THE FIRST AMENDMENT AND NATIONAL SECURITY: A CASE FOR A CLEAR TEST

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INTRODUCTION

The First Amendment is the cornerstone of constitutional law relating to several foundational rights: those of individuals to speak and be heard; those of the press; those of individuals and religious institutions to exercise their beliefs without compulsion; those of individuals and groups to peacefully assemble; and those of the citizenry to petition the government to seek redress.[1] The Supreme Court has found that the government can only restrict these rights in circumstances when it is necessary, as determined through several different standards. One such circumstance is wartime and instances when national security serves as a governmental interest. This paper seeks to explore the following question: how have the rights guaranteed by the First Amendment to journalists and citizens evolved over time as applied to wartime? I explore the historical trends amongst the prominent protections of the First Amendment, modern implications of the conflict between First Amendment rights and the governmental interest of national security, and the judiciary's attempts to address these problems. I also outline a proposed standard for judicial evaluation of national security as an interest to be considered against First Amendment protections. I hope to find a balance between these two crucial values and safeguard a third compelling interest: the efficacy and legitimacy of the judiciary in resolving these disputes.

The rights protected by the First Amendment are essential to American democracy. Representative government is only effective when there is a well-informed citizenry to check the strength of a powerful government, particularly the executive branch.[2] This is especially true in the realm of foreign policy, and assertions of national security threats should not be sufficient on their own to overwhelm such a core component of democratic governance.[3] Even the need for secrecy does not overwhelm the necessity of constitutional scrutiny.[4] Although secrecy is often a necessity itself, it conflicts with several aspects of democratic governance, such as the exchange of information regarding the operation of government.[5] The Supreme Court itself has determined that "truthful speech on core matters of public concern is at the height of the hierarchy of speech the First

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1. U.S. CONST. amend. I

2. Mary-Rose Papandrea, *Lapdogs, Watchdogs, and Scapegoats: The Press and National Security Information*, 83 IND. L.J. 233, 278 (2008).

3. *Id.*

4. *Id.*

5. Eric E. Ballou & Kyle E. McSlarrow, Plugging the Leak: The Case for a Legislative Resolution of the Conflict Between the Demands of Secrecy and the Need for an Open Government, 71 VA. L. REV. 801, 829 (1985).

Amendment protects."[6] Debate surrounding the conflict between national security and First Amendment protections is necessary because of the essential functions both interests represent. National security is a crucial interest to protect because it safeguards the continued existence of the United States. The First Amendment, however, is also significant, as the core values of American democracy are the distinctive elements of the United States that make the nation worth preserving. The conflict between these two interests, therefore, speaks to the very moral and constitutional character that the United States seeks to enshrine in the very essence of its being. Ultimately, the judiciary has afforded too much deference to the government in these conflicts, and it is necessary to adjust the legal framework for evaluating these issues in order to secure a more sustainable balance.

I. HISTORICAL BACKGROUND

A. Speech and Press

Over the twentieth century, the Supreme Court has defined a series of tests through which to analyze cases that challenge governmental restrictions on freedom of speech that would otherwise be protected by the First Amendment. Ultimately, there are three categories of speech regulations: regulations of political speech, which require "strict scrutiny"[7] as a standard of review[8]; regulations of less protected speech, such as commercial speech, that require "intermediate scrutiny" as a standard review to review whether the regulation promotes a substantial government interest and whether the regulation is devised to achieve the interest[9]; and finally, a broad category including most other types of speech regulations which requires a more lenient "rational basis" review.[10] There is also a distinction drawn between "content-based" restriction that require more stringent review by courts and restrictions based on time, place, or manner that earn more lenient review.[11] However, these tests were developed as broad manners to respond to a variety of different types of speech the government has attempted to regulate. National security information largely constitutes political speech, and it would thus normally fall into the first category when it is regulated by the government.[12] As a result, restrictions on the First Amendment that were conceived out of a desire to secure a national security interest have been folded into this framework, and they have had their own unique influence on First Amendment jurisprudence over time.

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6. Papandrea, *supra* note 2, at 286.

7. Strict scrutiny requires judges to look to whether there was a compelling governmental interest and whether the measures taken were tailored narrowly so that less restrictive alternatives could not further the interest.

8. STEPHEN BREYER, THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES 255 (2015).

9. *Id.*

10. *Id.* at 255–56.

11. *Id.* at 256.

12. *See* Mary-Rose Papandrea, *Leaker Traitor Whistleblower Spy: National Security Leaks and the First Amendment*, 94 B.U. L. REV. 449, 517 (2014).

The foundational case *Schenck v. United States* involves the government restricting speech and using the context of wartime to argue for a compelling interest.[13] Charles Schenck was arrested for violating the Espionage Act because his efforts to encourage opposition to the draft and conscription were deemed harmful to the military's war effort during the recruitment stage.[14] The Court found that the purpose of sending out the leaflets was to hamper the recruitment efforts for World War I, specifically the draft.[15] While this might be normally protected under the First Amendment, "the character of every act depends upon the circumstances in which it is done."[16] Therefore, what is acceptable to say and do during peacetime might not be acceptable in wartime. While *Schenck* is often known for creating the first limitations on the rights guaranteed by the First Amendment through the "clear and present danger" legal standard, it is important to note that in *Schenck*, the Court found that wartime amplifies the interests of the government and gives the government more authority to regulate the freedoms guaranteed by the First Amendment.

Several decades later, David O'Brien burned his draft card in front of a courthouse in order to protest the Vietnam War and convince other people to share his beliefs; he thus knowingly violated the law while desiring to express his beliefs and influence other people.[17] He was convicted for the destruction of the card but appealed by arguing that the law was a violation of his First Amendment right to freedom of speech. In addition to the Supreme Court's determination that burning a draft card could not be entirely classified as "speech" rather than "behavior," the Court found that Congress's power to raise armies indicates a compelling interest in maintaining the order of the Selective Service System; consequently, there is a compelling interest in preventing selective service certificates, which are critical to the program, from being destroyed.[18] This restriction on the destruction of the cards is in pursuance of a constitutional obligation. In writing the opinion, Chief Justice Warren established that a speech regulation is justified "if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression, and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[19] With *United States v. O'Brien*, the Court established the modern method for evaluating governmental restrictions on free speech; however, the Court also reaffirmed the rationale of the previous decisions in finding that interests related to the wartime powers of the military, such as facilitating the draft through the Selective Service System, give the government a strong, compelling interest in regulating the First Amendment freedoms.

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13. Schenck v. U.S., 249 U.S. 47, 47 (1919).
14. *Id.* at 48–51.
15. *Id.* at 49–50.
16. *Id.* at 52.
17. U.S. v. O'Brien, 391 U.S. 367, 369 (1968).
18. *Id.* at 377–78.
19. *Id.* at 377.

The *New York Times* had obtained classified documents relating to the history of American involvement in Vietnam. The *New York Times* intended to publish the "Pentagon Papers" over a series of time, but the Nixon administration argued that a prior restraint of the documents before they were published was necessary for national security interests.[20] The case quickly came to the Supreme Court, which found in favor of the newspapers in *New York Times Company v. United States*.[21] The Court found that there is a high burden that must be overcome in order for the government to implement a prior restraint and that the burden was not met.[22] In concurring opinions, the Justices gave additional reasoning. Justices Black and Douglas each wrote opinions in which they illustrated the importance of the freedoms of speech and the press, and they also wrote that the government gave no reasons as to how the documents fundamentally undermine national security or why national security should trump the First Amendment.[23] Justice Brennan argued that the First Amendment gives no right of issuing a prior restraint to the government: that restraint has only been found in cases in which the nation is explicitly at war.[24] Justice Brennan wrote that the government gave no reason as to why publication of the documents would hamper the government. Justices Stewart and White wrote that while the government can pass laws and rules to protect certain information, there were no regulations concerning these documents, so the constitutional freedoms of speech and press would be the authority.[25] Justice Marshall reviewed the case from a separation of powers framework and saw that only Congress could implement a prior restraint.[26]

Ultimately, these diverging paradigms leave us with an uncertain vision on how restrictions related to national security fit into the Court's framework on speech regulations. However, reluctance to permitting regulations on speech and the press, even in times of war, is a key takeaway from the Court's historical jurisprudence in this area.

B. Assembly and Association

The First Amendment does not only protect the freedoms of speech and of the press. Historical review of the protections guaranteed under the First Amendment for assembly and association are also relevant for evaluating the strength of those freedoms in a national security context. During World War II, President Roosevelt signed two executive orders giving military forces the authority to monitor, set curfews for, and exclude from certain areas, Japanese-American citizens. A student named Gordon Hirabayashi was convicted of violating both an imposed curfew and a relocation order from military areas that were given authority by those executive orders.[27] Hirabayashi's case made it to the

20. New York Times Co. v. U.S., 403 U.S. 713, 714 (1971).
21. *Id.*
22. *Id.*
23. *Id.* at 714–20 (Black, J., concurring); *id.* at 720–24 (Douglas, J., concurring).
24. *Id.* at 724–27 (Brennan, J., concurring).
25. *Id.* at 727–30 (Stewart, J. concurring); *id.* at 730–40 (White, J., concurring).
26. New York Times Co. v. U.S., 403 U.S. at 740–48 (Marshall, J., concurring).
27. Hirabayashi v. U.S., 320 U.S. 81, 83–84 (1943).

