Court and Congress have repeatedly stated that the exemptions to the FOIA must be narrowly tailored so as not to impede its fundamental goal of providing information pertaining to government functioning to whoever desires it, regardless of their purpose.[187] Moreover, the burden of proof necessitating the withholding of information under a specific exemption lies with the agency, not with the person seeking records.[188] The Ashcroft memorandum, by advocating broad support of agency denials, appears to shift that burden to members of the public seeking information[189] and runs counter to the central purpose of the FOIA, which is broad disclosure.

V. CONCLUSION

Historically, the constitutionally guaranteed First Amendment freedoms have been in conflict with the necessary task of the government of protecting the security of a democratic Nation. Following the 9-11 terrorist attacks, it appears that a serious breakdown in security necessitates once again examining the role of the First Amendment in protecting our right to a free press and to free access to information.[190]

The Supreme Court, Congress, and the Executive Branch have delicately balanced the goal of upholding the restriction on prior restraint of publication and public access to information while criminally punishing those who would violate the security of the Nation. But, as evidenced by the immediate restrictions placed on the press and the withholding of information from the public following the 9-11 attacks, the possibility of overarching reaction is evident, placing the rights guaranteed by the First Amendment in jeopardy. As stated by Justice Black in *New York Times*, "[t]he word 'security' is a broad, vague generality whose contours should not be

184. *Id.*

185. *Ashcroft Promises Support*, *supra* note 151.

186. *Id.*

187. H.R. REP. NO. 104-795, at 6 (noting that "[a]ny member of the public may use the FOIA to request access to government information. Requestors do not have to show a need or reason for seeking information.").

188. *Id.*

189. *See Ashcroft Promises Support*, *supra* note 151 (noting that the Department of Justice will defend decisions of federal agencies not to disclose information unless the determination lacks "'sound legal basis' or could lead to an unfavorable court decision that might impair the govemment's ability to deny records in the future.").

190. *See supra* Part III (discussing restrictions placed on information after 9-11).

invoked to abrogate the fundamental law embodied in the First Amendment. The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic."[191]

191. *N.Y. Times*, 403 U.S. at 719.

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