Supreme Court, which unanimously sided against the student in *Hirabayashi v. United States*.[28] Congress expressed approval for the executive orders by affirming a bill that would provide penalties for violating the authority created by the orders.[29] Additionally, the executive and legislative branches have a broad authority between the two of them to wage war in the most effective manner in both foreign and domestic sectors during wartime. The Court also found that considerations of due process or equal protection violations would be more important if not for the "danger of espionage and sabotage, in time of war and of threatened invasion" from the Japanese-American population.[30] The Court found justification in that there were noncitizens among the Japanese-American communities who wielded influence who could potentially dispense pro-Japanese propaganda in the future; furthermore, Japanese-American citizens would be more inclined to harbor sympathetic views toward Japan than other citizens, so the military was correct (in the Court's perspective) to target that group.[31]

Hirabayashi establishes that in weighing the competing interests between individual freedoms, such as freedom of assembly, and government's authority to wage war, the government has a strong interest and is given more power to regulate individual freedoms during wartime. The Court established as precedent the notion that the powers given for the declaration and waging of war give the executive and legislative branches broad powers that the judicial branch should not usually interfere with, especially when relating to strategic decisions. Specifically, because the Constitution gives the Executive and Congress the power to exercise "war power in all the vicissitudes and conditions of warfare, it has necessarily given them wide scope for the exercise of judgment and discretion in determining the nature and extent of the threatened injury or danger and in the selection of the means for resisting it."[32]

Conversely, the Court expanded on the freedom of association in the case of *United States v. Robel*. There, the government sought to restrain the activities of Communist organizations against the backdrop of the Cold War; specifically, the act in question prohibited individuals associated with a Communist organization from employment in a defense facility.[33] In reviewing this case, the Supreme Court determined that the law implicated the First Amendment because it swept across all Communist-affiliated groups without consideration for quality of the group or the degree of an individual's membership.[34] Notably, this case reviews an instance of a *legislative* authority over international security, which stems from the "war power" delegated to Congress in the Constitution. The Court, however, noted

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28. *Id.* at 105.

29. Act of Mar. 21, 1942, Pub. L. No. 77–503, 56 Stat. 173 (providing a penalty for violation of restrictions or orders with respect to persons entering, remaining in, leaving, or committing any act in military areas or zones).

30. Hirabayashi, 320 U.S. at100.

31. *Id.* at 96–97.

32. *Id.* at 93.

33. U.S. v. Robel, 389 U.S. 258, 260 (1967).

34. *Id.* at 262.

that this power was limited: "the phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit."[35] The Court further mentioned that defending the ideals that set the United States apart from the world is an implicit aspect of national defense, and the First Amendment's freedom of association is a core liberty that makes defense of the nation a worthwhile objective.[36] The Court found that the law itself would establish that an individual would be guilty by association, without any proof that the threat to national security actually existed.[37] Chief Justice Warren, writing the majority opinion for the Court, ultimately held that the law was an unconstitutional breach of the First Amendment's freedom of association because Congress must write legislation which would fulfill its purpose while having a "'less drastic' impact on the continued vitality of First Amendment freedoms," even though Congress had a legitimate legislative concern.[38] Thus, the Supreme Court established that despite a legitimate concern by Congress in the realm of national security, Congress must enact legislation to pursue those goals that have a less drastic effect on the vitality of freedoms guaranteed by the First Amendment.

The Antiterrorism and Effective Death Penalty Act (and the Intelligence Reform and Terrorism Prevention Act that amended it)[39] prohibited Americans or American organizations from knowingly giving any "material support or resources" to terrorist organizations (specifically foreign terrorist organizations, or "FTOs").[40] The Humanitarian Law Project was interested in providing nonmilitary aid and training to groups designated as terrorist organizations to help them peacefully resolve conflicts.[41] In *Holder v. Humanitarian Law Project*, the plaintiffs specifically wanted to give support to the Kurdistan Workers Party and Liberation Tigers of Tamil Eelam, arguing that those groups commit lawful acts in addition to their terrorist activities, and the plaintiffs wanted to support those lawful acts.[42] The plaintiffs argued several legal issues, including that by hampering their ability to support the organizations, the Act violates their First Amendment right to freedom of speech and association.[43] The Supreme Court heard the case and found in favor of the government. The provision of material support to the aforementioned terrorist organizations, even for legal and humanitarian purposes, can still bolster the terrorist activities of the organization indirectly and hurt the United States' fight against terrorism in other ways.[44] Additionally, the plaintiffs

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35. *Id.* at 263.
36. *Id.* at 264.
37. *Id.* at 265.
38. *Id.* at 267–68.
39. 18 U.S.C. § 2339B (2023).
40. Holder v. Humanitarian L. Project, 561 U.S. 1, 8 (2010).
41. *Id.* at 10.
42. *Id.*
43. *Id.* at 10–11.
44. *Id.* at 30–33.

could still provide advocacy for the organizations without providing material support.[45]

While the Court argued that § 2339B allows individuals to either advocate for an FTO or be a member without violating the statute, the Court seems to take the stance that each right protected by the First Amendment is separate and not interrelated (as previous jurisprudence would indicate).[46] The First Amendment was meant to allow its freedoms to be exercised in tandem, and restricting political rights in this case runs counter to core protections guaranteed by the First Amendment, even in conflict with recent jurisprudence.[47] Likewise, this decision raises the question of what the value of freedom of association truly is: "if an individual can be a member of an FTO, but is prohibited from speaking or doing anything that can be construed as 'coordinated activity' with the organization, then what real value does his membership retain?"[48] Freedom of association is thus rendered an "empty right" when disengaged from other core protections of the First Amendment.[49] The case law ultimately suggests that conflict between a perceived national security interest and the freedom of association will usually defer in favor of national security.

C. Religion

Furthermore, the First Amendment also protections religious freedom, which is also relevant in certain cases involving national security. There are two components to the First Amendment's protections on freedom of religion: the Establishment Clause (preventing government recognition of establishment of religion) and the Free Exercise Clause (preventing government abridging an individual's exercise of their religious beliefs). Regarding the Establishment Clause, the case establishing the modern jurisprudential framework is *Lemon v. Kurtzman*. Here, Catholic schools had been subsidized through a state program that allowed reimbursement for private school teachers for school supplies.[50] The Court determined that this program violated the Establishment Clause and established a three-pronged test, now known commonly as the "Lemon test": first, the action must have a secular purpose; second, the principle or primary effect of the action must not advance or inhibit religion; finally, the statute must not result in excessive entanglement between government and religion.[51] Likewise, the Court

45. *Id.* at 39–40.

46. Brent Tunis, Note, *Material-Support-to-Terrorism Prosecutions: Fighting Terrorism by Eroding Judicial Review*, 49 AM. CRIM. L. REV. 269, 290 (2012).

47. *Id.* The Supreme Court has held that the First Amendment prohibits Congress from punishing associations of citizens for engaging in political speech. Citizens United v. FEC, 558 U.S. 310, 348–49 (2010). The Court has also found that there is a close association between the freedoms of speech and assembly, and peaceful assembly for lawful discussion cannot be criminalized. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 907–08 (1982).

48. Tunis, *supra* note 46, at 290.

49. *Id.* at 291.

50. Lemon v. Kurtzman, 403 U.S. 602, 606–07 (1971).

51. *Id.* at 612–13.

listed three factors for determining the "excessive entanglement" of the third prong: the character and purpose of the institution benefitted, the nature of support provided by the state, and the resulting relationship between the government and religion.[52]

While this framework has never explicitly been overturned by the Supreme Court, it has been subjected to criticism from several Justices in recent cases. In *American Legion v. American Humanist Ass'n*, Justice Thomas stated in his concurrence that he would eliminate the Lemon test because it has "no basis in the original meaning of the Constitution."[53] Justice Gorsuch also concurred with the opinion that the Court should take a more modest approach than the Lemon test which interprets the Establishment Clause "by reference to historical practices and understandings."[54] Likewise, Justice Kavanaugh argues that due to a lack of consistency in its application, the Lemon test has implicitly fallen out of favor and cannot be considered good law.[55] However, these statements were not endorsed by a majority of the Court, and while the Lemon test has not universally been used, it is still a helpful framework for evaluating Establishment Clause cases at the present time, along with case-by-case analysis.

Regarding the Free Exercise Clause, there are a separate set of cases that outline the Court's framework for resolving these cases. First is the case of *Church of Lukumi Babalu Aye v. City of Hialeah*, in which the city of Hialeah banned animal sacrifice and a Santeria church challenged the law on the basis of the First Amendment's Free Exercise Clause.[56] The Court employed the same type of analysis as that used in the case of *Employment Division v. Smith* which determined that laws that burden religion do not need to undergo a strict scrutiny review if the law in question is neutral and generally applicable; if the law is not, then the Court will apply strict scrutiny.[57] The Court found in *Church of Lukumi Babalu Aye* that while the law was facially neutral, its application was targeted specifically toward religious sacrifices, and it thus applied strict scrutiny.[58]

The most recent case in which the Supreme Court reviewed the First Amendment's guarantee of freedom of religion specifically regarding a government action that promoted a national security interest was that of *Trump v. Hawaii*. Here, the Court was reviewing a presidential restriction on alien entry into the United States from several countries, most of which consisted of majority Muslim populations. While there were a couple claims made in the challenge, the Court's review of the implications of the restriction with the Establishment Clause provides guidance over the current constitutional relationship between the First Amendment's religious protection and the government's interest in furthering national security. Applying rational basis as the standard of review, the Court found that it would "uphold the policy so long as it can reasonably be understood

52. *Id.* at 615.
53. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2097 (2019).
54. *Id.* at 2087.
55. *Id.* at 2092–93.
56. Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 526–28 (1993).
57. *Id.* at 533–34.
58. *Id.* at 546–47.

to result from a justification independent of unconstitutional grounds."[59] Since the Court determined that there was "persuasive evidence" that the restriction had a "legitimate grounding in national security concerns," the Court accepted the justification.[60] Furthermore, the majority held that the Court "cannot substitute our own assessment for the Executive's predictive judgments on such matters, all of which 'are delicate, complex, and involve large elements of prophecy.'"[61] Chief Justice Roberts wrote that while the Court does not defer to the executive branch's interpretation of the First Amendment, it does give the factual determinations made by the executive, particularly in the realm of national security and foreign affairs, significant weight.[62] The takeaway for future cases from the majority opinion in *Trump v. Hawaii* seems to be that the Court grants significant deference to the executive on factual determinations relating to national security, and any executive actions taken that have at least a nominal national security purpose are permissible.

II. MODERN REPERCUSSIONS

The historical trend giving greater weight to national security over First Amendment freedoms has crystallized into two relevant zones of tension: access to national security-related judicial proceedings and documents and the release of "leaked" information to the public through publication. Additionally, the other protections guaranteed by the First Amendment all have tenuous futures for cases when they are in conflict with a declared "national security interest." These nexus points each reinforce the problems with the judiciary's general approach to interactions between national security interests and First Amendment protections. Specifically, a failure of a definitive framework for evaluating governmental claims of a national security interest has caused too much deference by the judiciary and a substantial lack of clarity on the extent of the government's authority, namely, the authority of the executive and the military.

A. Right of Access

There has been an emerging conception of the right of access to national security information afforded to the people (often via the press). While the ultimate authority to grant or deny access lies with the Pentagon,[63] there has been a trend throughout history leading to more press access to military operations and information. Prior to the founding, there was little regulation of the press regarding military information primarily due to a lack of necessity: "During the American Revolution, little or no official government censorship of the press occurred. This was due mainly to the methods of reporting, based primarily on

59. Trump v. Hawaii, 138 S. Ct. 2392, 2420 (2018).

60. *Id.* at 2421.

61. *Id.*

62. *Id.* at 2422.

63. Rana Jazayerli, Note*, War and the First Amendment: A Call for Legislation to Protect a Press' Right of Access to Military Operations*, 35 COLUM. J. TRANSNAT'L L. 131, 131 (1997).

private letters and official messages, which resulted in tardy and haphazard news coverage. Such coverage presented little or no threat to the war. . . ."[64] While laws existed, there was not much public or political appetite for enforcement of these laws.[65] This political environment, combined with technological limitations, allowed this dynamic to continue through the War of 1812 and the Mexican-American War.[66] However, press independence increased concurrently with technological improvements throughout the periods coinciding with the Civil War and the Spanish-American War, leading the federal government to institute censorship measures during World War I, emulating its allies France and the United Kingdom in that manner.[67] These measures did not manifest through a restriction of access; rather, correspondents were required to submit their materials to the government for review prior to publication.[68]

This "prior restraint" model was the norm until the Vietnam War. In conjunction with judicial action in cases such as *New York Times v. Sullivan* and domestic political dynamics surrounding the Vietnam War, the government altered its strategy. Rather than continuance of prior restraint, the government shifted to a public campaign to influence popular opinion about the war, including denial or harsh press coverage.[69] However, the press's aggressive coverage of the war permanently strained the relationship between the press and the military.[70] The military's perception that the press played a role in the failure of the war caused the military to take the position of restricting the press's freedom to cover (and criticize) future war efforts.[71] As a result, the government no longer implements prior restraints, as the Supreme Court has directly weighed in on those methods of restriction; instead, the government denies access to the press, which has been effective because the Supreme Court has not articulated that the press has a right of access to military operations or information.[72] This restriction of access has been present in all recent military operations to some degree. During the lead-up to the Gulf War, the United States deployed forces to Saudi Arabia without allowing reporters to accompany them.[73] This was later lifted, however, and information that was released to the press was substantially filtered by the administration throughout operations.[74]

The case of *Richmond Newspapers, Inc. v. Virginia* serves as the basis for discussion on the right of access for the press.[75] In this case, Justice Burger wrote for the plurality that on a structural level "even though the Constitution contained

64. *Id.* at 134.
65. *Id.*
66. *Id.*
67. *Id.* at 135.
68. *Id.*
69. Jazayerli, *supra* note 63, at 137.
70. *Id.* at 138.
71. *Id.*
72. *Id.* at 144.
73. *Id.* at 140.
74. *Id.*
75 448 U.S. 555 (1980).

no provision explicitly guaranteeing the right to attend criminal trials, the Court had recognized that some unenumerated fundamental rights were 'indispensable to the enjoyment of rights explicitly defined.'"[76] Meanwhile, several Justices in concurring opinions stated that the case preserved access to the press, but there was a disagreement amongst them on the extent of this access.[77] The plurality in this case can be construed as having established a presumption in favor of access unless there is an overriding governmental interest.[78] In a later case, *Globe Newspaper Co. v. Superior Court*, the Court struck down a law that would prohibit reporters and the public from having access to trials in which sexual offenses against a minor were alleged while the victim was testifying.[79] There, the Court found that access could only be denied on a case-by-case basis in which denial of access would be a narrowly tailored measure to further a compelling government interest. Specifically, the Court laid out a three part test for establishing a right of access but placing the burden of proving this right exists on the party asserting a right of access: first, the place must have been historically open to the press and the public; second, the right of access must play a significant role in the functioning of the process and the government; finally, a compelling governmental interest satisfied through narrowly tailored measures must not necessitate denial of access.[80]

The Court ultimately, in its divisive and inconsistent jurisprudence regarding access, has left the judiciary without a consistent framework for evaluating a right of access, but also notably without a distinctive *purpose* for a right of access.[81] Following *Globe*, the Court weighed in on several cases that did not acknowledge the framework or purpose regarding the right of access outlined in *Globe*.[82] In the context of national security, judges are both unaware of the importance of access to information in order for the electorate to make informed decisions when selecting the people directing American foreign policy and fearful of making a faulty decision that would hurt American security and cause them to have "blood be on their hands."[83] This has led courts to adopt deference toward secrecy.[84]

There is also the issue of access to judicial proceedings for cases that are of importance to national security. This issue emerged after the terrorist attacks on September 11, 2001, when several "special interest" immigration proceedings were closed to the public.[85] While this was shortly determined to be unconstitutional, a

76. Derigan Silver, Media Censorship and Access to Terrorism Trials: A Social Architecture Analysis, 25 NOTRE DAME J. L., ETHICS & PUB POL'Y 143, 153 (2012) (footnote omitted).

77. *Id.* at 153–54.

78. Jazayerli, *supra* note 63, at 145.

79. Silver, *supra* note 76, at 154.

80. Jazayerli, *supra* note 63, at 145–46.

81. Matthew L. Schafer, *National Security and Access, A Structural Perspective*, 11 J. NAT'L SEC. L. & POL'Y 689, 690 (2021).

82. *Id.* at 707.

83. *Id.* at 740 (footnote omitted).

84. *Id.*

85. Silver, *supra* note 76, at 144 (footnote omitted).

circuit split over the issue soon arose.[86] In spite of several judicial rulings articulating the necessity of access to information, a trend emerged of increased sealing of documents and restriction of access to courtrooms involving cases that relate to national security.[87]

National security information can be viewed as political speech that can influence the national political conversation, and access to this kind of information would help ensure that American foreign policy is accountable to the democratic process.[88] Government classification labels should not serve as a sole impediment to public access in the context of First Amendment judicial review.[89] If courts viewed classification status as a sole basis, it would encourage a "race to the bottom" as agencies would seek to over-classify information to side-step the democratic process. Over-classification is already an issue as there is a broad consensus that too much information is classified without any penalty for over-classification.[90] Furthermore, over-classification impedes the electorate from being well-informed on American foreign policy, thus eroding democratic accountability of American security decision-making.[91]

The judicial approach toward a right of access regarding national security information may be best showcased by the decision in *Nation Magazine v. United States Department of Defense*. In that case, members of the press challenged restrictions on access instituted by the Department of Defense surrounding operations in Grenada, Panama, and the Persian Gulf until 1991.[92] The Court found that historically, jurisprudence encourages judges to not interfere with the structure of the military establishment unless necessary.[93] Ultimately, the Court made several determinations. First, due to the swift nature of military operations in the modern era (particularly, the speedy Operation Desert Storm), judicial review will usually not occur in these cases in a fast enough timeframe to provide relief before cessation of hostilities.[94] Second, there is no right of access where an area has been traditionally closed to the public.[95] Third, the Court identified that a theme arising across both *Richmond* and *Globe* is the importance of an informed citizenry to democracy in America and the functioning of government.[96] As a result of this, the Court found that there is "at least some minimal constitutional right to access."[97] However, the specific claims to a right of access were not

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86. *Id.*

87. *Id.* at 144–46.

88. Papandrea, *supra* note 12, at 517.

89. *Id.*

90. Herbert Lin, *A Proposal to Reduce Government Overclassification of Information Related to National Security*, 7 J. NAT'L SEC. L. & POL'Y 443, 462 (2014).

91. Matthew Silverman, Comment, *National Security and the First Amendment: A Judicial Role in Maximizing Public Access to Information*, 78 IND. L.J. 1101, 1101–02 (2003).

92. Nation Mag. v. U.S. Dep't of Def., 762 F. Supp. 1558, 1560 (S.D.N.Y. 1991).

93. *Id.* at 1566–67.

94. *Id.* at 1569.

95. *Id.* at 1571.

96. *Id.* at 1572.

97. *Id.*

"sufficiently in focus" at the time, and in conjunction with the fact that hostilities had ceased, the Court refrained from making a final determination on a constitutional right of access.[98] This case shows that courts are aware of the constitutional protections that would extend to a right of access in many circumstances; however, it also showcases the skittishness of courts to set a clear standard regarding access to military information.

Additionally, the Court has weighed in on access to security information in a more recent case dealing not with the press's right of access, but instead focusing on an individual detainee's attempt to subpoena Central Intelligence Agency contractors to gain information about his treatment at a detention site.[99] In *United States v. Zubaydah*, the Court reiterated the state secrets privilege in which the government can prevent disclosure of information if it would harm national security through a formal claim of privilege, and courts must, keeping in mind traditional judicial reluctance to intrusion upon the Executive's national security authority, determine whether the claim of privilege is appropriate.[100] While the Ninth Circuit upheld the government's claim of privilege, it determined that this claim did not extend to information about the location of the detention site because the court there believed that the location had already been disclosed elsewhere.[101] Publicly available documents *did* conclude that Zubaydah had been detained in Poland,[102] but any sites have never been fully confirmed by the Central Intelligence Agency or the government of Poland.[103] Due to Zubaydah's specific requests, any response by the contractors would necessarily either confirm or deny the existence of a site in Poland.[104] The Court here held that sometimes information within the public domain can fall within the scope of the state secrets privilege.[105] Importantly, the CIA Director testified that the agency relies on clandestine relationships with foreign intelligence services, and official disclosure of these relationships would breach the trust that is crucial to maintaining these relationships, leading to serious consequences.[106] These consequences could be avoided by leaving an element of doubt about the accuracy of public information (here, the existence of a detainment site in Poland), which adds a layer of confidentiality, affirming the government's commitment to these relationships.[107] Likewise, the Court also determined that Zubaydah's need to confirm the location of the site was not significant, as by his own admission he was primarily trying to

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98. *Id.* at 1575.

99. United States v. Subaydah, 142 S. Ct. 959, 963 (2022).

100. *Id.* at 967.

101. *Id.* at 964.

102. Specifically, a decision by the European Court of Human Rights, testimony given by the contractors Zubaydah was trying to subpoena, and public information regarding "enhanced interrogation." *Id.* at 964–65 (citation omitted).

103. *Id.* at 965.

104. *Id.* at 968.

105. *Id.*

106. *Id.* at 968–69.

107. United States v. Subaydah, 142 S. Ct. at 969.

obtain information about his treatment, not his location.[108] This recent case showcases the traditional deference to the interests of the state and illustrates that the Court is capable of evaluating the merits of national security claims.

B. Classification, Whistleblowing, and the "Leaking" of Information

Another feature of the tension between the interests of national security and the First Amendment is the phenomenon of "whistleblowers" releasing information related to national security (such as military operations) to the press without the proper governmental authority or direction to do so. Prosecutions against leakers of this kind of information have grown exponentially as technology and the Internet have advanced.[109] Professor Mary-Rose Papandrea described the government's perspective on the current environment for dissemination of national security information:

> From the government's perspective, foreign intermediaries like WikiLeaks are particularly dangerous because they operate outside the conventional Beltway atmosphere in which the media and government's mutually beneficial relationship exists. They also serve very different audiences. The traditional media publishes for a general audience and, and [sic] as a result, it is less likely to publish hypertechnical material that is incomprehensible to its readers (but potentially very valuable to the nation's enemies and allies alike). In addition, the government may fear that, given the possibility of leaks from nontraditional sources, even the traditional media will not delay or forego the publication of secrets, given its need to compete in a challenging business environment.[110]

Likewise, enforcing measures like a prior restraint against entities like WikiLeaks that operate outside of the United States with little oversight is effectively impossible.[111] In addition, there is also a pervasive view that leaks of national security information in the modern era are more damaging than similar types of leaks would have been in the past.[112] Whistleblowers and journalists, despite furthering national discussion over critical liberty and security issues, have the potential to cause significant harm in many cases if information is leaked indiscriminately.[113] Additionally, there is an exponentially greater amount of damaging information than there was in the past.[114]

These matters ultimately germinate in a federal government that, regardless of administration,[115] is more aggressive in prosecuting leaking of classified, national

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108. *Id.* at 971.

109. Papandrea, *supra* note 12, at 455.

110. *Id.* at 456 (footnotes omitted).

111. *Id.* at 457.

112. *Id.* at 458.

113. Candice M. Kines, Note, *Aiding the Enemy or Promoting Democracy? Defining the Rights of Journalists and Whistleblowers to Disclose National Security Information*, 116 W. VA. L. REV. 735, 771 (2013).

114. Papandrea, *supra* note 12, at 458.

115. *Id.* at 455; Cora Currier, *Charting Obama's Crackdown on National Security Leaks*, PROPUBLICA (July 30, 2013, 3:40 PM), https://www.propublica.org/article/sealing-loose-lips-

security information to the public. While it is necessary for the Executive to maintain a degree of confidentiality over national security matters, there also must be a degree of transparency in a democracy for both Congress and the public to have effective oversight. For example, the current environment has led to leakers being a primary source of information for Congress on the actions of the Executive.[116] There are also systemic issues that stifle congressional oversight of the Executive on national security matters, such as a tradition of deference and a desire for ignorance in the case of unpopular policies coming to the public's attention.[117] Journalists themselves often work in tandem with the government to prevent the leaking of classified information to the public. The press has historically had a symbiotic relationship with the American security establishment that has led to a strong deference toward the government in refusing to publish information which could damage the country's national security.[118] This is a result of reporters relying on officials within the executive branch for access and information, while government officials use the press as a way to communicate information to the general public.[119]

However, there is also clearly a national security interest in not allowing the First Amendment to reign absolute on these issues. In many ways, First Amendment protections have hampered the government's ability to effectively fend off foreign influence and attempts at subversion. The protections of the First Amendment empower actors, such as Russia, to spread disinformation and propaganda because the highest amount of protection is granted to political speech, a category under which disinformation and propaganda likely falls.[120] This protection would also likely include falsehoods spread by the promotion of "fake news."[121] In the modern era, "[c]ounterspeech" only has limited utility to combat these types of threats and the doctrine of incitement is likely not inclusive of these types of disinformation campaigns at the present time.[122] Any legislative response would also be hampered by the First Amendment's protections and the culture surrounding it: "[c]oncerns with surveillance infringing on privacy and chilling speech also inhibit the U.S. Government's ability to respond to Russian disinformation campaigns. Any legislation that would allow the United States to combat information warfare must overcome these hurdles."[123]

Likewise, the protection of speech in the "public square" that is emblematic of traditional First Amendment jurisprudence is not cognizant of the realities of

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charting-obamas-crackdown-on-national-security-leaks; Ali Watkins & Josh Dawsey, *Trump's Leaks Crackdown Sends Chills Through National Security World*, POLITICO (July 7, 2017, 5:11 AM), https://www.politico.com/story/2017/07/07/trumps-leak-vendetta-sends-chills-240274.

116. Papandrea, *supra* note 12, at 468.

117. *Id.* at 469–70.

118. Papandrea, *supra* note 2, at 257.

119. *Id.* at 236.

120. Jill I. Goldenziel & Manal Cheema, *The New Fighting Words?:How U.S. Law Hampers the Fight Against Information Warfare*, 22 U. PA. J. CONST. L. 81, 95–96 (2019).

121. *Id.* at 96.

122. *Id.*

123. *Id.*

the modern era and social media. Several dynamics of social media present problems: algorithms develop echo chambers, it is more difficult to differentiate between legitimate and nonlegitimate sources of information, and there is virtually no limit on the amount of information that people can consume.[124] Social media also uniquely allows for the dissemination and reinforcement of disinformation and even has the capacity for wealthy actors to monetarily inflate their content.[125] Social media has exceptionally rendered our population vulnerable to information warfare due to the lack of filters and vetting systems, the velocity with which false information can spread, the amplification of sensationalist stories (particularly from foreign actors trying to influence political discourse), and the capability for targeted advertising campaigns to magnify the effect of disinformation—these factors were all utilized during 2016 in propaganda campaigns directed at multiple communities on the political spectrum.[126] Congressional efforts to respond to these efforts have yet to bear fruit, and America's adversaries are continuing to develop their capabilities in exploiting First Amendment protections and social media to strike at the citizenry of this country.[127] These vulnerabilities ultimately demand jurisprudence that is more flexible regarding the First Amendment's protections of speech and press in order for the government to adequately protect the country from foreign threats.

These problems are all compounded by a pervasive bias towards secrecy and over-classification within the federal government.[128] At the top of the executive branch, presidents rely on structural arguments as justification for wielding the power to classify information; specifically, presidents claim that secrecy is an essential element to perform certain executive functions effectively, especially in the realm of foreign policy and national security.[129] The general "rules" of classification are described as follows:

> The three levels of classification depend upon the level of danger the disclosure could be expected to cause. Information designated as "top secret" is such that its disclosure could reasonably be expected to cause "exceptionally grave damage" to national security, whereas the disclosure of "secret" information would cause "serious damage," and "confidential" information would merely cause "damage." When classifying information, the classifying officer must specify the danger the disclosure of the information might cause. The officer must attempt to set a date for declassification of the information. If no date is set it will be marked for declassification in ten or twenty-five years, depending on its sensitivity, although this date can be extended if the threat posed by disclosure persists. The Executive Order provides that

124. *Id.* at 100–01.

125. *Id.*

126. Goldenziel & Cheema, *supra* note 120, at 101.

127. *Id.* at 167. Specifically, Russia, Iran, North Korea, and China have continued to develop their information warfare capabilities, and inaction from the United States will continue to encourage other actors to exploit this unique vulnerability. *Id.*

128. Lin, *supra* note 90, at 462.

129. Papandrea, *supra* note 2, at 239.

> information must be classified to protect a risk to national security and cannot be classified to "conceal violations of law, inefficiency, or administrative error" or to "prevent embarrassment to a person, organization, or agency."[130]

However, different administrations also have approached classification from very different angles. For example, the Clinton administration enforced a presumption against secrecy while the second Bush administration reversed in favor of a presumption in favor of secrecy.[131] The Freedom of Information Act, a famous statute allowing for the request of executive information, has become increasingly less effective in providing information as agencies have viewed it more as an obstacle to overcome (in favor of keeping information from the public),[132] and judges have become increasingly deferential and reluctant to declassify evidence that the executive has deemed necessitates secrecy.[133]

Meanwhile, statutes enacted to prescribe whistleblower protections have similarly eroded over time in terms of their efficacy. Statutes provide different levels of protection for different types of government employees, effectively drawing legal distinctions between members of the civil service, the intelligence community, and the military.[134] In addition, the president has the authority to exclude all employees within an agency dealing with activities related to intelligence from general whistleblower protections, even without warning.[135] The general whistleblower protections for the broad categories of federal employees are described as follows:

> The general federal whistleblower law protects a government employee for any disclosure of information that he "reasonably believes" demonstrates either a violation of any law, rule, or regulation, or instance of gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. A member of the intelligence community, however, is covered under the Intelligence Community Whistleblower Protection Act of 1998 (ICWPA), and is protected only if he discloses a matter of "urgent concern." Urgent concern is narrowly defined to include "a serious or flagrant" violation of law or executive order, a false statement to Congress (or willful withholding of information from Congress), or the reprisal against a person who reported a matter of urgent concern. Members of the armed forces are protected under the Military Whistleblower Protection Act of 1988 ("Act"). The protected disclosures under this Act are similar to those covered under the general federal whistleblower law, but the Act excludes communications that are "unlawful." The Act does not define the term

130. *Id.* at 242 (footnotes omitted).

131. *Id.*

132. *Id.* at 244.

133. *Id.* at 245.

134. *Id.* at 246.

135. Papandrea, *supra* note 2, at 246–47.

"unlawful," leaving open the possibility that any unauthorized disclosure of classified information would not be covered.[136]

A notable provision of federal whistleblower statutes is that they do not prevent agencies from revoking the security clearances of employees as a result of their decision to become whistleblowers.[137] This serves as a major disincentive for whistleblowers. In fact, the Congressional Research Service determined in 2005 that there were inadequate governmental protections for whistleblowers.[138]

These dynamics are all visible in the case of *American Library Association v. Faurer* in the U.S. District Court for the District of Columbia. There, plaintiffs argued that once documents were part of the public domain, any attempts to classify those documents would run afoul of the First Amendment.[139] The Court, however, agreed with the National Security Agency that the government is not required to disclose any information that is "reasonably expected to cause damage to the national security."[140] Even more aggressively, the Court found that there is no First Amendment right where "disclosure of classified information would possibly endanger the national security, even though the information had been previously in the public domain."[141] Even though the Court was displeased with the NSA's attitude toward the classification process, it believed that the risk to national security was too strong to invalidate the classification determination made by the NSA.[142] This case exemplifies the extreme deference that courts are willing to make to executive determinations of fact in the realm of classification, rather than risk making a mistake when engaging with the factual issues at hand.

C. Future of Religious Interests

As the recent *Trump v. Hawaii* case illustrated, the judiciary is currently willing to give extreme deference to the executive on factual matters regarding national security. As Justice Sotomayor implied in her dissent, the Court's refusal to engage with the factual circumstances beyond adoption of the executive's interpretation of those circumstances played the decisive role in the holding of the case: "because the Proclamation is "'divorced from any factual context from which we could discern a relationship to legitimate state interests," and "its sheer breadth [is] so discontinuous with the reasons offered for it" that the policy is "'inexplicable by anything but animus.'"[143] This approach essentially nullified the First Amendment's religious protections by ignoring a variety of statements made by then-President Trump regarding the motivations for the Proclamation at issue and failing to consider the substantive merits of the Proclamation given other measures

136. *Id.* at 247 (footnotes omitted).

137. *Id.* at 248.

138. *See Id.*

139. *See* Am. Libr. Ass'n. v. Faurer, 631 F. Supp. 416, 421 (D.D.C. 1986).

140. *Id.*

141. *Id.*

142. *See Id.* at 423.

143. Trump v. Hawaii, 138 S. Ct. 2392, 2441 (2018) (Sotomayor, J., dissenting) (citations omitted).

taken at the time.[144] Specifically, as Justice Sotomayor noted, a review process already existed which would address any national security concerns absent the Proclamation:

> Congress has already erected a statutory scheme that fulfills the putative national-security interests the Government now puts forth to justify the Proclamation. Tellingly, the Government remains wholly unable to articulate any credible national-security interest that would go unaddressed by the current statutory scheme absent the Proclamation. The Government also offers no evidence that this current vetting scheme, which involves a highly searching consideration of individuals required to obtain visas for entry into the United States and a highly searching consideration of which countries are eligible for inclusion in the Visa Waiver Program, is inadequate to achieve the Proclamation's proclaimed objectives of "preventing entry of nationals who cannot be adequately vetted and inducing other nations to improve their [vetting and information-sharing] practices."[145]

The approach invoked by the majority in *Trump v. Hawaii* thus endorses a derogation of judicial oversight when First Amendment protections are implicated as long as the government asserts a national security interest without any review of the legitimacy or substance of the aforementioned national security interest. This precedent leaves the First Amendment protection to Freedom of Religion (both through the Establishment and Free Exercise Clauses) in danger of overbroad restrictions by the government as long as the government is able to assert a national security interest, without fear of the judicial scrutiny of the legitimacy of that interest. However, Justice Kennedy arguably left open a path for greater definition in the future with his concurrence. There, Justice Kennedy points out the necessity of the religious freedoms guaranteed by the First Amendment, even in national security matters and beyond the borders of the United States:

> The First Amendment prohibits the establishment of religion and promises the free exercise of religion. From these safeguards, and from the guarantee of freedom of speech, it follows there is freedom of belief and expression. It is an urgent necessity that officials adhere to these constitutional guarantees and mandates in all their actions, even in the sphere of foreign affairs. An anxious world must know that our Government remains committed always to the liberties the Constitution seeks to preserve and protect, so that freedom extends outward, and lasts.[146]

Kennedy's concurrence iterates that it is important for the Supreme Court to protect the rights of the First Amendment in cases concerning national security. As a result, it is important that a standard is set for these cases quickly in order for the judiciary to have clear guidance on resolving these issues in the future.

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144. *Id.* at 2443.
145. *Id.* at 2444 (citations omitted).
146. *Id.* at 2424 (Kennedy, J., concurring).

D. Future of Assembly Protections

The most recent defining case on the subject, *Holder v. Humanitarian Law Project* exemplifies how courts will view conflicts between freedom of association and national security under the current paradigm. Preventatively, the ban on providing material support to terrorist organizations (particularly Foreign Terrorist Organizations, or "FTOs") has weakened FTOs and prevented a wide array of illegal activity.[147] However, statutes that prevent the provision of "material support" to FTOs implicate the First Amendment right to freedom of association in ways that are hard to push against. For example, a Defendant charged with providing material support to an FTO is unable to challenge the designation of the subject organization or the constitutionality of the designation process, assert a lack of intent or knowledge, or argue that their actions would not support terrorist activity.[148] This scheme, supported by congressional statute and judicial interpretation, would allow for "the perverse possibility that individuals will be charged with materially supporting terrorism even if their actions could in no way reasonably support terrorist activity or threaten national security."[149]

Within the designation process itself, the Secretary of State has wide discretion (although with required consultation with the Attorney General and Secretary of the Treasury). This discretion is reliant on both an administrative record created by the Secretary and classified information provided to the Secretary, while FTOs themselves have no real mechanism for challenging the findings of the Secretary of State.[150] In order for a court to overturn a designation, it would look to whether the evidence used by the Secretary to designate an FTO as "foreign," "engaged in terrorist activity," or "threatening national security" was arbitrary or lacking in substantial support.[151] However, courts normally give significant deference to the secretary of state regarding whether the organization threatens national security, usually citing a lack of experience in the field to question the expertise of the executive.[152] This structure erodes the possibility of judicial review as a check on executive overreach.

Notably, in *Holder v. Humanitarian Law Project*, the Court never determined if national security would be advanced through prohibiting the Plaintiffs from providing material support to the suspect groups.[153] Instead, the Court deferred to the broad findings of Congress.[154] Likewise, extending the rationale of the Court in this case significantly expands the amount of benign activity that could be prosecuted under the statute to include actions like former President Carter's election monitoring in Lebanon in 2009, teaching members of the Taliban about Gandhi's theory of nonviolence, and even an attorney's action of filing an amicus

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147. Tunis, *supra* note 46, at 270.
148. *See id.* at 271.
149. *Id.* (footnote omitted).
150. *See id.* at 274.
151. *Id.* at 275 (footnote omitted).
152. *See id.* at 275–76.
153. Tunis, *supra* note 46, at 291–92.
154. *Id.*

brief on behalf of an FTO.[155] This decision thus runs contrary to the traditional jurisprudence of the Court on freedom of association, which allowed individuals to peacefully associate with an organization even if the organization engaged in unlawful means to pursue its goals.[156]

III. JUDICIAL STANDARD FOR NATIONAL SECURITY INTERESTS

A tangible standard on judicial review of national security as an interest to supersede First Amendment protections is of tantamount importance. A core feature of American democracy is at risk through judicial evasiveness on this issue: "The principle of a free press in the view of the Framers is that of a necessary check on government in a democratic society. Such a check could, however, be nullified if the government is allowed to cloak all information in secrecy under an unreviewable claim of national security."[157] While national security invokes the most crucial powers of both the Executive and Legislative branches of government, democratic accountability is of tantamount importance: "one could argue that the need for an enlightened citizenry should be at its zenith when the country is engaged in overt military operations that risk the country's national security."[158]

On the other hand, the judiciary's hesitation is understandable. The judiciary possesses neither the power of the purse nor the power of the sword to enforce its decisions, so it relies upon popular and institutional legitimacy to ensure that judicial decisions are followed.[159] Historically, there are instances of judicial opinions being ignored by powerful administrations.[160] Ultimately, the surety of enforcement of judicial decisions is hazy because "[t]here is no 'secret,' no single miraculous reason why the rulings of our Court are followed. There is only the accretion of customs, habits, and understandings about the rule of law, built and

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155. *Id.* at 294. The latter example was provided by Justice Elena Kagan while she was still serving as a Solicitor General during oral arguments for Holder v. Humanitarian Law Project. Id. She also argued that helping an FTO petition an international body would be a crime under the statute. She described Congress's reasoning behind the statute as recognition of the fact that "when you help Hezbollah build homes, you are also helping Hezbollah build bombs." Adam Liptak, Before Justices, First Amendment and Aid to Terrorists, N.Y. TIMES (Feb. 23, 2010), https://www.nytimes.com/2010/02/24/us/24scotus.html.

156. Tunis, *supra* note 46, at 294; *see generally* De Jonge v. Oregon, 299 U.S. 353 (1937).

157. Jazayerli, *supra* note 63, at 153 (footnotes omitted).

158. *Id.* (footnotes omitted).

159. The Federalist No. 78 (Alexander Hamilton), https://avalon.law.yale.edu/18th_century/fed78.asp.

160. In response to the Court's decision in Worcester v. Georgia affirming the rights of Natives, the federal government infamously refused to enforce the decision. Debra Cassens Weiss, *What Would Happen if Trump Administration Ignored a Court Order? Law Profs Consider the Issue*, AM. BAR ASS'N J. (Feb. 7, 2017, 7:00 AM), https://www.abajournal.com/news/article/what_would_happen_if_trump_ignored_a_court_order_law_profs_consider_the_iss. President Andrew Jackson allegedly stated that "John Marshall has made his decision, now let him enforce it." *Id.*

maintained over the course of many years."[161] Additionally, judges are also apprehensive due to the general expertise of the judiciary regarding military decisions. Within the federal judiciary, there are a limited number of judges with military experience.[162] Without clear guidelines for making decisions, judges fear that there is a significant risk of a mistaken judgment that would cost American lives and harm the country's national security interests.[163] This would also lead to an erosion of the legitimacy of the American judiciary.[164] As a result, judges are currently reluctant to definitively weigh in on many of these issues without clear statutory guidance.[165]

However, this wariness does not warrant a derogation of the judicial duty to ensure that the Constitution is enforced as the "[S]upreme Law of the Land."[166] The First Amendment is a critical protection for the people, and it is the role of the judiciary to safeguard the rights guaranteed by the First Amendment against undue government encroachment. However, judges are correct that they require cognizable guidelines and standards for making these decisions. However, if the executive or Congress refuses to determine these guidelines, it is the role of Supreme Court to either (1) demand that these guidelines are set for judges to follow, or (2) create the guidelines itself through informed decision-making and guidance by experts.

IV. A NEW FRAMEWORK FOR CONFLICTS NATIONAL SECURITY AND FIRST AMENDMENT RIGHTS

I ultimately propose that judges evaluating the strength of a national security interest against the protections guaranteed by the First Amendment should weigh several factors: first, the probability of the alleged harm to the country's national security; second, the magnitude of the potential harm to the country's national security; third, the temporal distance between the assertion of the First Amendment right and the damage to the country's national security; fourth, the alternative measures the government could take to secure the interest without restricting the specific protection; fifth, the specificity of the national security harm to the specific circumstances and assertion of the specific protection; and sixth, the alternative ways that the harm could be suffered regardless of the assertion or suppression of the specific protection. Once this assessment has determined the strength of the national security interest, courts will then weigh the strength of the

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161. BREYER, *supra* note 8, at 279.

162. Rory E. Riley-Topping, *More Veterans Should Be Nominated to the Supreme Court*, THE HILL (Sept. 25, 2018, 7:00 PM), https://thehill.com/opinion/judiciary/408378-More-veterans-should-be-nominated-to-the-Supreme-Court; Abby Rogers, *In America's 'Endless War,' No Justices Are Prepared*, BUS. INSIDER (Aug. 13, 2012, 12:50 PM), https://www.businessinsider.com/supreme-court-military-experience-2012-8?r=US&IR=T; *Veterans of the Law: Many in Judiciary Celebrate JAG Service*, U.S. CTS. (Nov. 10, 2021), https://www.uscourts.gov/news/2021/11/10/veterans-law-many-judiciary-celebrate-jag-service.

163. *See* Jazayerli, *supra* note 63, at 160.

164. *See id.*

165. *See id.* at 166.

166. U.S. CONST. art. VI, cl. 2.

interest against the importance of the First Amendment right on a case-by-case basis. This multi-factor assessment would provide judges with the tools to accurately estimate the strength of a national security interest and would thus allow them to accurately weigh the proportionality of a government measure restricting a First Amendment right as a result of a specified national security interest. This test would not invalidate or replace the myriad of other methods used to evaluate First Amendment cases, such as application of different levels of scrutiny based on whether a free speech restriction is content-based or content-neutral. Rather, this assessment would provide judges an avenue for evaluating national security interests when necessary and prevent excessive deference to the legislative and executive branches that has characterized these types of cases in recent memory. Because national security issues are of a different nature than other types of interests that would compel the government to enact First Amendment restrictions, they should carry their own test to adapt to the specific issues at hand.

The first factor in this assessment is critical in calculating the true significance of the alleged national security interest. Evaluating probability would provide insight into the necessity of the restriction by showing the likelihood of the national security threat. The second factor evaluates the magnitude, or the full impact, of the alleged threat to the national security interest. Not all national security interests carry the same magnitude; for example, the release of the identities of U.S. intelligence agents operating abroad is necessarily a more critical interest than the name of an asset who has been deceased for decades. This factor will allow courts to gain a more nuanced look at the nature of the alleged national security interest. The third factor, evaluating the timeframe, calculates the urgency of the threat arising from assertion of the First Amendment protection. If the damages would not come quickly after the restriction on the protection is struck down, the government would potentially have enough time to mitigate damages. Likewise, a longer timeframe reduces the directness of the link between the restriction at issue and the harm the government seeks to circumvent. The fourth factor determines whether curbing the implicated freedom is the best, or only, measure the government could take to preserve the national security interest. If there are alternative measures the government can take to sufficiently secure the national security interest without curbing the freedoms guaranteed by the First Amendment, those measures should be pursued instead. The fifth factor measures how closely linked the restriction of the First Amendment right is to the protection of the asserted national security interest. The more closely linked the restriction is to the furtherance of the national security interest, the more justification the government holds in enacting the restriction. The sixth factor determines the efficacy of the restriction on the First Amendment in protecting the national security interest. If the restriction on the First Amendment is unlikely to achieve the protection of the national security interest, it should not be implemented.

While many judges fear engaging in risk calculation over matters of national security, judicial review in this context is the best way to ensure that both democratic rights and the security of the nation are appropriately balanced. However, in truth many judges engage in risk calculation now — they simply choose to err on the side of caution by making the decision not to engage in reviewing the substance of claims. In many post-9/11 opinions, judges

exemplified an increase in cognitive bias as a result of heightened awareness of terrorism.[167] This is a result of two dynamics. First, media coverage of the threat of terrorist attacks was sky-high after the World Trade Center attacks and left a strong imprint on the public conscience.[168] Second, a psychological concept called "availability heuristic," in which people determine the magnitude of a risk based off of what is conceivable to them, made the threat of terrorism more tangible.[169] Furthermore, the element of "probability neglect," in which people tend to disregard the likelihood of a negative outcome when the risk evokes strong emotions, was also at play.[170] Interestingly, a study came to the conclusion that "just the discussion of a low-probability risk, even one in which trustworthy sources elaborate on the minimal risk, increases perceptions of the risk's probability."[171] This dynamic is also present in a study that found that people perceived that a terrorist event was of a greater risk than a non-terrorist propane explosion or an infectious disease, even with a comparable number of deaths resulting from each incident.[172] Legal scholar Cass Sunstein thus argues that experts, in their awareness of relevant factual information and tendency to act rationally when making policy decisions, are better positioned than ordinary people to make risk calculations.[173]

Some may argue that this analysis indicts judges' ability to make rational decisions in the area of foreign policy. There is both research and anecdotal evidence that provides fuel for the argument that judges are susceptible to emotional decision-making, including a study that found that judges are often more intuitive than deliberative.[174] Likewise, studies have also shown that judges can react emotionally when presented with statistical evidence and often make intuitive judgements of conduct when presented with the ultimate outcomes of that conduct.[175] There is even evidence that factors as extraneous as timing of meals could impact judicial decision-making.[176] Judges also fall into a problem regarding timeframe; namely, they have leaned on a presumption of imminence when taking into account the possibility of a national security threat.[177] In *Holder v. Humanitarian Law Project*, the majority read into the factual determination a presumption of

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167. Avidan Y. Cover, *Presumed Imminence: Judicial Risk Assessment in the Post-9/11 World*, 35 CARDOZO L. REV. 1415, 1420 (2014).

168. *See id.* at 1423–24.

169. *Id.* at 1422–23 (footnote omitted).

170. *Id.* at 1425 (footnote omitted).

171. *Id.* (footnote omitted).

172. *Id.* at 1427. It should be noted that this study was completed well before the outbreak of the COVID-19 pandemic, and given the phenomena discussed in the article, it is reasonable to believe that a similar study completed now might find that risk of outbreaks of infectious diseases would be similarly high.

173. Cover, *supra* note 167, at 1427.

174. *Id.* at 1428.

175. *Id.* at 1429.

176. *Id.*

177. *Id.* at 1447–48.

imminence,[178] and probability neglect causes imminence to be assumed by courts when reviewing governmental restrictions on constitutional rights.[179]

However, I argue that many problems with judges' ability to make rational decisions regarding national security arise from judicial traditions that effectively exclude them from making a full review of the facts and assumptions underlying those cases. Providing significant deference to executive determinations has been shown to increase all of the cognitive issues with decision-making outlined above.[180] Meanwhile, it is also true that many of these cognitive biases also apply to executive agency officials.[181] Executive agencies are also "subject to concerns over political or public outcry and blameworthiness, which may lead them to overestimate the probability of attacks and ignore civil liberties concerns."[182] The current legal framework, through a strong presumption to "err on the side of government" and reinforce prior errors and emotional decision-making, would justify most restrictions on First Amendment rights justified in the name of national security directed toward an FTO or other entity deemed a threat to national security by the executive.[183] Likewise, the idea that judicial deference is necessary given the unique, timely threat of terrorism is illusory because the risk of terrorism and other acts of aggression by nonstate actors is unlikely to dissipate any time in the foreseeable future.[184] Moreover, many threats that are international in nature might take on domestic dimensions, and domestic threats might have connections to the foreign sphere.[185] It would thus be a derogation of judges' duty to continue their permissive framework when they are charged with defending the values of the Constitution and the laws of the United States.

Judges, in moving beyond this framework that hampers their decision-making, will need to scrutinize the factual scenarios and evidence behind the cases that are brought before them. Despite claims to the contrary, this type of adjudication is something that judges are well-equipped to do; in fact, they already are accustomed to it. Specifically, they have significant experience in reviewing expert analysis and decision-making:

> courts review the decisions of experts in a myriad of highly complex subjects. Judges also may be at a greater advantage in terms of determining the accuracy of information because of the adversarial process, which allows them to weigh contrary information that executive officials might not have incentive to consider. Article III courts have, of course, overseen scores of terrorism cases, both of domestic and international dimensions.[186]

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178. *Id.* at 1443.
179. Cover, *supra* note 167, at 1448.
180. *Id.* at 1452–53.
181. *Id.* at 1453.
182. *Id.*
183. *Id.* at 1443.
184. *Id.* at 1453–54.
185. Cover, *supra* note 167, at 1454–55.
186. *Id.* at 1456.

Courts also have procedures that allow them to review classified information while maintaining the secrecy of that information from the general public,[187] and specialized courts such as those established under the Foreign Intelligence Surveillance Act,[188] show that courts have been entrusted with reviewing foreign policy expertise and maintaining confidentiality, with success, for years.[189]

V. THIS TEST BALANCES THE IMPORTANCE OF BOTH INTERESTS

Critics may argue that jettisoning the current system in favor of significant executive deference in favor of proportional balancing tests that place legal decisions squarely in the hands of judges would pose a significant risk to national security. After all, national security is extremely compelling as a governmental interest and there are instances where First Amendment protections should not trump a genuine threat to the security of the nation. It would be a mistake to establish the rights of the First Amendment as eminently supreme over any conflicting national security interest and subordinate our nation's defense in favor of individual rights in every case. However, the aforementioned test I have proposed does no such thing. In fact, I argue that this test would at times provide greater justification for national security to prevail than under the current legal framework. By balancing the interests at stake, judges will be able to gain a determination of the true strength of an asserted governmental interest in national security and the relative importance of a First Amendment protection.

Taking into account a right of access to information, courts are already likely to find that the government's burden to deny access is less weighty than its burden to impose a prior restraint.[190] In adopting a proportional mindset and the multi-factor assessment to determine the strength of each asserted national security interest, courts are likely to weigh the benefits and disadvantages, consider the already existing "limited public forum doctrine," and find a right of access that exists, but would not be too broad as to be a detriment to national security.[191] This would secure national security as an interest when credibly asserted, while providing access on issues where it is necessitated by the First Amendment and the necessity for American democracy to have a well-informed electorate. Likewise, in cases involving "leaks" or whistleblowing, the government would likely need to show that disclosure would cause actual harm to the United States, as well as potentially evaluate the intent of the individual disclosing the information.[192] However, this test would also acknowledge the fact that secrecy is

187. *Id.*

188. Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783.

189. Cover, *supra* note 167, at 1456. The FISA Court is uniquely suited to reviewing matters of intelligence gathering due to the Court's inherent structure and practice. Emily Berman, *The Two Faces of the Foreign Intelligence Surveillance Court*, 91 IND. L. J. 1191, 1236 (2016). Despite criticisms of its jurisprudence, the injection of judicial review into national security provided by the FISA Court is an essential function. George W. Croner, *The FISA Court Serves An Essential Purpose*, U. PA. CTR. FOR ETHICS AND THE RULE OF L. (July 23, 2020).

190. Jazayerli, *supra* note 63, at 152.

191. *Id.*

192. Papandrea, *supra* note 2, at 305.

often essential to national security, and courts applying it would thus recognize the necessity of preventing many leaks of information.[193] The impact on intelligence gathering by showcasing to the world exactly *what* intelligence the United States is able to collect will have a counterproductive effect as foreign actors will take measures to correct any leaks that they are able to plug.[194] Courts would be able to take this reality into account, as they can recognize that information relating to an ongoing foreign operation by an intelligence agency (such as the identities of foreign operatives) would be of a necessarily higher priority for secrecy than other types of information.

Furthermore, even under the current framework, our laws have shown deficiencies in mitigating security threats as a result of areas in which too much deference is given to First Amendment protections. In 2016, the State Department wanted to identify users on social media that were spreading Russian propaganda and target them with counterarguments; however, it was unable to enact this plan because of a statute that restricts data collection regarding exercise of First Amendment rights.[195] Lawyers for the State Department believed that "the First Amendment prohibited a program that would have encouraged the First Amendment right to free political debate by adding political speech to the marketplace of ideas,"[196] which is a formalistic perversion of the purpose of the First Amendment and renders the country's public sphere susceptible to information warfare. Were judges to take a multi-factor assessment into account and weigh the interests through proportionality analysis in this case, they might consider whether social media should be treated as the public square at all and recognize the risks that come with different interpretations, including the potential for widespread dissemination and exploitation.[197] Taking a less absolutist role towards both the First Amendment and national security determinations in contexts when the two are at a potential impasse would arguably strengthen both. Courts would be able to weigh factual determinations and risks, and they could thus serve as a bulwark to ensure that First Amendment rights are not weaponized against the country and serve the true purpose as a cornerstone of American democracy.[198]

In fact, adoption of this framework in many cases would not be a significant overhaul of determinations courts make now. Instead, it would simply free courts to fully assess information and make judgments in the context of judicial review and prevent national security from running roughshod over First Amendment rights. However, when courts find that the government has a sufficiently strong interest and proper measures, they would uphold restrictions. An analogous case under the present framework would be *Twitter, Inc. v. Barr*. There, the government prohibited Twitter from publishing its Draft Transparency Report because the

193. Ballou & McSlarrow, *supra* note 5, at 823–24.

194. *Id.* at 825.

195. Goldenziel & Cheema, *supra* note 120, at 85.

196. *Id.*

197. *Id.* at 101–02.

198. *Id.* at 167.

report contained classified information.[199] Twitter argued that information was improperly classified in order to prevent publication.[200] The Court looked to the totality of evidence provided, and after reviewing classified declarations of multiple officials, determined that the risks associated with publishing the report were significant enough to provoke imminent harm to the United States.[201] While the Court there applied strict scrutiny as a standard of review, the analysis is very similar to what it likely would have made should it have applied a balancing test like the one I propose. The Court's recent analysis in *Zubaydah* also shows that the judiciary is capable of evaluating the strength of national security interests relative to competing interests in coming to a decision.

VI. JUDICIAL EDUCATION IN INTERNATIONAL AND SECURITY LAW

I believe that this test will provide judges with the tools to properly evaluate the strength of an asserted national security interest as compared with a First Amendment right. However, this test alone would be folly if the judges themselves did not have some grounding knowledge in the area of national security. As Justice Stephen Breyer of the United States Supreme Court argues, judges must have to consider nonjudicial activities that take place abroad as a result of the increased amount of judicial oversight involving legal questions on foreign policy.[202] Specifically, Breyer argues that courts must be knowledgeable in order to come to sound decisions about national security or risk coming to conclusions that damage the country's security, which has long been a fear preventing judges from weighing in: "the Court will have to understand in some detail foreign circumstances—that is, the evolving nature of threats to our nation's security, and how the United States and its partners are confronting them—in order to make careful distinctions and draw difficult lines. This need for expanded awareness will require the Court to engage with new sources of information about foreign circumstances, in greater depth than in the past."[203]

Furthermore, Justice Breyer argues that a judiciary that is capable of making sound conclusions about national security issues is critical to ensure faith in the judicial system, especially given the increasing nature of security policies to conflict with traditional rights:

> Insofar as the public sees the Court as one of the few remaining bulwarks against abuse, the Court of necessity may find itself more involved in security-related matters. But that involvement will help build confidence in our public institutions only if the Court can reach sound conclusions. And it can do so only if it understands the security side as well as the civil liberties side of the equation. That, it seems to

199. Twitter, Inc. v. Barr, 445 F. Supp. 3d 295, 299 (N.D. Cal. 2020).

200. *Id.*

201. *Id.* at 303.

202. Breyer, *supra* note 8, at 81.

203. *Id.*

> me, is the major institutional challenge imposed by the new global realities.[204]

The Supreme Court's capability in this regard is on display in the recent analysis taken in *Zubaydah*. Breyer also contends that when the courts have made decisions on these issues, even when they choose to grant deference to the executive, they are implicitly showing that they are willing to make decisions about the issues themselves.[205]

There is a myriad of solutions that would help make our judiciary more informed about national security issues. First, legal education should prioritize national security issues. While it is a success that more than 125 law schools offer courses on the subject,[206] national security should be promoted as more of a core legal field within law schools for students with an interest in clerking or eventually trying to become judges. Second, future presidents and the Senate should consider more judge who have backgrounds in national security. Experience serving in the armed forces (especially as Judge Advocates, or with a branch's "JAG" Corps) should be considered a priority when appointing judges to seats on district and circuit courts, and service with the Court of Appeals for the Armed Forces, the Courts of Criminal Appeals for the Armed Forces, and the United States Foreign Intelligence Surveillance Court should be considered when appointing judges to further high courts. This will bring more perspective and expertise to the judiciary when questions of national security are put forward in litigation.

CONCLUSION

National security and the liberties protected by the First Amendment often run into conflict, and judges have struggled for decades to strike a proper balance. Under the current framework, courts often allow for government officials to claim that restrictions on the First Amendment further a national security interest without having to show a demonstrable national security risk, which tilts the balance heavily in favor of the government.[207] I argue that in order to strike a proper balance, courts should adopt a multi-factor assessment to properly determine that nature of an alleged national security interest, and then proceed with a proportional, "balancing test" analysis to determine whether or not it is stronger than the First Amendment's protection. Likewise, courts should attempt to understand the complexity of many cases and take into account the role that psychological biases and human error can play in making determinations.[208] Judges should also seek to educate themselves on national security issues, and American legal culture should emphasize education surrounding international legal issues so

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204. *Id.* at 87.

205. *Id.* at 81.

206. Peter Raven-Hansen et al., *A Brief History of the Field of National Security Law*, in NATIONAL SECURITY LAW FIFTY YEARS OF TRANSFORMATION: AN ANTHOLOGY, 31 (Jill D. Rhodes, ed. 2012) (accessed at https://securitypolicylaw.syr.edu/wp-content/uploads/2015/02/A-Brief-History-of-the-Field-of-National-Security-Law.pdf).

207. Cover, *supra* note 167, at 1461.

208. *Id.* at 1468.

that courts will be best prepared to adjudicate these cases. The protection of the nation and integrity of our democracy deserves a judiciary capable of addressing these nuanced issues and making well-reasoned judgments.